A

GENERAL ABRIDGMENT

OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

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Factor.

(A) Who may be a Factor, and how *conſidered.

*See Bankrupt.

1. A Factor *is* a ſervant created by a merchant's letters, and taketh a kind of proviſion called factorage; ſuch perſons are bound to anſwer the loſs which happens by over-paſſing or exceeding their commiſſion; but a ſimple ſervant or an apprentice can only incur his maſter's diſpleaſure. The gain of the factorage is certain, however the ſucceſs of the voyage proves. Molloy 462. ſect. 1.

Mal. Lex. Merc. 81. And his duty is as a ſervant to merchandize the beſt he can, and differs from a ferryman, inn-keeper or carrier, who take hire, and muſt anſwer for things ſtole. 4 Rep. 84. in Southcote's Caſe.

2. 9 & 10 *W.* 3. 26. *No governor, or deputy* governor of any of the plantations in America, *or the judges there, or any other for their uſe, ſhall be a factor or agent for the* African *Company or others, for the ſale or diſpoſal of negroes; and any perſon offending therein ſhall* forfeit 500 l. *to be recovered in any of the courts of record at* Weſtminſter. Expired.

3. By 20 H. 6. 5. *No cuſtomer, &c. their ſervants, &c. ſhall be factor to any merchant.*

(A 2.) What is his Power.

1. A Factor that *has only a bare authority to ſell* cannot *truſt*, but ought to take and receive the money preſently on the ſale. 1 Bulſt. 104. Barton v. Sadock.——Molloy 463. ſect. 3.

2. When the merchant *delivers goods to the factor to ſell*, he has made the factor *negotiator geſtorum*, and therefore he may ſell without ready money, and it is good reaſon, for by chance they are *bona peritura*; but if he ſells them *to one whom he knows will prove bankrupt*, it is not good. Per. Hobart Ch. Juſt. Winch 53.——Factor that has a general commiſſion may *ſell on truſt*, but not take *bond in his own name*. 2 Chan. Caſ. 57. Daſhwood v. Elwell.——

1 Roll. Abr. 124. pl. 12. cites D. 29. pl. 193.

Pleading ſuch bond is not good by way of account, but it is a good plea before the *auditors* by way of diſcharge. Buſſt. 103. per Williams Juſt. cites D. 29. pl. 193.

193. But ſuch truſt muſt be *for a reaſonable time only*, according to the uſual time allowed for ſuch goods ſo diſpoſed of, though his power was general, of doing with them as if they were his own; but he cannot truſt for an unreaſonable time, as for ten years. Buſſt. 103. Burton v. Sadock. ——Molloy 463. ſect 3.

If factor ſells goods to one that is worth nothing, or that cannot give ſecurity for them, it ſhall be to *his own loſs*, and not his maſters.

3. A merchant delivers goods to his factor *ad merchandizandum*; he cannot *ſell them upon credit*, but for ready money, unleſs he has a * *particular commiſſion* from the maſter ſo to do; for if he can *find no buyers* he is not anſwerable, and if they are *bona peritura*, and cannot be ſold for money on the delivery, the merchant muſt give him authority to ſell upon truſt. 2 Mod. 100. Anonymus.

Yelv. 202. Sadock v. Burton.

*[2]

4. In trover and converſion of divers quarters of malt; the caſe upon the evidence was, that the defendant having a great quantity in a veſſel, impowered one *Smith* a broker to ſell it, and afterwards the *defendant himſelf ſold it* to a ſtranger, and the *ſame day, and before notice of the ſale by the defendant*, Smith *ſold it to the plaintiff*, who demanded it of the defendant, who denied to deliver it; and the caſe was doubtful to Rolle Ch. Juſt. For *if the defendant's ſale ſhould ſtand againſt the ſale of* Smith, before notice of the firſt ſale, then ſhould he be chargeable for his bargain which he could not perform without any default in him; and on the other ſide it were hard that the ſale of the owner, who hath the abſolute property in the goods, ſhould be defeated by a ſubſequent ſale of him that had but a bare authority. But in concluſion he declared his opinion, that the ſale of the defendant ſhould ſtand good, and the *broker ought in ſuch caſe to make his ſale conditionally*, if the maſter hath not ſold it before; but he ſaid that neither the broker nor his vendor ſhould be liable to any action for detaining the goods, though demanded, without notice given of the ſale by the maſter. Et partes concordaverunt. Aleyn 93. Alwin v. Taylor.

5. He cannot *barter* any commodities for other commodities, but he muſt have expreſs commiſſion and order for it from the merchant; neither can he *transfer or ſet over any bills obligatory*. For albeit this manner of commiſſion given to factors is very large, yet it containeth certain reſtrictions and limitations in every merchant's underſtanding. Mal. Lex Merc. 83.

6. A factor is not barely intruſted with the cuſtody of the company's goods, and as ſuch has a power *to inveſt* their *money and goods in whatever he thinks moſt for the advantage of* the company, and is not to account for the goods themſelves but the neat produce of them, ſo that he *may convert* the company's *ſtock to his own uſe*, provided he anſwers it to them out of his own eſtate. 10 Mod. 144. Shepherd and Maidſtone, *B. R.* (Alias the Eaſt-India Company's caſe.)

7. Every factor of common right is to *ſell for ready money*; *but if* he be a factor in a ſort of dealing or trade, where the *uſage is* for factors *to ſell on truſt*, there, if he ſells to a perſon of *good credit at that time*, and he after becomes inſolvent, the factor is diſcharged; but otherwiſe if it be to a *man notoriouſly diſcredited at the time of the ſale*. But if there be no ſuch uſage, and he, upon the general authority to ſell, ſells upon truſt, let the vendee be ever ſo able, the factor is only chargeable; for in that caſe, the factor having gone *beyond his authority*, there is no contract created between the vendee and the factor's principal; and ſuch ſale is a converſion in the factor; and if it be not in market overt, no property is thereby altered, but trover will alſo lie againſt vendee. So likewiſe if it be in a market overt, and vendee *knows the factor to ſell as factor*. Per Holt Ch. Juſt. at Guildhall. 12 Mod. 514, 515. Anonymus.

Unleſs he can *prove* that he was *ignorant* of the party's weak eſtate and credit, *or that he ſold the goods on his own account alſo*; which argueth plain dealing, of that he *had commiſſion* of the other man to deal for him as if it were for his own proper goods. Mal. Lex Merc. 83.

8. In commiſſions they now generally inſert theſe words: *diſpoſe, do, and deal therein, as if it were your own*, by which the actions of the factor are to be excuſed, though it turns to his *principal's loſs*, becauſe it ſhall be preſumed he did it for the beſt, and according to his diſcretion. Molloy 463. ſect. 2. Mal. Lex. Merc. 81.

(B) Tranſactions and Accounts between him and his Employer. [3]

1. IF a *conſul* beyond ſea hath power, and doth *levy goods upon a private merchant*, the company muſt bear it, if the factor could not prevent the act of the conſul. Hill. 1630. Toth. 169. Leate v. Turkey Company of Merchants.

2. An *Eaſt-India* factor was not allowed to place any thing to *account* under the head of *general expences*, &c. Fin. R. 117. Eaſt-India Company v. Blake.

3. If a factor by *error of account* do wrong to a merchant, he is to amend and make good the ſame, not only for the principal money, but alſo with the intereſt thereof for the time; and on the contrary, if a factor in his own wrong, hath forgot to charge the merchant's account with ſome payments made by him, or money made over by exchange; the merchant is to anſwer it, with intereſt for the time. Mal. Lex Merc. 83.

4. Between merchant and factor, if the *factor has paid more than the merchant could have demanded* of him, the merchant ſhall have no account from the factor till he has made even. Sic dicitur. 2 Chan. Caſes 38. as a note on the caſe of * Faſhion v. Atwood. * Vide (C) pl. 2.

5. Factor's *account reſted upon fourteen years*, and his books and *papers loſt by no fault of his*, but by a ſeiſure in Spain where he factored,

tored, he ſhall not be charged beyond his own oath. Chan. Caſes 30. Borr v. Vandall. N. Chan. R. 140. S. C.

Chan. Caſes 76. Knipe v. Jeſſon, S. P.

6. Factor ſhall have the benefit of *cuſtoms ſaved* and not the merchant that imployed him. Chan. Caſes 25. Smith v. Oxenden.——This was where the cuſtoms were ſtolen from *a foreign king*; but of cuſtoms ſtolen from our own king, factor ſhall not have the benefit. Chan. Caſes 30. Borr v. Vandall.——N. Ch. R. 87. S. C. but reports it decreed againſt the factor on the general foot of fraud.

Action on the caſe lies for the owner againſt the factor for running goods, by which means they are *forfeited* and ſeized. Cro. J. 265. Lewſon v. Kirk.

Where a factor ſmuggles *foreign cuſtoms*, and yet ſets them down to his maſter as paid upon account; the Chancery would not relieve, for that the factor ventured his life; and ſo it was ruled by Hide, Lord Chancellor, in the caſe of VANDERVALDY and BARRY; but North (Lord Keeper) ſaid he was not ſatisfied of it, for that he ventured his maſter's goods as well as his own life. Skin. 149. Anonymus in Canc.

7. Factor *deceives the merchant* in ſending him from beyond ſea one ſort of ſilk for another; merchant ſells them again to *J. S.* for the ſame ſort of ſilk for which the factor ſent it, and was ignorant of the deceit. Per Holt, the merchant is anſwerable for the deceit of the factor *civiliter*, though not *criminaliter*, and judgment for *J. S.* 1 Salk. 289. Hern v. Nichols.

8. As to accounts between the agents and factors of the *African Company* and the Company, vide 2 Chan. Caſ. 11 to 14. Melliſh v. African Company and Edlin.

[See Account ( ) pl. 8.]

[4] (B 2.) Tranſactions between Factor and Employer.

Frauds by Factor.

Mal. Lex. Merc. 82.

1. IF factors ſhall give time to a man for payment of monies contracted on ſale of their principal's goods, and after the time is elapſed, they ſhall *ſell goods of their own* to ſuch perſons *for ready caſh (leaving their principal's unreceived)* and then ſuch man break and become *inſolvent*, the factor in equity and honeſty ought to make good the loſſes, for they ought not to diſpenſe with the non-payment of their principals monies after they become due, and procure payment of their own to another man's loſs; but by the laws of *England* they cannot be compelled. Molloy 463. ſect. 5.

2. If any factor ſell unto a man certain goods of another perſon's account, either by themſelves or among other things, and *gives not advice to his principal of the ſale* of the ſaid goods, but afterwards having more dealings with the ſame man he becomes *inſolvent*; the debt for the goods ſo ſold the factor ſhall be anſwerable for, becauſe he gave no advice to the owner of the ſale of the ſaid goods

goods in convenient time; and it is as if he had diſpoſed of thoſe goods to a man contrary to the commiſſion given unto him; for the ſalary of factorage bindeth him thereto. Law of trade, &c. 2d Part 403.

3. *Alſo* if a factor *by commiſſion* of a merchant *buy a commodity* for his account, with the ſaid merchant's money, or by his credit, and the factor *giveth no advice* of it to his principal, *but ſells the ſame* goods *again for his own benefit*; the merchant ſhall recover this benefit of the factor, according to the cuſtom of merchants, and his factor ſhall likewiſe be amerced for the fraud. Law of Trade, &c. 2d Part 403.

4. If a factor ſhall *by falſe entry* in the Cuſtom-houſe, either *unawares or of purpoſe* conceal part of the cuſtom *without conſent* or privity of the merchant, whereby the *goods become forfeit* to the prince, the ſaid factor ſhall bear the loſs of them and anſwer the value thereof unto the merchant as they did coſt, if it be for goods to be tranſported, or as they might have been ſold, if it be for goods to be imported. Mal. Lex Merc. 83.

5. If a factor, by a letter of advice or *by an invoice* of commodities which the merchant ſendeth, *doth make a ſhort entry* in the Cuſtom-houſe, the goods not entered ſhall be loſt, but the factor cannot be charged with the ſame. Mal. Lex Merc. 83.

[See (B) pl. 6. ——(F 2.) pl. 2.]

(C) Diſputes between Factor or Employer, and *Creditors* of the other; and where the Factor or Employer dies or fails.

1. A Merchant *remits goods* to his factor, and about a month after *draws a bill* on him, the factor *having effects* in his hands *accepts the bill*, then the *principal breaks*, againſt whom a commiſſion of bankrupt is awarded, and the goods in the factor's hands are ſeized; it has been conceived the factor muſt anſwer the bill notwithſtanding, and come in as a creditor for ſo much as he was enforced by reaſon of his acceptance to pay. Molloy 465. ſect. 8. [5]

2. Factor having over-paid his merchant, but having goods unſold of the merchant's in his hands, the merchant by *parol agrees that factor ſhall pay himſelf out of the monies ariſing from the ſale of the goods remaining* in his hands; factor being indebted to others by parol likewiſe aſſigns to his creditors the debts which were due for ſale of the goods of the merchant. The merchant dies, and owes debts by bond.—The factor dies indebted by bond likewiſe. Per Lord Chancellor, the factor had a good title in equity to the debts which in equity are become his, and are no longer the merchant's, and decreed for the creditors of the factor. 2 Chan. Caſ. 36. Faſhion v. Atwood.

3. *A.* as factor to *B.* ſells goods *on credit and dies indebted* by ſpecialty more than his aſſets would pay. The money ſhall be paid to *B.* and not to *A*'s adminiſtrator, as part of *A*'s aſſets, but the *commiſſion money* muſt be deducted for the adminiſtrator of *A.* And per Cowper C. Though the factor has a right at law, yet he *is only a truſtee in equity.* 2 Vern. R. 638. Burdet v. Willet & al.

Whether he may retain in caſe the clothier becomes *bankrupt.* 2 Vern. 254. Woodford v. Swaine.

4. A *Blackwell-Hall* factor having cloth in his hands *advanced monies to the clothier*; the clothier dies, adminiſtrator ſues the factor at law for the cloth, the factor ſues in equity to be allowed what he advanced, but denied *per* Lords Commiſſioners; for if there are debts of a higher nature, it will be a *devaſtavit* in the adminiſtrator to pay or diſcount the plaintiff's debt. 2 Vern. 117. Chapman v. Derby.

5. If one employs a factor, and intruſts him with the diſpoſal of merchandize, and the factor *receives the money*, and *dies indebted to debts of an higher nature*, and it appears by evidence that *this money was inveſted in other goods*, and remains unpaid: thoſe goods ſhall be taken as part of the merchant's eſtate, and not the factor's.—But if he *have the money*, it ſhall be looked upon as the *factor's eſtate*, and muſt firſt anſwer the debts of a ſuperior nature. 1 Salk. 160. In Canc. Whitcomb v. Jacob.

(D) Of *Joint* Factors; or where one Factor is imploy'd by ſeveral Principals.

Mal. Lex Merc. 82.

1. ONE and the ſame factor may act for ſeveral merchants, who muſt *run* the *joint riſque of his actions*, though they are *meer ſtrangers to one another*; as if five merchants remit to one factor five diſtinct bales of goods, and the factor makes one joint ſale of them to one man, who is to pay one moiety down, and the other at ſix months end; if the vendee breaks before the ſecond payment, each man muſt bear an equal ſhare of the loſs, and be contented to accept of their dividend of the money advanced. Molloy 463. ſect. 4.

2. *But* if ſuch a *factor draws a bill* of exchange *upon all thoſe five merchants*, and *one* of them *accepts* the ſame, the others ſhall not be obliged to make good the payment. Tamen quære de hoc. Molloy 463. ſect. 4.

3. If two men are *partners of merchandizes* in one ſhip, and one of them appoints and makes a factor of all the merchandizes, it was ſaid, and not denied, that both of them may have *ſeveral writs* of account againſt him, or may join in one writ of account if they pleaſe. Quære of that. Godb. 90. M. 28, 29 Eliz. B. R.

[6]

4. *Surviving* factor ſhall *account* for what was made by himſelf or co-factor, and yet account lies againſt the *executrix* of the dead factor. Chan. Caſ. 127. Holtſcomb. v. Rivers.—N. Ch. R. 139. S. C.

(E) In

(E) In what Caſes his *Contracts* bind the Principal.

1. IF a factor *enters into a charter-party* with a maſter *for freightment*, the contract obliges him; *but* if he *lades aboard generally* the goods, the principals and the lading are made liable, and not the factor, for the freightment. Molloy 466. ſect. 9. Mal. Lex. Merc. 85.

2. The *principal orders* his factor that as ſoon as he hath loaded (he having monies in his hand) *to make an aſſurance on the ſhip and goods*; if the ſhip happens to miſcarry, by the cuſtom of merchants he ſhall anſwer the ſame, if he hath neglected his commiſſion; ſo it is if he having made an aſſurance, and loſs hath occurred, he ought not to make a compoſition without orders from his principal. Molloy 466. ſect 9. Mal. Lex Merc. 86.

3. If a factor by order or commiſſion of his principal *buys* any goods *above the price limited* to him, *or* they be *not of that ſort, goodneſs or kind*, as by the authority they ought to be; this factor is to keep the ſame for his account proper, and the merchant may diſclaim the buying of them. Mal. Lex Merc. 82. 2 Law of Trade 403, 404.

4. *The like* he may do, if the factor having *bought* a commodity *according to his commiſſion* ſhall *ſhip the ſame for any other place* than he hath commiſſion to do. Mal. Lex Merc. 82. 2 Law of Trade, &c. 404.

5. *But* in ſuch caſe if the *price* of the goods *riſeth*, and the factor thereupon fraudulently ladeth them for ſome other port, to take the advantage thereof, the principal merchant may recover damages of the ſaid factor upon proof made of it. Mal. Lex. Merc. 82. 2 Law of Trade, 404.

6. If one be a factor for a merchant *to buy one kind of ſtuff, as tin*, or other ſuch like, and the ſaid factor hath not uſed to buy any other kind of wares, but this kind only for his maſter; if now the ſaid factor *buys ſaies, or other commodities* for his maſter, and aſſumes to pay money for that, now the maſter ſhall be charged in an *aſſumpſit* for the money, and for that let the maſter take heed what factor he makes. Per Cur. Goldſb. * 138. pl. 46. Petties v. Soame. * The book is miſpaged (139).

7. A motion for a new trial in *indebitatus* againſt a factor on ſale of rape-ſeed, becauſe though the goods were *ſold to* S. yet it was *for the uſe of* D. and ſo were the receipts; ſed non allocatur. For per Cur. if a factor or ſervant *buy goods generally*, and do not upon the contract declare that he buyeth only as factor or ſervant, he is chargeable in his own right, and judgment for plaintiff; but if he would have ſtood only on payment, new trial might be. 2 Keb. 812. Degelder v. Savory.

(E 2.) Liable to *anſwer Damages* in what Caſes in general.

1. IF a factor, having received other mens goods or monies into his cuſtody, *be* * *robbed* of the ſaid goods and monies, he is to bear the loſs, and to make good the ſame unto the merchant; but *not* in caſe where the unmerciful elements of *fire and water* ſhall deſtroy the ſaid goods or monies, or where a *town is ſacked* or *pilled*, which is always to be borne by the owner or proprietary of the ſame. Mal. Lex Merc. 83.

* In account it is a good *plea before auditors*, that he was robbed. For though he has wages, yet if he uſes all his induſtry, he ſhall be diſcharged. 4 Rep. 64. in SOUTHCOTE's caſe.—S. P. and ſo if they are burned without his own default. 2 Mod. 100. Anonymus.

2. If a factor buy a commodity which *afterwards becomes damnified by ſome accident* or caſualty, whereby the merchant (for whoſe account he bought the ſame) becomes a loſer, the factor is not to be charged with any part of the loſs. *But* if the commodities were *damnified before*, then he is to bear ſome part of the loſs, although it happened to be known afterwards. Mal. Lex Merc. 84.

3. If a factor receives *money* for other mens accounts, which are *afterwards decried*, or ſome loſs doth happen by exchanging the ſame be it upon copper monies, or light gold taken for merchandizes ſold, every man is to bear that loſs proportionably according to his ſum, and the factor is to ſuſtain no damage thereby, unleſs it were for *falſe coin* by him received, which he is bound to know. Mal. Lex Merc. 84.

(F) Factor liable to anſwer Damages, in what Caſes. *Not obſerving Orders*, or *acting without Orders*.

2 Law of Trade, &c. 404

1. A Factor *ſelling* merchandize *under the price limited* unto him by his principal, he is to make good the loſs or difference of the price, unleſs he can give a ſufficient reaſon for his ſo doing. Mal. Lex Merc. 82.

2. A factor is accountable for all lawful goods which come ſafe to his hands, and ſhall ſuffer for not obſerving of orders. If he has *orders not to ſell any commodities particularly ſpecified*, and yet ſells them, he is anſwerable for any damage that ſhall be received; in caſe goods are bought or exchanged without orders, it is at the merchant's curteſy whether he will receive them, or turn them on his factor's hands. Law of Trade, &c. 2d Part 409.

3. If a factor do *pay money* for a merchant *(without commiſſion)* to another man, it is at his peril to anſwer for it: And if he *deliver*

liver another man's *money at intereſt, and take more than the toleration of the ſtatute*, whereby the ſtatute againſt *uſury* taketh hold of him, and the money is loſt, the ſaid factor is to be charged therewith, and to make good the money unto the merchant. Mal. Lex Merc. 83.

4. If a factor be required *to make aſſurance* for a merchant *upon a ſhip or goods laden* for a certain voyage, *and have monies in his hands* to pay for the premium or the price of aſſurance; and this factor doth neglect the ſame, and giveth *no notice* of it to the merchant, who might have made aſſurance in another place, and the ſaid ſhip or goods do periſh at the ſeas; this factor is to anſwer the damage, unleſs he can give ſome ſufficient reaſon for the non-performance of the ſaid order or commiſſion. Mal. Lex Merc. 86. [8]

5. If a factor having made aſſurance upon goods laden, which afterwards are taken by the enemy, makes any *compoſition with the aſſurers* for the ſame, *without order* or commiſſion for it, he is to anſwer the whole aſſurance to the merchant. Mal. Lex Merc. 86.

(F 2.) Liable to anſwer Profit or Damage. *Not giving notice* of Tranſactions.

1. IF a factor do *ſell* unto a man certain goods of another man's account, either by itſelf or among other parcels, and this factor giveth not advice unto the owner or proprietary, of the ſale of the ſaid goods, but afterwards (having had more dealings with that man in ſelling of goods and receiving of monies) this man *becometh inſolvent*, the factor is to make good that debt for the ſaid goods ſo ſold, becauſe he gave no advice to the owner of the ſale of them at a convenient time, even as if he had ſold thoſe goods unto a man contrary to the commiſſion given unto him; for the ſalary of factorage bindeth him hereunto. Mal. Lex Merc. 82.

2. If a factor, by the advice of a merchant, do buy a commodity for that merchant's account with the ſaid merchant's money, or by his credit, and the factor giveth no advice of it to the ſaid merchant, but doth *ſell the ſame again for his own benefit* and gain, the merchant ſhall recover this benefit of the ſaid factor, by the office of prior and conſuls, according to the cuſtom of merchants, and ſhall be moreover amerced for his fraud. Mal. Lex Merc. 83.

[See (B 2.) pl. 2.]

(F 3.) Liable, how. In Caſe of *prohibited Goods* or *Seiſures*.

1. IF a factor *make return* unto a merchant for the provenue of his commodities ſold, *in prohibited goods* which may not be tranſported, *and have no commiſſion* from the merchant to do the ſame; he ſhall bear the loſs of thoſe goods, if they be ſeiſed upon for the king, or taken as forfeited. *But if it be upon commodities to be imported*, the factor is in no fault. Howbeit he ought to give *advice* to the merchant what commodities are forbidden to be imported or exported, according to the pleaſure of the princes, which are abſolute governors in their havens, harbours, ports or creeks. Mal. Lex Merc. 83.

2. If a factor *commit an unlawful act by direction* of the merchant, be it for the *tranſportation of gold or ſilver* into the parts beyond the ſeas, or otherwiſe; and if it happen thereupon that the ſame be taken, the merchant beareth the loſs: and yet the factor is ſubject to pay treble damages by the law, if it be followed within the year; or *may be fined* for the ſame in the Star-Chamber, although it be *many years after*. Mal. Lex Merc. 83.

[9]

(F 4.) *Offences* by Factor. Puniſhment.

IF a factor or merchant do *colour the goods of merchant ſtrangers, in paying but Engliſh cuſtoms* (although he did bear the adventures of the ſeas for the ſaid goods) he runneth into a *præmunire*, and forfeiteth all his goods unto the king, and his body to *perpetual impriſonment*. Mal. Lex Merc. 83.

[See (F 3.) pl. 2.]

(G) Actions, Pleadings and Evidence.

Br. Account pl. 56. cites 41 E. 3. 3 & 9. * 4 Rep. 84. in South-cote's caſe.

1. IT is a good diſcharge *before auditors* for a factor to ſay that in a *tempeſt*, becauſe the ſhip was ſurcharged, the *goods were caſt* over-board *into the ſea*. Dubitatur 41 E. 3. 4. Roll. Abr. a. 124. (O) pl. 1.—So, that he was * *robbed*, or that the goods were *burned* without his own default. 2 Mod. 100. Anonymus.

Lane 65. S. C. by name of Leviſon v. Kirke.

2. Action on the *caſe* lies for the owner againſt the factor *for running goods*, by which means they are forfeited and ſeiſed. Cro. Jac. 265. Lewſon v. Kirke.

D. 29. pl. 103. 1 Roll. Abr.

3. If factor that has a general commiſſion *takes a bond in his own name*, he cannot plead ſuch bond *by way of account*, but it is a good plea

plea *before auditors* by way of diſcharge. Per Williams Juſt. Bulſt. 103. cites D. 29. 124. pl. 12 cites S. C.

4. If the factor makes a *contract for his maſter*, the maſter ſhall have the action on the contract. Per Coke Ch. Juſt. Roll. R. 337.

5. If, where the uſage is for factors to ſell upon truſt, he ſells to a perſon *of good credit at that time*, and he afterwards becomes inſolvent, the factor is diſcharged; but otherwiſe if it be to a *man notoriouſly diſcredited at the time of the ſale*, *unleſs* he can *prove* that he was *ignorant* of the party's weak eſtate and credit. Mal. Lex Merc. 83.

6. The proper remedy againſt a factor, acting as ſuch, is *account*; but if he converts, *trover* will lie againſt him. Per Holt Ch. Juſt. 12 Mod. 602. Anonymus.

7. Where a factor at the Canaries deſerves money for factorage, he cannot bring an *action for his factorage*, unleſs the *principal refuſe to come to an account*; and if it appears that the factor has money in his hands, he may *detain*, and cannot bring an action for his factorage; but if he were directed to veſt all the produce of his adventure in wines, then he may bring an action for his factorage and pains, becauſe he cannot detain, and hath no other remedy. Per Holt. Comb. 349. Hereford v. Powell.

8. Where a factor or agent of the African Company had *delivered up his accounts* to his ſucceſſor according to the rules of the eſtabliſhment, which were afterwards *burnt* by a late agent of the company, the Lord Chancellor ordered the plaintiff to *ſwear that he left them with the ſucceſſor*, which ſhould conclude the Company. Mich. 31 Car. 2. 2 Chan. Caſ. 11, 14. Melliſh v. African Company and Edlin.

9. A factor *took a bond in his own name*, and died, and the obligor having failed, a bill was brought againſt his ſon for an account. The Lord Chancellor put the ſon to *prove that* his father the teſtator *gave particular notice* to the plaintiff that he ſold on truſt, and to whom. Trin. 33 Car. 2. 2 Chan. Caſ. 56, 58. Daſhwood v. Elwall. [10]

[See Maſter and Servant (B).]

(A) Faculties.

1. THE *Court of Faculties is* a court, although it holdeth no plea of controverſy. It belongeth to the Archbiſhop, and his officer is called *magiſter ad facultates*. And *his power is* to grant diſpenſations, as to marry, to eat fleſh on days prohibited, (and ſo may every 4 Inſt. 337. Godolph. Rep. 106. ſect. 8.

every dioceſan) the ſon to ſucceed his father in his benefice, one to have two or more benefices incompatible, &c. It is called faculties in the ſtatute of 28 *H.* 8. which in one ſenſe ſignifieth a diſpenſation. So as *facultates* (in this ſenſe) *diſpenſationes & indulta, are ſynonyma.* This authority was raiſed and given to the Archbiſhop of Canterbury by the ſtatute of 25 H. 8. 21. 4 Inſt. 337.

An exception was taken that a faculty granted by the archbiſhop of Canterbury was *not ſubſcribed by the archbiſhop's clerk of the faculties, but by his under-clerk,* when it is expreſly required by the ſtat. 25 H. 8. that it ſhould be ſigned by the clerk himſelf, which is very true; but *the act is but directory,* and it is not ſaid that it ſhall be ſigned by the chief clerk himſelf; ſo that this being ſigned by his under-clerk, and it being *cuſtomary* in this office for the under-clerk to ſign faculties, this exception is of no weight. 8 Mod. 364. King v. Biſhop of Cheſter.

2. 25 H. 8. 21. *enacts, that the* Archbiſhop of Canterbury *and his ſucceſſors ſhall have power and authority to ordain, make and conſtitute a clerk, which ſhall write and regiſter every licence, diſpenſation, faculty, writing or other inſtrument to be granted by the ſaid archbiſhop, and ſhall find parchment, wax and ſilken laces convenient for the ſame, and ſhall take for his pains ſuch ſums of money as ſhall be hereafter in this preſent act to him limited in that behalf for the ſame. And that likewiſe the King, his heirs and ſucceſſors, ſhall by his letters patent under his great ſeal ordain, depute and conſtitute one ſufficient clerk, being learned in the Court of Chancery, which always ſhall be attendant upon the Lord Chancellor, or the Lord Keeper of the Great Seal for the time being, and ſhall make, write and inrol the confirmations of all ſuch licences, diſpenſations, inſtruments or other writings, as be thither brought under the archbiſhop's ſeal, there to be confirmed and inrolled; and ſhall alſo intitle in * his book, and inrol of record, ſuch other writings as ſhall thither be brought under the archbiſhop's ſeal, not to be confirmed, taking for his pains ſuch reaſonable ſums of money as hereafter by this act ſhall be limited for the ſame; and that as well the ſaid clerk appointed by the ſaid archbiſhop, as the ſaid clerk to be appointed by the king, his heirs or ſucceſſors, ſhall ſubſcribe their names to every ſuch licence, diſpenſation, faculty or other writing that ſhall come to their hands to be written, made, granted, ſealed, confirmed regiſtred and inrolled by authority of this act, in form as is before rehearſed.*

Another exception was taken in the caſe above, that it was *not ſubſcribed and inrolled by the king's clerk of the faculties in Canc.* as it ought, becauſe *he is impowered* by the ſtatute *to tender an oath to the perſon* who hath obtained it; which ſtatute was made to reſtrain the extravagant grants of the Pope in thoſe days, and therefore ſhould be fully and ſtrictly performed by the clerks themſelves, and not by their *deputy clerks*; and this muſt be intended by the legiſlators, for otherwiſe this act would have been penned as the ſtatute of Wills, or as the ſtatute of Promiſſory Notes, by which it is enacted, That the ſigning ſhall be by the parties themſelves, or by any other perſon authorized by them; therefore this muſt be done by the principal clerks themſelves, and not by their under-clerks, for it is not aſſignable to them; and therefore this faculty is void, eſpecially ſince there is a *proviſo* in the faculty itſelf, *that it ſhall not be good till ſubſcribed and regiſtered by the clerk of the faculties in chancery,* which is in the nature of a condition precedent, and not to be ſigned or ſubſcribed by his order. It was held that where a man doth any thing by the *expreſs order of another,* as it was done in this caſe, it is as good as if done by himſelf; as where one expreſsly orders another to ſign a deed, which the perſon thus ordered did afterwards ſign, this is as good as one determinate act; but where the deputy doth any thing by virtue of general deputation, it muſt be where a deputy may be made by law. The judgment was affirmed. 8 Mod. 364, 365. King v. Biſhop of Cheſter.

3. The *king* by his prerogative, *without the archbiſhop*, may grant to a biſhop to hold a church in commendam, notwithſtanding

ſtanding the ſtatute of 25 H. 8. 21. Cro. Eliz. 601. Armiger v. Holland.

[See Commendam.——Pluralities. (G.)]

Faits [or Deeds.]

Fol. 21.

(A) What Perſons may make a Deed.

[1. IF an *infant* deliver a deed, it is *not void* but voidable. 8 H. 6. 22. 9. H. 6. 6.] The *difference* taken that the deed of an infant (as *letter of attorney*) whereby he gives an authority, is *void*, but where he paſſes any intereſt (as *bond*, &c.) is *only voidable*, is not agreeable to reaſon; for by that means the infant would be more prejudiced in paſſing his eſtate than he would in giving a bare authority, which cannot be maintained. Per Holt Ch. Juſt. Comb. 468. in caſe of Thompſon v. Leach.

Where it is held that the *deeds of* infants are not *void* but *voidable*, the meaning is, that *Non eſt factum* cannot be pleaded, becauſe they have the form though not the operations of deeds, and therefore are not void upon that account, without ſhewing ſome ſpecial matter to make them of no efficacy. 3 Mod. 310. Thomſon v. Leach.——But he may ſay *non conceſſit*, &c. Per Wray Ch. Juſt. 2 Le. 218. in Humfreſton's caſe.

2. *Dum fuit infra ætatem* was brought by an infant of land and rent, ſo that you may ſee that *grant of rent by inrolment* by deed is not void but voidable, as it ſeems. Br. Faits, pl. 83. 46 E. 3. 33.

3. 5 Eliz. 4. ſect. 42. *Becauſe there hath been ſome queſtion whether any perſon being within the age of one and twenty years, and bounden to ſerve as an* apprentice *in any other place than in the city of* London, *ſhould be bounden, accepted and taken as an apprentice.*

4. Sect. 43. *Be it enacted, That all and every ſuch perſon and perſons that at any time or times from henceforth ſhall be* bounden by indenture *to ſerve as an apprentice in any art, ſcience, occupation or labour, according to the tenor of this ſtatute, albeit the ſame apprentice or any of them, ſhall be within the age of one and twenty years at the time of the making of their ſeveral indentures, ſhall be bounden to ſerve for the years in their ſeveral indentures contained, as amply and largely to every intent, as if the ſame apprentice were of full age at the time of making ſuch indentures; any law, uſage, or cuſtom to the contrary notwithſtanding.* [12]

5. If an infant makes a deed of *feoffment, and a letter of attorney* to a ſtranger *to make livery* of ſeiſin, and he makes livery of ſeiſin by force thereof, he ſhall be taken for a diſſeiſor. Perk. 6, 7. cites 18 E. 4. 2.——See pl. 1. Noy 130. cites 21 H. 6. 31.—— Roll. R. 242. Palm. 237. Br. Feoffment pl. 48. cites 18 E. 4. 27. *But* a *letter of attorney* by infant *to receive livery* and ſeiſin for him is good, becauſe it is for his advantage. Per Aſcue Juſt. But e contra per Paſton Juſt. Br. Faits, pl. 31. cites 21 H. 6. 31. But he ſays the law ſeems to be with Aſcue.

6. In

Br. Age, pl. 80. cites 4 Ma. 1.—— pl. 45. cites 21 E. 4. 13, 14.

6. In Little Brook, fol. The caſe is, a *parſon or prebend* being within age *made a leaſe* for years *of his beneſice*, and would, but could not, after avoid it for his nonage; for ſeeing the church had made him of full age to diſcharge the ſpiritual office, our common law thought it fit to enable him to diſpoſe of his temporalties. Callis of Sewers 202. —— Watſ. Comp. Inc. 456.

Br. Age, pl. 64. cites 20 E. 4. 8.

7. In 21 H. 7. 12 & 13. the caſe is put by Bridges, and confirmed by Juſtice Sylliard, and was not denied by any, That an *obligation* made *by a mayor and commonalty*, dean and chapter, abbot and covent, *ſhall not be avoided for the nonage of the mayor*, dean or abbot. Callis of Sewers 202.

8. If a *blind man* has underſtanding, he may deliver a deed ſealed by him. Jenk. 222. pl. 75.

Fin. Law 8vo. 103.

9. If a man be *born dumb*, but can well hear, ſuch a man at full age by delivery of his lands by ſigns, and without delivery *by ſigns*, may make a gift. Perk. 11. ſect. 25.

Vide Martha Elliot's caſe, Cart. 53.

10. *And* a man that is *born dumb and deaf* may make a gift, *if he have underſtanding*. But it is hard that ſuch a perſon ſhould have underſtanding. For a man ought to have his perfect underſtanding by his hearing, yet divers perſons have underſtanding by their ſight, &c. And a man *born dumb and blind* may have underſtanding. *But* a man that is *born blind, deaf and dumb*, can have no underſtanding, ſo that he cannot make a gift or a grant. Perk. 11. ſect. 25.

11. The grants of *all dead perſons in law*, as *monks*, *friars* and *canons profeſſed*, and ſuch like others, are void, if they be *not* made by the *ſovereigns of ſuch houſes*, or by matter of concluſion, or otherwiſe that it be in ſpecial caſes; and therefore if a monk, friar or canon profeſſed, who is not ſovereign of the houſe, grant unto me an annuity by *deed poll*, the grant is void notwithſtanding that he be *dereigned afterwards, or made ſovereign* of the ſaid houſe, or of another houſe, or created a biſhop, &c. Perk. 2. ſect. 3. cites H. 14 H. 8. 16. Mich. 2 H. 3. 5. H. 32 H. 6. 31.

12. If a *feme covert* grants an annuity by deed, the grant is void. Perk. 3. ſect. 6. cites M. 1 H. 5. 12.

13. *And* if a *man be ſeiſed of lands in the right of his wife*, and his *wife grant a rent iſſuing out of the ſame lands*, without the knowledge of the huſband, the grant is void; and ſo it is notwithſtanding that the huſband had conuſance of it, if it be made and delivered *without his aſſent, or with* his aſſent, if it be made in the name of the wife, and *not in the name of the huſband*. Perk. 3. ſect. 6. cites M. 9 E. 3. 28.

[13]

14. *And* notwithſtanding the *huſband was abroad out of the country at the time* of ſuch grant made and delivered, ſo that it is not known whether he be alive or dead; yet ſuch grant is void if the huſband be living, in as much as if the grantee, by force of ſuch grant enter into the land and diſtrain, the huſband, at his return, ſhall have for his entry and diſtreſs an action of treſpaſs. Perk. 3, 4. ſ. 6. cites H. 4 H. 4. 13. H. 2 H. 7. 15.

15. 34 & 35 *H.* 8. 22. *Enacts, That recoveries and deeds inrolled,*

rolled, &c. by femes covert in corporate towns *ſhall be of the ſame force as they were before* 32 *H.* 8.

See { Deaf, Dumb and Blind (A). / Enfant ( ) / Feoffment (E). } { Grant ( ) / Lunatic (B). / Non Compos (B). }

(B) By what Names they may make a Deed. [*Miſnoſmer*].

[1. IF a man makes a deed by name of *J. S. the elder where he is J. S. the younger*; yet he ſhall not avoid the deed, becauſe he is the perſon who made it. 13 H. 4. 4. b.]

[2. So if *J. Boſom* makes a deed by name of *J. Bozom*, he ſhall not avoid it. 14 H. 4. 3. b.] Br. Faits, pl. 22 cites 14 H 4. 30.

[3. If *J. S.* binds himſelf in an obligation by the name of *W. S.* he ſhall not avoid it: but if it be *falſe in the name of baptiſm only*, it is otherwiſe. 3 H. 6. 25. b. 26.] [So it is in the original and in the year-book.]

It ſeems that one cannot plead miſnoſmer of the name of baptiſm, neither need he do it, for he is not the ſame perſon. Nota, Br. Miſnoſmer, pl. 4. cites 3 H. 6. 25.——

If J. S. grants an annuity by his contrary name of baptiſm, viz. by the name of W. S. ſome think this grant is not good, becauſe that the deed of W. cannot be the deed of J. for a man cannot have *(a)* two names of baptiſm, and ſo they conceive the grantor may deny the deed. Perk. 17. ſ. 38. cites 3 H. 6. 26.——*(a)* Cro. I. 558. Watkins v. Oliver.

And ſome hold contrary, for when they are at iſſue upon the deed, the *plaintiff may give in evidence, the day, year and place*, where the plaintiff delivered the ſame as his deed, &c. then the *grantor hath not any thing* to help him, *but to ſay that his name is J. and not W.* and ſo not his deed; now they ſay, that the plaintiff may demur upon this evidence, foraſmuch as he hath not gainſaid the delivery of the deed as his deed; they ſay that he ſhall be *concluded* to ſay, that his name is other, but as the deed doth ſuppoſe, Ideo Quære. Perk. ſ. 39. cites M. 9 E. 4. 43.

But if *J. S. reciting* by his deed, *that his name is J. S.* and by the ſame deed *grants* an anuity *by the name of W. S.* this is a good grant, for the writ ſhall be brought upon the whole deed. Perk. ſ. 40. cites 3 E. 3. Itin. Not. Eſto. 132.

[4. If a man binds himſelf by a falſe *ſurname*, as by the name of *J. S. where his name is J. D.* he ſhall not avoid it, but it ſhall eſtop him, becauſe he *(b) may have divers ſurnames.* 3 H. 6. 25. b.] Br. Miſnoſmer, pl. 4. cites S. C. *(b)* Br. Miſnoſmer, pl. 2. S.P. cites

2 H. 6. 5. *Burges* made a releaſe by the name of *Burgeles*, and the defendant pleading that Burges, by the name of Burgeles, releaſed, &c. the ſame was held good. Br. Faits, pl. 34. cites 22 H. 6. 48.

5. Debt, and counts *Quod cum prædictus Jacobus, per nomen Johannis Winlow*, ſuch a day and year, *per quoddam ſcriptum ſuum obligatorium conceſſit, &c.* The defendant demanded oyer of the bond, whereby it appeared, that the defendant, by the name of John Winlow, *fecit ſcriptum, &c.* and the *condition was, If James Winlow* paid, &c. whereupon the defendant demurred. And all the court held, that the action lay not: for John cannot be James. Cro. E. 897. Field v. John alias James Winlow.

6. *A binds himſelf by the name of B.* and he is accordingly ſued by the name of B. he may *plead miſnoſmer*, and the other may *reply*, that [14]

that he made the bond by the name of B. and *eſtop* him by demanding judgment, if againſt his own demand he ſhall be admitted to ſay *his name is A.* and then he may *rejoin*, and ſay he made no ſuch demand; and this he muſt do without oyer; for if he *pray oyer*, he admits his name to be B. Per Cur. 1 Salk. 7. Linch v. Hook. ——6 Mod. 225. Fox v. Tilly.——Litt. R. 184. per Richardſon Ch. Juſt.

See { Eſtoppel (O). Grants (B). } { Miſnomer (A). Nomes (B). }

(C) *To what Perſons* may be made.

Per Cateſby, If one [1. A Deed may be made to a *feme covert*. 3 H. 6. 23. b.]

enfeoff a feme covert, and after the *baron diſagrees*, the feoffment is void, to which Brian agreed, For the feoffment was never good without the agreement of the baron; quære of this opinion, for it ſeems that it is *good till the baron diſagrees*. Br. Feoffment de terre, pl. 36. cites 1 H. 7. 16.

Perk. 19. ſ. 43. ſays, that the grant is good till the huſband diſagrees, and therefore if a *rent-charge* be granted unto a feme covert, and the *deed is delivered unto her*, her huſband not knowing thereof, and the *huſband die* before any diſagreement made by him, and before any day of payment; now the grant is good, and ſhall not be avoided, by ſaying that the huſband did not agree, &c. But the *diſagreement* of the huſband *ought to be ſhewed*. Perk. 19. ſ. 43. cites 15 E. 4. 2.

If an eſtate be made to a man's *wife de novo*, it is not neceſſary to *aver the huſband's aſſent*, for it *(c)* veſts till he diſſent; but aſſent is neceſſary where the wife had an eſtate before, which cannot be *deveſted* by his aſſent to the latter eſtate. Hob. 204. *(d)* Swain v. Holman & Ux.——Hutt. 7.——*(c)* Show. 298. arguendo cites C. L. 3. 356. of a feoffment by livery to a feme covert. *(d)* S. C. cited arguendo, Show. 300.

If he *agrees ſeven years after*, it is good. So it is of a *diſſeiſin to an uſe*, and ſo it is of an *aſſumpſit to the wife*. Arg. Goldſb. 13. cites 27 H. 8. in Jordan's caſe, and 1 H. 7. in Dove's caſe.

If an Engliſhman *goes* [2. But if a deed be made to *a monk* it is void. 3 H. 6. 23. b.]

into France, and there becomes a monk, yet he is capable of any grant in *England*, becauſe ſuch *profeſſion* is not triable, and alſo becauſe all profeſſion is taken away by the ſtatute, and by our religion now received, ſuch vows and profeſſion is held void; I have heard that this was reſolved accordingly by all the juſtices at Serjeants Inn in 44 Eliz. in one Ley's caſe, 2 Roll. 43. Grant (C). pl. 1.

If a *leaſe for life* be made [3. So if made to a *channey profeſt* it is void. 3 H. 6. 23.]

to a monk, the remainder over, both the eſtates are void. Per Coke Ch. Juſt. 2 Bulſ. 292. cites 9 H. 6. 24. and Perk. 109. pl. 568. and Pl. C. 35. in Colethirſt's caſe.

4. *But* if a monk or friar profeſſed, &c. be *ſovereign of the houſe*, he may be a grantee. Vide Perk. 24. ſ. 51. cites 5 H. 7. 25. M. 19 H. 6. 25.

5. A man *non ſanæ memoriæ* may be a grantee. Perk. 24. ſ. 51.

6. A man *attainted of felony, murder or treaſon*, may be grantee, and a *clerk convict* and a man *impriſoned*. So may the king's villein and an *alien*. And a man *outlawed in a perſonal action*, and a *baſtard*, may be a grantee or a purchaſor, but a baſtard cannot be heir, nor have heir, without iſſue of his body begotten. Perk. 22. ſ. 48.

7. An

7. An *abbot* may be grantee, and ſo may *dean and chapter, mayor and commonalty.* Perk. 23, 24. ſ. 51. cites 5 H. 7. 25. M. 19 H. 6. 25.

[See Grants (C).]

(D) What *Things* are *neceſſary* to the making of a Deed. [*And what Words.*] [15]

[1. THERE ought to be theſe things to the making of a deed, that is to ſay, *writing, ſealing, and delivery.* 4 H. 6. 4. 8 H. 6. 6. b. 30 E. 3. 32.] Perk. ſ. 118. ſays, that ſome *kings* and princes have uſed to make *blank patents and charters ſealed* to be delivered to divers men, to write what matter ſoever they would in them. And that ſuch patent has been ſufficient warrant to the patentees, &c. Yet if a *common perſon* ſeal an obligation, or any other deed, without any writing in it, and deliver the ſame unto a ſtranger, man or woman, it is nothing worth.

[2. If a deed be *wrote upon wood, leather, cloth,* or the like, it is not good, but ought to be wrote upon *parchment or paper,* otherwiſe it is not good, becauſe the writing upon them may be leſs vitiated or corrupted. Co. Lit. 35. b.] 2 Inſt. 672. cites 5 Rep. 20. b. Stiles's caſe.

[3. The deed *takes effect from the delivery,* and not from the date. 29 *E.* 3. 23. adjudged.] As to dates vide (P). 2 Rep. 5. Goddard's caſe.

[4. A deed ſhall be good enough though it has not any *date.* 13 H. 7. Kelloway 34. b. For the time of the making may be alledged in pleading.] 2 Rep. 5. Goddard's caſe. Perk. ſ. 120.

[5. If an *abbot and covent* make a deed, and in the end the words are, In cujus rei teſtimonium *ſigillum noſtrum appoſuimus,* though it be not ſigillum noſtrum *commune,* yet it is good enough to bind the ſucceſſor. 22 H. 6. 4.] As to ſealing, vide (H). Perk. ſ. 133. cites S. C. and 11 E. 4. 4. and 37 H. 6. 3. Br. Faits, pl. 30. cites S. C. and 22 H. 6. 3.

[6. If an obligation be, Ad quam quidem ſolutionem bene & fideliter faciendam *obligo me,* hæredes, executores & adminiſtratores meos firmiter *per præſentes datas, &c.* though the words *(ſigillo meo ſigillat') are omitted,* yet it is a good deed. M. 10 Jac. B. R. adjudged between Meyhen and Dune.]

[7. This word *(meum)* in a deed is not neceſſary, for In cujus rei * teſtimonium ſigillum appoſui is ſufficient without the word meum; for if he *ſeals it with the ſeal of another man,* it is ſufficient. 21 E. 4. 81.] *Folio 22.

[8. Theſe words *(In cujus rei teſtimonium ſigillum meum appoſui)* are not neceſſary to be in a deed. Bro. Obligation 8. in abridging 40 E. 3. 17. Kelloway 41. b. Contra 40 E. 3. 2.] Br. Faits, pl. 103. cites 7 H. 7. 14.

[9. Theſe words *(ſigillum meum appoſui)* are not neceſſary. 8 H. 6. 35.]

10. There muſt be *grantor and grantee*; yet where a deed tripartite of bargain and ſale inrolled *had not the grantor's name before*

the words (hath granted) ſo that it was not ſaid, who hath granted, and (hath) was in the ſingular number though the deed was tripartite, yet becauſe a grantor may *with certainty enough be collected from the whole deed*, the deed was held good. 10 Mod. 45, &c. Lord Say and Seal's caſe.

2 Vent. 142. Tretheway v. Elleſden.

11. If a deed of feoffment be *without premiſſes*, *habendum*, *tenendum*, *reddendum*, clauſe of *warranty*, or * of *in cujus rei teſtimonium*, the *date* and the clauſe of *his teſtibus* yet it is good. Co. Lit. S. 1. 7. a.

* D. 19. pl. 13. Dal. 1. pl. 4. 96. pl. 24 — Le. 25. Bedne's Caſe. —— Ow. 33. —— 3 Bulſ. 301. —— Kelw. 70. b. ——— 2 Rep. 5. Goddard's caſe. —— Het. 75. Peters v. Field.

[16] 12. The *year of the king* is not eſſential to a deed. 2 Salk. 462. Cromwell v. Grunſden.

13. Though a deed be ſufficiently written, *viz.* without raſure, interlining, or new writing upon the old writing, or without any other like fault, and alſo be ſufficiently ſealed and delivered as the deed of the party, yet if the *words* in the deed in themſelves are *not ſufficient in law to bind the party*, the deed will avail little or nothing againſt him. Perk. ſ. 155.

14. In the reign of queen Elizabeth, deeds were often *without witneſſes*, and a counterpart of an old leaſe without witneſſes made about that time was allowed as good evidence; and Windham Juſt. ſaid, that he had ſeen ſeveral deeds made in her time without witneſſes. Lev. 25. Garret v. Liſter.

See Aſſent (B. 4)

15. If *A. makes a deed to B. and delivers it to J. S. to deliver it to B.* this is not a deed without *B.'s agreement* to it; for J. S. the bailee, as here, is ſervant to A. who makes the deed, and not to B. to whom the deed is made. Br. Faits, pl. 80. 8 H. 7. 13.

(D 2.) What ſhall be ſaid to be, or ſhall *amount to* a Deed.

1. A *Preſentation by writing* to a church is not a deed, but only in nature of a letter to the biſhop. C. L. 120. a.

2. Debt upon bond of 200 l. to indemnify againſt a bill ſealed (for the payment of 42 l. in which the plaintiff was bound) when he ſhould be required; the defendant pleaded non eſt factum, upon which they were at iſſue; and it appeared upon the evidence, that the *bill was written in a book*, and that the defendant *put his hand and ſeal to the* ſame *leaf on which it* was written, after a verdict adjudged, this was a good deed, though there was *no evidence of the delivery*. Cro. E. 613. Fox v. Wright.

3. *Grant of next preſentation* or avoidance of a living cannot be good without deed, and a *letter wrote by the patron* to the father of the plaintiff, in which the patron *ſaid he had given him the next avoidance*, is not ſufficient. Cro. E. 164. Criſp's Caſe.

[Vide N. a.]

(D 3.) What

(D 3.) What ſhall be ſaid the Deed, or *only the Agreement* of Perſons ſigning it.

WHEN an *incumbent grants a rent* by the conſent of the *patron and ordinary*, and they *put their ſeals* to it; this is not their deed, but only their agreement to it. Cro. E. 57. Eaſt, Skidmore, &c. v. Vaudſtevan.

(E) What Things are neceſſary to make a *Deed indented*. [17]

[1. IT cannot be a deed indented, unleſs it be *actually indented*. For if the words of the deed are, *hæc indentura*, &c. yet if it be not indented in fact, it cannot be an indenture. Co. Litt. 143. b. 5 Rep. Stiles's Caſe 20. b. adjudged, though there were two parts of it.] Cro. El. 474. Frampton v. Stiles.—2 Inſt. 672.

[2. *If* the deed be *indented, though the words* of the deed *are not hæc indentura*, yet it is an indenture. Co. Litt. 143. b.] 2 Inſt. 672. cites 5 Rep. 20. b. Stiles's Caſe.

(F) [*Charter-Parties*] Who ſhall be ſaid Parties to the Indenture to be charged, or to take Advantage by it. [*Or rather who ſhall take Advantage or be bound by a Deed, not being Party or Sealing.*]

[1. IF an *indenture of the charter-party* be made *between one A. and others, owners of the ſhip called E. whereof B. is maſter, of the one part, and C. of the other part.* In which indenture (a) *A. covenants with B. and C. and C. covenants with A. and B.* and binds them to C. and B. for performance of covenants in 600 *l.* and the concluſion of the indenture is, *in witneſs whereof, the parties aboveſaid have put their hands and ſeals, and the ſaid B.* to the ſaid indenture *put his hand and ſeal, and delivered it.* In this caſe *B. is not any party* to this indenture, ſo that B. cannot releaſe the action brought upon this indenture by A. becauſe it is an *indenture reciprocal, between parties of one part, and* parties *of the other* part, in which caſe no obligation, covenant, or grant can be made with any who is not party to the deed; but *where the deed indented is not reciprocal*, but is without the words, *between*, &c. as *omnibus Chriſti fidelibus*, &c. there the *obligation, covenant, or grant may be made* See (C. a) —Molloy de jure maritimo 261. cites S. C. and is thus, (viz.) A. covenanted with C. and B. and bound themſelves to the plaintiff, and B. in 600 l.—Where a *deed* runs *in the firſt perſon* ſigning and ſealing

makes B. a party, *though not named* therein.

made to divers ſeveral perſons. Co. Magna Charta 673. where is cited *Trin.* 29 El. B. R. adjudged.]

1 Salk. 234. Nurſe v. Frampton.——(a) In the indenture were divers covenants to be performed by A. and by B. to C. and e converſo; and there was a clauſe, that A. and B. bound themſelves to C. to perform the covenants. Cro. El. 56. Eaſt, Skidmore and Foame v. Vauſtevan.——The words in 2 Inſt. 673 are, that A. covenanted with C. and B. and alſo C. covenanted with A. and B. and bound themſelves to A. and B. for performance of covenants in 600 l. &c. 2 Inſt. 673. Scudamore v. Vandeſtene.

See (D. a) * Molloy 262. S. C. but leaves out the word (all). —Debt on a charter-party, *quod per indenturam teſtatum exiſtit, that A. covenanted to pay* 100 *l. to B.* between whom, as owner, and C. merchant

[2. If an *indenture of charter-party* be made *between A. and B. owners of a ſhip, of the one part, and C. and D. merchants, of the other part*, and there are ſeveral *covenants of the one part, and the other*, and *A. only ſeals the indenture of one part, and C. and D. of the other part*; but in * all the indenture is mention, that A. and B. covenant with C. and D. and C. and D. covenant with A. and B. In this caſe *A. and B. may join in action againſt C. and D.* upon this indenture, *for breach of a covenant* in the deed, *though B. never ſealed* the deed; for he is a party to the deed, and C. and D. had ſealed the other part to B. as well as to A. upon which the action is brought. Hill. 18 Car. B. R. adjudged per Cur. upon a demurrer without argument, for the clearneſs of it, between Clement and Henly.]

the indenture was, *and* 100 *l. to D. the plaintiff*, as maſter. The defendant pleaded, that the plaintiff was no party to the indenture. The plaintiff demurred; and per curiam, any one mentioned therein, is party enough to ſue this indenture, being not between parties, but only *hæc indentura teſtatur*, which is all one with a deed in the firſt perſon; as if it was, I give ſo much to J. N. and ſo much to J. S. 3 Keb. 115. Hill. 24 Car. 2. B. R. Coke v. Child.

[18] See indorſement.

(G) In what Line or Place the Writing being, ſhall be *Parcel* of the Deed.

A bond was conditioned to *ſave lands harmleſs* from all incumbrances made by the obligor, and a memorandum was alſo indorſed, that the condition *ſhould not extend to an extent of a ſtatute* acknowledged by him to J. S. and it was held to be parcel of the condition conjoined to it as an exception; for it is an explanation in writing of the intention of the parties, written before the ſealing of the bond. Mo. 679. Broke v. Smith.

[1. IF *part* of the deed be written *upon the back* of the deed for default of parchment, yet it is a good deed. 41 E. 3. 10 b.]

But it ought to be *written before the ſealing and delivery*, or elſe it is not good. Per Harvey Juſt. Het. 137. Taylor's Caſe.

Indorſement *after* ſealing and *delivery*, and at another time, makes a new deed. 6 Mod. 237. Cook v. Remington.

[2. So an *obligation* with a *condition upon the back* of it, is a good condition. 41 E. 3. 10. b.]

[3. If an obligation be made, and *one word is put above and another below, and another in another place*, yet the deed is good. 14 H. 4. 18.]

* Fol. 23.

[4. * If a man be bound in an *obligation upon condition*, that if he pay a certain ſum to his firſt child which ſhall be born afterwards,

wards, then the obligation ſhall be void, and *before the ſealing* of it *a memorandum is made under the condition*, that it is the intent of the parties, *that the ſum mentioned in the condition ſhall not be paid till* the firſt child, which ſhall afterwards be born, can aſk his father's bleſſing; this is part of the condition as ſtrongly as if it had been put in the reſidue of the condition, it being done before ſealing; for it *is not repugnant* to the condition before, *but only an explanation* of the condition and of the intent of the parties. Dubitatur Paſchæ 16 Jac. between Chibborn and Horwood, upon a demurrer.]

Mo. 679. Brook v. Smith. A *condition under a recognizance* is no part of the recognizance, not being in the recognizance, but under. So if it was adjudged,

on the back of it.——See Trial (C g.) pl. 25. cites 36 H. 6. 2.

[5. But the obligee did not much rely upon the law, but ſued in the Court of Requeſts.]

[6. *And* in this caſe, *if the memorandum had been, that the matter aforeſaid ſhould be parcel of the condition aforeſaid*; this would make it parcel of the condition. Per Mountague, in the ſaid caſe of Chibburn and Horwood.]

[7. *And* in the caſe aforeſaid, *if after the memorandum*, and the matter aforeſaid done and alleged, there *had been theſe words, then the condition ſhall be void*, it had been parcel of the condition. In the ſaid caſe agreed per Houghton.]

[8. If a *clauſe* comes in a deed *after* theſe words, *in cujus rei teſtimonum, &c. ſigillum appoſui, &c.* it is not any part of the deed, though it was written before the ſealing and delivery. 1 Ma. Brook, Faits, 72. agreed by the juſtices. And ibid. 76.]

Bendl. 12. contra. Het. 88. arguendo. S. P.

If a *proviſo* be put in *after the in cujus rei teſtimonium*, and ſubſcribed to the deed before the ſealing, it is then part of the deed. And though it be after the ſealing, yet it may be as a condition annexed to the deed. Per Doderidge Juſt. 3 Bulſt. 302. Thompſon v. Butcher.

That which is *written* in a deed *after the in cujus rei teſtimonium* ſhall be parcel of the deed as well as that which is wrote before. Per omnes J. Mo. 3. pl. 5. Anon.——Per Coke Ch. Juſt. It is no part of the bill, but may be a condition, and muſt be pleaded. So in covenant brought on words of covenant in a deed, after the in cujus, &c. and above the ſeal, it was held good. Brownl. 59. Hamond. v. Jethrell.——2 Brownl. 99. S. C.

Before the ſealing twenty things may be *indorſed* or *ſubſcribed*, as condition of the obligation, and all ſhall ſtand. Mo. 679. Brook v. Smith.

[19]

9. Before the ſealing a leaſe of houſes in which a rent was reſerved, it was *indorſed* for the *payment of twelve bottles of Canary wine every year to the leſſor*.——It was argued for the defendant, that the wine ariſes in covenant, that it is a reſervation and not properly a rent; but for the plaintiff it was ſaid not to be material, whether a reſervation or not; for that it is a duty, and ariſes by reaſon of the thing demiſed, and goes along with it. 4 Mo. 74. in the caſe of Pitcher v. Tovey.

10. In debt to perform covenants in an indenture; one covenant was, that the defendant would ſafely give up to the plaintiff the *goods, a particular whereof was writ on the back of the indenture*. It was held per Cur. that the *indorſement, if made at the time of the enſealing and delivery of the deed*, was part of it, and therefore giving oyer of the deed without oyer of the indorſement, was an incompleat oyer of the deed relating to the

indorſement, and not perfect without it. 6 Mod. 237. Cook v. Remington.

(H) Sealing.

See (N. a. 4) pl. 1.—Perk. S. 130.

[1. THAT cannot be the deed of any, who does not ſeal it. 6 H. 4. 5.]

Though *words obligatory*, or, &c. *are written* in parchment or paper, and obligor, or, &c. *delivers the ſame as his deed*, and it is *not ſealed* at the time of the delivery, it is but *an eſcrowl* notwithſtanding that the name of the obligor be ſubſcribed. Perk. S. 129.

A. by indenture *leaſes to B. and C.* rendering rent and with divers covenants, and *B. and C. bind themſelves for performance of the covenants in* 40 l. and *B. ſeals the indenture, but C. does not*, but *both enter*. This is no obligation as to the 40 *l.* but only againſt B. who ſealed it, as it ſeems there. Br. Obligation, pl. 13. and 27. cites 38 E. 3. 8. and 45 E. 3. 3. 11.———Br. Dette, pl. 80. cites S. C. becauſe it is a collateral thing, though he ſhall be bound by his agreement to the leaſe as to the payment of the rent, yet not as to the 40 *l.* unleſs he had ſealed, per Finch.———Br. Dette, pl. 38. cites 45 E. 3. 4. But Brooke ſays, quære legem. For that it ſeems not law in the point of the words obligatory, and cites 45. E. 3. 11. that of all reſervations and things neceſſary to the leaſe, C. ſhall be bound by his agreement, though C. had been a feme covert at the time, but that of a thing which binds the perſon as a thing obligatory ſealing and delivery is neceſſary.——Br. Dett. pl. 80. S. P. cites 38 E. 3. 8. and there Brooke ſays, that a penalty for non-payment of the rent annually is a reſervation.

[2. If *four make a deed, two may make one ſeal, and the other two another ſeal*; and this may be averred, and ſhall be a good deed of all four. 6 H. 4. 5. 29 E. 3. 32.]

Jo. 268. S. P. Lord Lovelace's Caſe.—Br. Faits, pl. ‡ S. C. 17. pl. *S. C. 30.

[3. If *twenty* make a deed and *all ſeal it at the ſame time with one and the ſame ſeal*, yet it is good, and the deed of all. * 8 H. 4. 8. ‡ 22 H. 6. 4. b. per Port.]

One piece of wax may ſerve *for all the grantors* which are named within the deed, if every one of them put his ſeal upon the ſame piece of wax, or if another do ſo for them, &c. if the words in the deed imply ſo much, viz. if it be ſaid in the deed *in cujus rei teſtimonium ſigilla noſtra appoſuimus*, or words to the ſame effect. Perk. S. 134. cites 8 H. 6. 8. 27 H. 6. Feoffm. 105.

Per Clark Juſt. *Twenty men may ſeal with one ſeal on one piece of wax only*, if all lay their hands on the ſeal together. Per 2 J. contra. 2 Le. 21. in the caſe of Lightfoot v. Butler.——Per Noy, Attorney General, that it is good. Jo. 268. in Itinere Windſor.——Cro. El. 247. Bretton v. Bolton.——Br. Obligation, pl. 73. cites 21 H. 6. 3. and 27 H. 6. 4. S. P. which Brooke ſays, ſeems to be intended where all ſeal with one print.

[4. If an *abbot and covent ſeal a deed with a ſeal*, it is good enough to charge the ſucceſſor. 22 E. 3. Abbe 21.]

Jo. 331. Lort v. Biſhop of St. Davids.—Br. Faits, pl. 75.——For the print of the other's ſeal is his ſeal. Br. Obligation, pl. 69. cites 21 E. 4. 81.

[5. If *a man ſeal* a deed *with the ſeal of another man*, it is good enough. 21 E. 4. 81.]

[20] Though the words are in cujus rei teſtimonium appenſum eſt *noſtrum ſigillum commune*; for this ſeal ſhall be ſaid the covent or common ſeal for the time, for with their common aſſent they *may change their common ſeal* at what time they will. Perk. S. 132.———Br. Obligation, pl. 73. cites 21 H. 6. 3. and 22 H. 6. 4.

[6. If an *abbot and covent* make a deed, and *ſeal it with my ſeal*, it is good enough. 22 H. 6. 4. b. Per Pole. Perkins 132.]

So if it had been *ſigilla noſtra appoſuimus*, inſtead of ſaying the common ſeal, and yet held good, and it ſhall be intended their common ſeal. Br. Faits, pl. 70. cites 11 E. 4. 4.

7. The

7. The ſealing of charters and deeds is much more *ancient* than ſome, out of error, have imagined; for the charter of the *king Edwyn*, brother of king Edgar, bearing date anno Dom. 956. made of the land called Jecklea in the iſle of Ely, was not only ſealed with his own ſeal (which appears by theſe words, Ego Edwinus gratia Dei totius Britanniæ telluris Rex meum donum proprio ſigillo confirmavi) but alſo the biſhop of Wincheſter put to his ſeal, Ego Elfwinus Winton Eccleſiæ divinus ſpeculator proprium ſigillum impreſſi. And the charter of *king Offa*, whereby he gave the *Peter-pence*, doth yet remain under ſeal. But no king of England before or ſince the conqueſt ſealed with any ſeal of arms, before king *Richard* 1. but the ſeal was, the king ſitting in a chair on the one ſide of the ſeal, and on horſe-back on the other ſide, in divers forms. Co. Litt. 7. a.

8. If *dean and chapter*, or *mayor and commonalty* cauſe a writing to be made, in which it is ſaid *ſigillum noſtrum appoſuimus*, and *not* ſigillum noſtrum *commune*, yet the writing is ſufficient, and ſhall bind them. But if *dean and mayor ſeal*, a writing made in their names, and in the name of the chapter and commonalty, *without the aſſent of the chapter and commonalty*, and it is ſaid in the deed ſigillum noſtrum commune appoſuimus, and the ſame is *delivered by the dean and mayor without the aſſent* or agreement *of the chapter and commonalty*; this is only the deed of the dean and mayor and not of the chapter and commonalty; cauſa patet. Perk. ſect. 133. cites 11 Ed. 4. 4. 22 H. 6. 4. 37 H. 6. 3.

Br. Obligation, pl. 73. cites 21 H. 6. 3. and 22 H. 6. 4.

9. If in a deed *no mention is made of ſealing*, it is not a good deed *though ſealed in fact*, if theſe words, ſigillum appoſui, are wanting. Br. Faits, pl. 76. cites 21 E. 4. 81.

S. P. per Keble, and not denied per Read of the other ſide. Br. Faits, pl. 103. cites 7 H. 7. 14. and 8 H. 6. 35. S. P. but not adjudged there. —And cites alſo 40 E. 3. 1. — Br. Obligation, pl. 8. cites 40 E. 3. 1. where debt was brought on an *obligation* which *was in the third perſon*, and no mention made that the parties had put to their ſeals, and awarded that the plaintiff take nothing by his writ; but he makes a quære if the want of thoſe words (ſigillum ſuum appoſuit) be material.

10. *Declaration of uſes of a fine* may be good by writing only, without a ſeal, even ſince the ſtatute of frauds. Per Holt Ch. Juſt. Farr. 76. in caſe of Shortridge v. Lamplugh.

[See (F) pl. 2. (I) pl. 9. (Y. 2) pl. 4. Corporation.]

(H. 2) What Things are eſſential to make a good Deed.

[*Signing.*]

1. A. MAKES a *bond to B.* but does not *ſubſcribe it*, yet the bond is good without it; for ſubſcribing is no eſſential part of the deed, and ſealing is ſufficient. 2 Salk. 462. Cromwell v. Grunſden.

Per Holt Ch. J. the name in the bond is only material. Comb. 477. S. C.

2. *Signing* is not neceſſary to a deed. For in former times they were only ſealed but not ſigned. But now *ſince the ſtatute of frauds* an *aſſignment* by writing, if it is no deed, yet it muſt be ſigned. Per Holt. Ch. Juſt. 3 Salk. 171. Queen v. Goddard.

3. All *ſolemnities* in conveyancing are appointed *to hinder the parties from ſurprize.* G. Equ. R. 170.

(I) What Things are neceſſary to make a good Deed. [*Delivery, and what is a good Delivery.*]

Action on a joint bond was brought *againſt one*, and a verdict was for the plaintiff. On motion in arreſt of judgment that though this might have been pleaded in abatement, yet ſince it appears on the face of the record that the plaintiff had no right againſt one alone, he cannot have judgment, the court was of opinion, that it did not *appear of record that the other* ſigned, ſealed, or delivered this bond; but admitting that it did appear that he *ſigned and ſealed it*, yet if it appeared *not that he delivered it*, it is the bond of the defendant alone, though another is named in it with him, for it is not his deed without the delivery. 8 Mod. 242. Cloud v. Nicholſon.

[1. THERE ought to be *a delivery*, otherwiſe it cannot be a deed. 9. H. 6. 37. b.]

[2. There ought to be a livery *in law or in deed* to make a good deed. 9 H. 6. 37. b. Curia.]

Notwithſtanding that a deed be ſufficiently written in my name, and ſealed by me, if it is not delivered by me, or by another, by my aſſent, or by my agreement or commandment, the ſame ſhall not bind me; for all this while it is but an eſcrowl. And if I make ſuch eſcrowl, and let it lie by me, and a ſtranger gets it, it ſhall not bind me, for it is not yet my deed. Perk. ſect. 137.

[3. If I make a deed to B. and ſeal it, and after B. *takes* the deed *without any delivery* of me, *without my will or otherwiſe*, it is not a good deed, becauſe it wants a livery. 9 H. 6. 37. b. Curia. 10 H. 6. 25. Contra 14 H. 6. 1. b.]

2 Le. 97. S. P. Willes v. Jermin.

[4. The *deed of a corporation* needs not any delivery, but the *appoſition of the common ſeal* gives perfection to it without any delivery. Da. Rep. 44 b. Dean and chapter of Fernes.]

Cro. E. 167. S. C.

[5. *As* if *dean and chapter put their chapter ſeal* to a deed, this is a perfect deed by it without any delivery. Da. Rep. 44. b. H. 32 El. B. R. agreed between Germin and Willis.]

*Fol. 24.

It is a good leaſe; for though the putting the ſeal of the corporation aggregate to the deed carries with it a delivery, yet *the latter of attorney to deliver it on the land ſhall ſuſpend the operation of it till then.* Vent. 257. Anon. upon evidence in ejectment. * Per two juſtices accord. and per two contra. Jo. 170.

[6. * *But* if a dean and chapter *have a right* to the land, *but* they *cannot make a good leaſe before an entry* made by them into the land, as [if] a ſtranger has a voidable leaſe, *they may make a leaſe in writing, and affix their ſeal to it, and make a letter of attorney to J. S. to deliver it as their deed upon the land*, who delivers it accordingly. This is a good leaſe, for the affixing of the ſeal to the leaſe doth not make it a deed, they *being out of poſſeſſion* till the attorney has delivered it as their deed upon the land, becauſe otherwiſe it ſhall be void. Mich. 13 Car. B. R. between * Fludd and Gregory. Per Cur. reſolved upon a trial at bar, which concerned the Dean and Chapter of Peterburgh, and Juſtice Jones cited a reſolution accordingly.]

[7. If

[7. If I make an *obligation to two, and deliver it to one* of them only, *and say nothing of the other* upon the livery, the deed is *void as to him.* 3 H. 6. 19.]

[8. If a man seals a writing obligatory, in which he is *bound to J. S.* but this is made *for the* behoof and *use of A. S.* whom the obligor intends to marry, and on the day of the solemnization of the marriage he *delivers it to A. S. saying* these words, scilicet, *this will serve*; and *immediately the same delivers it over to the obligee*, this is a good delivery. D. 3 El. 192. 26. adjudged, Tenant' case.]

[9. If a *deed not sealed* be produced in court, if *the other acknowledges it*, it is of force. 41 E. 3. 10. b.]

10. A *statute* is good, though there was no delivery, per Fenner Just. And per Popham, debt lies upon it as upon a record, though it never was delivered; for it is upon record that it was delivered, and the party is *estopped* to say the contrary. Cro. E. 494. in case of Ascue v. Hollingworth.

11. A makes an obligation to B. and *seals it and flings it on the table*, and B. takes it, it is not good. Ow. 95. Stanton v. Chamberlin. —— Cro. E. 122. S. C. —— D. 192. b. pl. 26. Marg. Vide (K) pl. 5.

12. A. makes an obligation *to B. to the use of C.* and A. *delivers it to C. in the presence of B.* and says to him, *this will serve.* This is a good delivery. to B. Jenk. 195. pl. 2. Jenk. 222. p. 75. S. P.

13. If a *patron draws a presentment* in writing, and *puts his seal to it*, and *lets it lie in his study*, and the party named in it to be presented gets it without the privity of the patron, and carries it to the bishop, and is instituted and inducted thereupon, it is merely void, and no presentation at all. Yelv. 7. in the case of Grendit v. Baker.

[See Corporation ( )]

(K) Delivery of a Deed, how it may be.

[1. THE deed *of a corporation* does not need delivery, but the *apposition of the seal gives perfection* to it. Da. Rep. Dean and Chapter of Fernes, 44. b.]

[2. Co. 9. Thoroughgood, 136. b. Resolved that *actual delivery* of a writing sealed *to the party without any words* is a good delivery.]

[3. Co. Litt. 36. Co. 9. Thoroughgood, 137. b. Resolved if a man *deliver* a writing sealed *to the party* with these words, *I deliver this writing to you*, it is clearly sufficient, though he doth *not say, as his deed*, or as his act.] Dal. 104. pl. 46.

[4. Co. 9. Thoroughgood, 137. If a writing be sealed and it *lies in a window, or upon a table*, and the obligor *saith* to the obligee, *do you see the writing there? take it as my deed*, and he *takes it* accordingly, this is a good delivery in law. Co. Lit. 36.]

[5. So

D. 192. b. pl. 26. Parker v. Tenant.—Jenk. 221. pl. 75. S. C. *Caſting* a writing ſigned and ſealed *on a table*, and ſaying nothing is no delivery. But if he ſays, *this will ſerve*, it is good. Le. 140. Chamberlain v. Stanton.—— The jury found that the defendant cauſed the obligation to be written, and ſigned and ſealed it, and then laid it upon a table, and the plaintiff came and took it; the queſtion was, if this was the defendant's deed; and the opinion of all the juſtices was that it was not, without other circumſtances found by the jury. Cro. E. 122. S. C.

[5. *So* if he ſaith, *go and take the ſaid writing, it is ſufficient for you, or it will ſerve the turn.* Co. Lit. 36.]

Delivery is ſufficient without ſpeaking any words. Per Anderſon Ch. Juſt. Cro. E. 356. in caſe of Hollingworth v. Aſcue.——Co. Lit. 49. b.——Otherwiſe a man that is *mute* cannot deliver a deed, which he may do. See (A) pl. 9.

[23] [6. If a man ſeals a deed, and *delivers it to a ſtranger to keep to the uſe of the maker*, this is not any deed without other delivery. 4 H. 4. 3. b. Dubitatur.]

After refuſal to receive it upon B.'s offer to deliver it to him as the deed of A. he got the obligation, and recovered upon it. 2 Le. 111. pl. 145. Alford v. Lea. cites 3 Eliz. D. 167. Taw's caſe.——

[7. If a man makes an *obligation to J. and delivers it to B.* if *J. gets the obligation* he ſhall have action upon it, for it ſhall be intended that B. took the deed for him as his ſervant. 3 H. 6. 27.]

[8. If a man writes a *deed of feoffment to J. with letter of attorney to B. to make livery*, but *does not deliver it*, and after alters his intent, and *razes out* the name of *J. and puts in the name of S.* in his place, *and delivers it to S. but doth not ſay any thing upon the delivery*, yet this is a good deed, for his intent appears. Dubitatur 35 Aſſ. 6.]

[9. But if this will not be ſufficient, [yet] if the *attorney makes livery to S. and the feoffor agrees* to it, it ſhall be ſufficient, for this will *explain* his general delivery before. Dubitatur 35 Aſſ. 6.]

A deed poll of *covenants between A. and B.* in which A. covenants to convey lands to B. and B. covenants to pay A. 100 l. *B. delivers to A. and then A. delivers the ſame deed to B.* this *re-delivery* does not make the deed void. 2 And. 41. Croſs v. Powell.——Cro. E. 483. S. C. and that it is a good deed to both.——

10. A *parchment* (not a deed indented) *ſealed and delivered by one firſt, and then by the other*, is the deed of one as well as of the other. Per tot. Cur. 2 And. 36. Croſs v. Powell 41. S. P. adjudged accordingly.

11. Bond to ſubmit a matter to arbitration, *ita quod deliberetur utrique partium.*——If there are two, or four, &c. it muſt be delivered to every one. 5 Rep. 103. a. b. Hungate's caſe.

12. A. *delivers a deed made to J. S. to J. D.* though he does *not ſay to the uſe of J. S.* yet it is a good delivery of the deed to J. S. if he accepts it. Clayt. 31. Anonymus.

13. *An indorſement after ſealing and delivery* is a new deed. 6 Mod. 237.

[See Corporation ( )]

(L) * How the Delivery of a Deed may be, and what ſhall be ſaid a Delivery. *Fol. 25.

[1. IF a man, *being out of poſſeſſion, makes a* deed of *leaſe* of the land *to try the title, and annexes a letter of attorney to enter and deliver the leaſe upon the land*, and annexes the letter of attorney to the leaſe, *and makes a label of both, and puts his ſeal upon the label, and* after puts *another ſeal upon the letter of attorney only*, and then *delivers the letter of attorney only as his deed, and not the leaſe*, this is not any delivery in law of the leaſe alſo, though it be annexed to the letter of attorney, and ſo he delivers it in facto; for he may well *divide his delivery* to give effect to that which he intends to deliver only. Mich. 15 Ja. B. R. between Davies and Bridges, in ejectione firmæ upon leaſe made by the Biſhop of Oxford againſt Fawkner. Reſolved and adjudged per Cur. upon evidence at the bar.] [24]

[2. If a man writes an *obligation in a book, and there at the ſame folio puts his ſeal to it*, and then *delivers the book to the obligee as his deed*, this is a good obligation, for he has delivered that which makes the obligation, and more, as his deed; and though the delivery be *void for the ſurplus*, it is good for the reſidue. Tr. 40 El. B. R. between Fox and Wright.]

Popham willed the jury to find it ſpecially, but they found it generally to be *factum ſuum*, for they ſaid it was an uſual courſe in London; and being afterwards moved in court, Clench and Popham agreed that it was a good deed, but Fenner doubted. Yet now by the verdict it is put out of queſtion. Cro. E. 613. S. C.

3. Leſſee for years grants his term by deed, and *ſealeth it in the preſence of divers, and of the grantee* himſelf; and the deed at the ſame time *was read*, but not delivered, nor the grantee did not take it, but *they left it behind them* in the ſame place. Yet the opinion of all the juſtices was that it was a good grant; for the parties came for that purpoſe, and performed all that was requiſite for perfecting it, except an actual delivery; but it being left behind them, and not countermanded, it ſhall be ſaid a delivery in law. Cro. E. 7. Shelton's caſe.

(M) Delivery to deliver over.

[1. IF I make a *writing to A. and deliver it to another as an eſcrow, and after A. gets the deed*, yet this is not my deed, for the bailee has not any authority to deliver it as his deed. 10 H. 6. 25. 9 H. 6. 37. b. So it ſeems, by this reaſon, it ſhould be though the bailee had delivered it over as his deed; for this is out of his authority, it not being appointed.] Pl. 5. Perk. S. 142.

[2. If a man ſeals a writing, and delivers it *to a ſtranger as his deed*, it ſeems, it is to be intended) *to deliver to the party* to whom it

It is not his deed *ſimpliciter*. Perk.

S. 138.—— Verdict was that *A. delivered a deed to B. to the uſe of C. and D. ſo as C. would agree.* A. directed B. to carry it to C. and pray him to take the ſame, but if C. would not, that then he would not that D. ſhould be made acquainted with it, but that all ſhould be void. B. went to C.'s houſe, but did not ſpeak with C. and C. after died, not having any notice of the deed. Adjudged that this was a condition precedent, and ſo not his deed. Mo. 300. Degoſe v. Rowe.——Le 152. S. C. and two juſtices againſt one that it was his deed. But adjornatur.

it is made, *after certain conditions performed*; if the *ſtranger delivers it to him before the conditions performed*, yet it is his deed and he is put to his remedy againſt the bailee. 9 H. 6. 37. b. Contra 8 H. 6. 26.]

Perk. S. 144. S. P. and ſtates it as in pl. 2. ſupra of the delivering to a ſtranger *(as his deed)*.

[3. *So* it ſhall be if *he to whom the deed is made gets the deed without any delivery of the bailee*, it is a good deed. 9 H. 6. 37. b.]

As until certain indentures between me and the ſaid A. containing certain conditions, are ſealed and delivered; this obligation ſo taken away ſhall not bind me. Perk. S. 142. cites 9 H. 6. 27.

[4. If I make a writing to A. and ſeal it, and *command another to keep it till certain conditions performed*, if *A. takes the deed out of his poſſeſſion before the conditions performed*, yet this is not a deed, becauſe here is not any condition either in deed or law; and here *is not any word that the deed ſhall be delivered to A. at any time.* 9 H. 8. 37. b, Curia.]

[25]

Pl. 1. 6 Mod. 217. S. P. Buſhell v. Paſmore.

[5. If I make a writing to A. and deliver it to another *to deliver to A. after certain conditions performed*, if *A. takes the deed out of the poſſeſſion of the bailee before the condition performed*; this is not his deed, becauſe he does not deliver it as his deed, but as an eſcrow. 19 H. 6. 58. 10 H. 6. 25. Dubitatur.]

[6. *So* if *bailee delivers the deed before the conditions performed*, it is not his deed. 19 H. 6. 58. Contra 14 H. 6. 1. b.]

7. If I deliver an obligation or other writing unto a man as my deed, to deliver unto him to whom it is made *when he ſhall come to York*, it is my deed preſently; and if he deliver it to him before he comes to York, yet I ſhall not avoid it; and if I die before he comes to York, and afterwards he cometh to York, and he delivereth the deed unto him, it is clearly good, and my deed, and that it cannot be, if it were not my deed before my death. Perk. S. 143.

Co. Lit. 49. b.——Contra, by the greater part of the juſtices. Mo. 697. Wilcock v. Howſon.

8. A difference was taken between a delivery of a deed *to a ſtranger*, or *to the party himſelf.* It cannot be an eſcrow, if delivered to the party himſelf. Mo. 642. Williams v. Green.—— 6 Mod. 218. Buſhell v. Paſmore.——Noy 6. Whiddon's Caſe. ——Hob. 246. Holford v. Parker.——9 Rep. 137. Thoroughgood's caſe.

9. A. delivers a deed to B. as an *eſcrow*, to deliver it to C. who *refuſes*, upon which B. leaves the deed, and afterwards C. brings action upon it, and held good. And. 4. Taw v. Bury, ——S. C. cited 2 Le. 101.——D. 167. pl. 14. S. C.

(N) At what Time the Delivery ſhall be good. Second Delivery.

[1. IF a deed be ſealed and delivered, yet *if the ſealing and delivery are* * *all utterly void, ſo that it cannot take effect as a deed*; there a ſecond delivery, *without new ſealing*, will make it a good deed. 8 H. 6. 7.]

* Fol. 26.

When a perſon at the firſt delivery *has no power or ability in law to make the leaſe, &c. but before the ſecond delivery he becomes able*, there the leaſe, &c. is void. But when he *has ability at the firſt delivery* to contract, *but cannot perfect it* till an impediment is removed, there, if the *impediment is removed before the ſecond delivery*, the contract is good. 3 Rep. 35. b. cites the caſe of Jennings v. Bragg.

[2. *As* if a *feme covert* ſeals and delivers a deed, *a ſecond delivery when ſhe is ſole* will make it good; for the firſt delivery was merely void.]

Perk. S. 154.

As if an *infant or feme covert* deliver a deed as an *eſcrow*, and it is delivered after full age, or *when ſhe is ſole*, it is void. For it *has relation* to the firſt delivery; ſo è converſo, where a *feme ſole delivers a deed as an eſcrow*, &c. becauſe it was delivered by authority before, when ſhe was ſole. Cro. El. 447. in caſe of Jennings v. Bragg.

S. C. cited 3 Rep. 35. b. in Butler and Baker's caſe, Goldſb. 167. S. P. cites Paſ. 5 H. 7. 27.

[3. If a man ſeal and deliver a deed, and after *the ſeal is taken from the deed*, if *he ſeals and delivers it again*, though *the ſame writing continues*, yet it is a good deed. (For the firſt deed was *utterly defeated* by the taking away the ſeal.) 11 H. 6. 27. Curia. For there other matter is pleaded.]

[4. *But* if the *firſt delivery be not void, but it continues a deed only voidable*, but not void, there a ſecond delivery will not make it good. 8 H. 6. 7.]

Where it *once takes effect*, a ſecond delivery will not make it good. Br. Faits, pl. 28. cites 8 H. 6. 6. pl. 64. cites 1 H. 7. 14. per Vavi. for.——Perk. S. 154.

[5. *As* if an *infant* makes and delivers a deed, and after *at full age delivers it again*, this ſecond delivery is void; becauſe the deed was but voidable by plea, and not void. 8 H. 6. 7.]

[26]

Br. Faits, pl. 28.

Perk. S. 154.

[6. *So* if a man makes a deed *by dureſs, and delivers it again at large*, this ſecond delivery is void; becauſe it was voidable by plea, not void. 8 H. 6. 7.]

Br. Faits, pl. 28. Perk. S. 154.

[7. If *A. be bound* in an obligation *to B.* and after *B. delivers it to A. in lieu of an acquittance of money, and A. after, before any cancelling* of the obligation, *delivers the ſame obligation to B. for another duty*; this is void, becauſe it continues his deed by force of the firſt delivery at the time of this ſecond delivery, and ſo the ſecond delivery void. 1 H. 7. 14. b.]

[8. If a writing *by the firſt delivery takes effect as a deed, though* it be *void in operation*, yet a ſecond delivery, at a time when it may operate in law, ſhall be void, and ſhall not make it good.]

§ [9. *As*

Br. Faits, pl. 28. cites 8 H. 6. 6. that it is good by the ſecond delivery, becauſe it took no effect by the firſt delivery.

[9. *As* if a *parſon grants an annuity*, and the *patron ſeals and delivers a deed of confirmation before the grant, and after* the grant *delivers it again*, this ſecond delivery is void; becauſe though by the firſt delivery it does not take effect as a confirmation, but is void in operation; yet it was his deed, for he could not plead non eſt factum. Ergo. Contra 8 H. 6. 6. b. 39 H. 6. 37. b.]

As where one *grants a rent-charge out of the manor of C. and has nothing in it at the time*, &c. and after he *purchaſes* the ſame manor, and then retakes the deed and redelivers it to the grantee, this is good.

Br. Faits, pl. 28. cites 8 H. 6. 6. pl. 64. cites 1 H. 7. 14. per Vaviſor.

[10 *So* if I *releaſe* to you *all my right in the manor of D. where you have nothing in the manor at the time, and you after purchaſe* the manor, and after I deliver the releaſe again, the ſecond delivery is void, becauſe it was my deed before, though it was void in operation. Contra 1 H. 6. 4. b. 1 H. 7. 14. b. Dubitatur 8 H. 6. 22.]

Br. Faits, pl. 96. Fitzh. Bar. 73. So where the label was taken out, and a new label and ſeal put to it. Bro. Faits, pl. 98. cites 11 H. 6. 27.

11. Debt upon *bond* by A. againſt B. who ſaid that the writing was ſealed and delivered as his deed, and after A. *by negligence broke the ſeal, and prayed B. to ſeal it again*, who did ſo, and delivered it to A. This is a good deed. Br. Obligation, pl. 81. cites 11 H. 6. 27.——The reaſon ſeems to be, that though a deed cannot have two deliveries, yet when the ſeal is broke it is not a deed but a writing, and a writing by ſealing and delivery may be made a deed. Quod nota. Br. Faits, pl. 78. ut ſupra.

12. If a man be diſſeiſed and make a writing of a *leaſe for years, and deliver the deed, and after deliver it upon the ground*, the ſecond delivery is void, for the firſt delivery made it a deed, and for that the leaſe for years muſt take effect by the delivery of the deed, therefore the deed delivered when he was out of poſſeſſion, was void. But ſo it is not of a charter of feoffment, for that takes effect by the livery and ſeiſin. But if the leſſor had *delivered it as an eſcrow* to be delivered as his deed upon the ground, this had been good. Co. Lit. 48. b. (d.)

13. A *corporation* ſeiſed of the lands in queſtion in the ſeveral *poſſeſſions of A. and B.* made a deed of *leaſe to J. S. and a letter of attorney to W. R. to deliver the deed and the poſſeſſion.* W. R. entered on the poſſeſſion of A. and there delivered the deed, and then into the poſſeſſion of *B.* and there delivered the deed; and this was found by verdict; the queſtion was, if this were good for the land, for which the ſecond delivery was, becauſe one deed cannot have two deliveries. The firſt was not doubted; it was held, that as the verdict is found, this matter does not come in queſtion; [27] for it is found that the corporation was ſeiſed, and being ſo ſeiſed made the deed, and then there is no impediment, but that the delivery ſhall be good for all; for it ſhall not be intended, but A. and B. had poſſeſſion only as *tenants at will to the corporation*, and then the *delivery in one place is good for all*; and it ſhall not be intended, that

that they had a leaſe for years or life, except it be ſo ſhewn. Cro. El. 181. Williams v. Aſhet Aſh.

14. A *diſſeiſee made a leaſe for years*, and delivered it to a ſtranger as an *eſcrow*, commanding him to enter into the land, and then to deliver it as his deed, who did it accordingly. This was adjudged a good leaſe, for the leſſor was able to make a contract as well in regard of his perſon as of his right and intereſt in the land, but was only hindred by the diſſeiſin, which *impediment being removed before the ſecond delivery*, the leaſe is good. 3 Rep. 35. b. cites it as adjudged in the caſe of Jennings v. Bragg.———Cro. El. 446. S. C. adjornatur. But it was there ſaid per Anderſon, that it was not his deed till the ſecond delivery, at which time he had a good right and power to let it.———And the ſecond reſolution, 3 Rep. 35. b. 36. was accordingly, and that to ſome intent the ſecond delivery ſhall have *relation*, as where it is for neceſſity, and *ut res magis valeat quam pereat*, but to other intent it ſhall have *no relation*, but according to the truth ſhall become a deed from the time of the ſecond delivery, and not from the firſt, when the leſſor was out of poſſeſſion, and the leaſe therefore void; and *fictio legis inique operatur alicui damnum vel injuriam.*—It was reſolved 3dly, That as to *collateral acts* done between the firſt and ſecond delivery, there ſhall be no relation. As if obligee releaſe before the ſecond delivery, ſuch releaſe is void. 3 Rep. 36. Jennings v. Bragg.

But if he delivered the deed as a deed, and after delivered it on the land, the ſecond delivery is void, for the firſt delivery made it a deed; and becauſe the leaſe for years muſt take effect by the delivery of the deed, therefore the deed delivered when he was out of poſſeſſion was void. Co. Lit. 48. b. (d.) *ſecus* of a *feoffment*, for that takes effect by livery and ſeiſin. Co. Lit. 48. b.

So a *leaſe by a corporation* perfected in their chapter-houſe, by ſetting to it their ſeal, and afterwards by letter of *attorney* delivered on the land to eject the tenant in poſſeſſion, was held good for neceſſity, there being no other way for a corporation to make a leaſe but this. Cro. El. 167. Willis v. Jermin.

A. the leſſor of the plaintiff in ejectment being in another county, and out of poſſeſſion of the lands, *delivered a leaſe to B. as his deed, to the plaintiff's uſe*, and afterwards made a *letter of attorney to B. to deliver it upon the land*, which he did; the leaſe is void, for it was delivered in another county when A. had nothing in the land; and though the firſt delivery is void to *paſs a thing, yet it is his deed by the firſt delivery*, ſo as it takes thence its eſſence, and ſo the ſecond delivery is void. Cro. El. 483. Stephens v. Elliot.

15. In caſe of a leaſe delivered as an *eſcrow*, if at the time of the *firſt delivery* the leſſor be a *feme ſole*, and *before the ſecond delivery*, ſhe *takes baron or dies*, in ſuch caſe for neceſſity, ut res magis valeat to this intent, by fiction of law, this ſhall be a deed ab initio. 3 Rep. 35. b. in the caſe of Butler v. Baker.

(N 2.) Second Delivery neceſſary, in what Caſes.

A. Made indenture of covenant to ſtand ſeiſed to uſes, according to perpetuities, and delivers this to a ſtranger to the uſe of the covenantee, who hearing of it, utterly diſagreed to it, by which *A.* in every part of the deed raſed the *name of the covenantee, and writ the name of J. S.* Lord Keeper *Egerton* agreed, that the deed is void as to all the benefit which the covenantor might have; but it is not therefore void for the uſe and eſtates to the other perſons;

ſons; and that a *new delivery* is neceſſary, otherwiſe there is not any covenant for want of a covenantee. Mo. 300. Waferer v. Row.

[28] (O) Delivery of a Writing as an *Eſcrow* to be his Deed, upon a Condition performed.

Mo. 642. Le. 152. Degory v. Roe. 6 Mod. 218. in the caſe of Buſhel v. Paſmore.

[1. IF a writing be delivered ſealed *to the party* as an eſcrow to take effect as his deed, upon condition performed, it is his deed now; for the law reſpects the delivery to the party himſelf, and rejects the words which ſhall make the expreſs delivery to the party upon the matter no delivery. 9 Rep. 137. *Thoroughgood's* caſe, and are cited 12 H. 8. Rot. 751. Upon demurrer adjudged, and 13 H. 8. Rot. 405. Upon demurrer alſo adjudged accordingly. Mich. 3 Jac. B. R. between *Wade* and *Blundell* adjudged. Hobart's Reports 307. between *Hackford* and *Parker* adjudged, 8 H. 6. 26. b. *Trin.* 3 Jac. per Cur'. Co. Lit. 36.]

Cro. El. 835. Hawkſland v. Gatchell.

* Folio 27.

5 Rep. 84. b. (d). Peryman's caſe. 9 Rep. 137. S. P. Thoroughgood's Caſe. A deed cannot be delivered as an eſcrow to *the party* himſelf. Cro. El. 520. Whiddon's caſe.——Cro. El. 835. diſtinguiſhes between delivering it as an eſcrow, upon condition to be his deed, to the party himſelf, and delivering it as his deed upon condition, &c. and that in the laſt caſe the deed is abſolute, but not in the firſt. Hawkland v. Gatchell.——But Cro. El. 884. Contra, and adjudged, that it cannot be delivered to the party himſelf as an eſcrow, becauſe then a bare averment without any writing would make void every deed. Williams v. Green.

[2. 19 H. 8. 8. Delivery of an obligation *to the party* upon conditions to be performed or otherwiſe but as an eſcrow, and there adjudged, that it is his deed preſently. *(Nota)* That he delivered it as an obligation, which implies it to be his deed; and then it is clear, that he cannot make it * as eſcrow by non-performance of a condition. But *note*, that the delivery to the party explains it, for there it is agreed, that otherwiſe it would be *to a ſtranger*. *Paſ.* 44 El. B. cites *Trin.* 43 El. B. R. to be adjudged. *Mich.* 9 Car. B. R. between *Baker* and *Shepherd*, adjudged upon a demurrer. Intratur *Hill.* 8 Car. Rot. 419. Contra 29 H. 8. D. 34, 35. per two juſtices. 27 H. 8. 12. admitted. For iſſue is taken upon the performance of the condition. *Trin.* 43 El. B. R. by the opinion of the court adjudged, *Hanckton*, and *Gatchell.*]

3. A. delivers a deed as an eſcrow to J. S. to deliver it to the tertenant on certain conditions to be performed, and before the day A. *becomes non compos*, and then the *conditions are performed*, and J. S. delivers the deed. This is good, becauſe it has relation to the firſt commandment. Br. Lect. Stat. Limit. 150.

4. If I make a deed and deliver the ſame *unto J. S. a ſtranger* as an eſcrowl, *to keep until ſuch a day*, &c. upon condition, that *if before that day* B. (he to whom the eſcrowl is made) ſhall *pay to me* 10 *l.* or ſhall give me a horſe, or infeoff me of the manor of Dale, or ſhall perform any other condition, *then J. S. ſhall deliver the eſcrowl unto B. as my deed*, in this caſe if J. S. deliver the ſame unto B. as

B. as my deed, *before the conditions* or condition *performed*, it is not my deed *ſimpliciter*; but if the conditions or condition be performed, and the eſcrowl be delivered by J. S. *after the conditions performed*, as my deed, then it is my deed and ſhall bind me, and at the time of this delivery then begins it to be my deed, and ſhall not have relation to the firſt delivery. But quære, if it ſhall have relation to the time of the condition or conditions performed. But it ſeemeth not. Perk. S. 138. cites 9 H. 6. 37. 10 H. 6. 25. 41 E. 3. 29.

5. J. S. delivered a deed to A. to the uſe of B. and C. *if B. would agree to the ſame*, &c. B. dies before agreement.———So the deed is void, becauſe it was a condition precedent. Mo. 300. Degoze v. Row.———Le. 152. S. C. but no judgment; but Anderſon Ch. Juſt. and Periam J. held, that it is the deed of J. S. though B. never agreed. But Walmſley contra.——— [29]

6. If *A. delivers an obligation* to B. *as an eſcrow* (in which he is bound to C.) *to be delivered as his deed* to C. *after certain conditions performed*, and after C. releaſes to A. *before the ſecond delivery*, this is void, becauſe though after a ſecond delivery it ſhall relate to the firſt delivery, where there is a neceſſity, ut res magis valeat quam pereat; yet as to *collateral acts* it ſhall not relate at all. 2 Roll. 410. Releaſe (B. a.) pl. 3. cites 3 Rep. 36. Butler v. Baker. S. P. Goldſb. 167 and 168. in the caſe of Hoo v. Marſhall, cites 5 H. 7. 27. notwithſtanding that 27 H. 6. 7. is contrary.

(O 2.) Pleadings as to Deeds delivered on Conditions, and to be delivered over.

1. ALTHOUGH the *obligor cannot avoid* his own deed, by alledging, that he delivered it to the obligee upon condition; *yet a ſtranger* to the obligation, to whom the obligor delivered it, to be delivered to the obligee upon the performance of a certain condition; *if detinue be ſued againſt him* for this deed by the obligee, he (the ſtranger) *may plead this bailment and condition*, and *pray garniſhment* againſt the obligor, *to acknowledge whether the condition be performed*, or not; for he is party to the bailment, but not to the deed; and upon the garniſhment, the trial of performance, or not, ſhall be between the obligor and obligee. Jenk. 166. pl. 20.——cites 8 H. 6. 28.—43 Ed. 3. 27.——4 Ed. 2.—Fitz. Debt, 167.

2. A. delivers a deed to B. to deliver as his deed to C. *C. refuſes to accept it*; B. leaves it, C. however ſues upon it and has judgment. And. 4. Taw v. Bury.——Dy. 167. pl. 14. S. C. ——5 Rep. 119. b. ſays, by the refuſal, the delivery has loſt its force, and non eſt factum may be pleaded.——1 Salk. 307. S. C. cited. 2 Le. 101. S. C.

3. In *debt on bond*, defendant pleads, that he delivered it as an *eſcrow*, & hoc *paratus eſt* verificare. It is not good, for he ought to ſhew to whom he delivered it, and alſo to conclude his plea, and Cro. El. 884. Williams v. Green.——Mo. 642.

S. C. If the delivery was to the party himſelf, he cannot plead non eſt factum, for it is his deed ab origine. Mo. 642.——Jenk. 327. pl. 50. cites M. 14 Jac. Athfield v. Wrenſford.——D. 34. b. pl. 25.——Cro. El. 835. Hawkſland v. Gatchell contra.——He ought to *conclude to the country*. 1 Salk. 274. Watts v. Roſwell. Cro. El. 520. Whiddon's Caſe.——Noy 6. S. C.——ibid. 50. S. P.

Iſſint nient ſon fait. Vent. 9. Anonymus.—Vent. 210. Ward v. Ford. S. C.

(O 3.) Eſcrow. Relation thereof to what Time.

1. IF I make a deed and deliver the ſame *unto J. S. a ſtranger* as an eſcrowl, *to keep until ſuch a day*, &c. upon condition, that *if before that day* B. he to whom the eſcrowl is made, ſhall *pay to me* 10 *l.* or ſhall give me a horſe, or infeoff me of the manor of Dale, or ſhall perform any other condition, *then J. S. ſhall deliver this eſcrowl unto B. as my deed*; in this caſe, if J. S. deliver the ſame unto B. as my deed, *before the conditions* or condition *performed*, it is not my deed *ſimpliciter*. But if the conditions or condition be performed, and the eſcrowl, delivered by J. S. *after the* [30] *condition performed* be as my deed, then it is my deed, and ſhall bind me, and at the time of this delivery then begins it to be my deed, and ſhall not have relation unto the firſt delivery. But quære, if it ſhall have relation unto the time of the condition or conditions performed. But it ſeemeth not. Perk. S. 138. cites 9 H. 6. 37. 10 H. 6. 25. 41 Ed. 3. 29.

(P) Date. [*Neceſſary or not and what is ſufficient.*]

A *date is not eſſential* to a deed.

[1. IF a deed has *not any date of day or place*, yet it is good. 20 E. 4. 1. Perkins S. 120. 20 H. 6. 44. b.]

Per Tirrel Juſt. Cart. 153. cites Perk. fo. 25. b. 2 Rep. 5. * Goddard's caſe.——Pl. C. 231. b.——A deed is good without any date, by the delivery of the ſame. Per Doderidge Juſt. 3 Bulſ. 312. and agreed.——But upon the ſtatute of *inrolments*, the inrolment muſt be within ſix months after the date. Per Jones Juſt. Ibid. 313. * S. C. cited arg. 5 Mod. 284.

For the pleadings vide (P 3.)

[2. And *in ſuch caſe a day and place may be averred* of the delivery. Perkins S. 120.]

Hob. 148. Per Hobart. The day of the *delivery* is the day of the date, though no day is ſet forth. 1 Salk. 76. pl. 18. Armit v. Breame.

3. A deed is good though it has *no date*. Kelw. 34. b.——Noy 21.—2 Rol. R. 274. arg'.——Pl. C. 231. b. in caſe of Williams v. Berkley, ſays it is the ſame in caſe of *letters patent*.

4. *Bond* was given *March* 25, and *releaſe* of all demands, *dated* 27*th*, *but altered to the* 24*th*, before execution, to avoid releaſing the bond, and the day indorſed was the 24th; yet this upon *prima deliberatum pleaded* was adjudged a releaſe of the bond. N. B. The releaſe ſhould have been *till the day of the date*. D. 307. pl. 67.

5. The

5. The date of the deed many times *antiquity* omitted, and the reaſon was, for that the limitation of preſcription, or time of memory, did often in proceſs of time change, and the law was then holden, that a *deed bearing date before the limited time of preſcription was not pleadable*, and therefore they made their deeds without date, to the end they might alledge them within the time of preſcription. And the date of the deed was commonly added in the reign of E. 2. and E. 3. and ſo ever ſince. Co. Lit. 6. a.

6. A deed was dated *anno domini* 11671, and yet held good. 6 Mod. 45. in caſe of Ford v. Lord Gray.——an *impoſſible date* is no date, and the plaintiff muſt declare of the time of making. 2 Salk. 463. Cromwell v. Grunſden.

A date *impoſſible* as to the *year of the king*, but the year of the Lord, and the day of the month being well, is ſufficient. Cro. J. 261. Dobſon v. Keyes.——So where the *year of the lord* was impoſſible, and the year of the king was right. 8 Mod. 45. Ford v. Lord Grey.

In wills the *eccleſiaſtical law* takes notice only of the anno domini, but the *common law* of anno regis. Per Doderidge. J. Lat. 11.

7. The date of a deed was 1701, (without anno domini) and *Willielmi tertii nunc regis Angliæ, &c. domini tertio* (without anno regni) and yet held good, for it is implicitly in the deed. 2 Salk. 658. Holman v. Borough.

A deed dated *8 S pt. anno* 78. without ſaying more, as 1478. or 1578. was held a voiſd date, becauſe the years were not well alledged. Br. Faits, pl. 74. cites 21 E. 4. 38.

(P 2) Dates. Conſtruction thereof. [31]

1. IF a next avoidance of a church be *granted* unto B. *by deed bearing date the firſt day of May* in the 5 H. 7. and the ſame deed is *firſt delivered* as a deed to *B. the fourth* day of May the ſame year; and *by another deed dated the ſecond* of May in the ſame year, the *next avoidance* of the ſame church *is granted by the ſame grantor to C.* and the ſame deed is delivered as the deed of the grantor *the third* day of May in the ſame year; in this caſe the laſt grantee ſhall have the next avoidance of the ſame church, and not the firſt grantee; and yet his deed did bear date before the deed of the ſecond grantee: but it is, becauſe a *deed firſt takes effect by its delivery, &c.* Perk. S. 145.

2. *A datu* includes the day, but *a die datus* excludes the day. 2 Salk. 413. Hath v. Aſh.——3 Lev. 439. S. C.——Roll. R. 387. *(a)* Bacon v. Waller. Per Croke and Haughton, that a datu, and a die datus, is all one, and judgment accordingly.——This difference is good where it is *in a caſe where an intereſt is to be conveyed* from one to another, as in caſe of a *(b)* leaſe for years, &c. But *in matters of account only*, where no intereſt is to be paſſed, as if A. is to be accountable to B. and the deed expreſſes it to be done a die datus, or a datu, it is all one. Per tot. Cur. Bulſ. 177. Anonymus.—There is no difference between the date of a deed and

(a) 3 Bulſ. 264. S. C.

(b) Cro. J. 647. Scavage v. Porter. Held good in an ejectment leaſe. Cro. J. 135.

Osborn v. Rider.—Habend. *from henceforth* includes the day, and an ejectment may be alledged the same day. Cro. J. 258. Luellin v. Williams.

and the making of it; for the making is the delivery, notwithstanding 1 Inst. 46. b. Per Holt Ch. Just. and Sir Barth. Shower said, that it was held by all the court of Common Pleas, *(c) to hold from the date*, or from *the making*, is all one. Cumb. 399. Hicks v. Harvey.

Policy of insurance was that the defendant undertook to pay the plaintiff 100l. if Sir Robert Howard did *live a twelvemonth from the day of the date* of the policy, being the third of December 1697, and he died the third of December 1698, and Holt directed the jury to find for the plaintiff. And he said, if a man born on the third of December, die the second of December twenty years after, making a will on that day, it would be a good will. 12 Mod. 256. Fanshaw v. Harris.

(c) Cro. J. 647. Scavage v. Porter.

Per Doderidge Just. 3 Bulst. 312. D. 307. pl. 68. 5 Rep. 1. Clayton's Case. * 6 Mod. 244. S. C. *Gerens dat.* must be understood of an express date, but *cujus dat.* may be the delivery. 2 Salk. 463. Cromwell v. Grunsden.

3. The day of the *delivery* of a deed is the day of the date, though there is no date set forth; if a deed bear date at one day, and be delivered at another, it was really dated when delivered, though the clause of *gerens dat.* be otherwise. 1 Salk. 76. * Armitt v. Bream.—Brownl. 30, 31. S. P.——But every *grant by record* has relation to the day of the date specified in the record, and not to the time of the delivery. Pl. C. 491. b. Ludford v. Gretton.

(P 3.) Pleading of Dates.

1. IF A. be *bound in a recognizance to B.* and *B. grants* unto A. by his deed indented, bearing date before the recognizance, *That if A. perform certain conditions* contained in the same indentures, that *then the recognizance shall be of no force*, in this case it behoveth A. to take advantage of this deed, by *averring the delivery of the* same *deed after the recognizance* entred into. Perk. S. 147. cites 29 Ass. p. 47.

[32] 2. If the *defeazance of a recognizance* be *dated before*, if in this case any use be to be made of it, it must be *averred to be delivered* at or *after the* time of the *recognizance* entred into. Heath's Max. 37. cites Perk. S. 147.

3. A bond bears date *at S. in the county of S.* and *action is brought in com. W.* the plaintiff ought to *surmise that the first delivery was made at B. in the county of W.* where the writ is brought. Ut dictum fuit. Quære. Br. Faits, pl. 35. cites 22 H. 6. 57.

4. In assise the defendant pleaded a *release*, *bearing date at A.* the *plaintiff says, that tempore confectionis he was imprisoned at B.* and the *defendant says, that after the imprisonment the plaintiff delivered to him this release at C. when he was at large*; and because he had departed from the place where the release bears date, the assise was awarded. Quod nota. Br. Faits, pl. 46. cites 1 H. 6. 3.

Vide Perk. S. 148. Vid. Br.

5. Note, per Cotesmore, if I *deliver an acquittance to J. N. the sixth of May*, dated the same day, and *afterwards J. N. delivers me a bond*

a bond bearing date the first of May, and in debt upon the bond J. N. pleads the acquittance, it is a good replication, that after the delivery of this acquittance this obligation was delivered to me. 1 H. 6. 4. But 18 H. 6. 8 H. 6. 5 H. 7. are contrary, and * that the plaintiff shall count upon a *primo deliberatum in his count*, and not come in with it in his replication, for then there is a departure, viz. he shall count that the bond bearing date a week before the delivery, *was delivered to him the 8th of May after*, quod nota, scilicet, quod idem def. per scriptum suum obligatorium gerens dat. primo die Maii, &c. et primo deliberat. to the plaintiff octavo die Maii, &c. concessisset se teneri, &c. and then the acquittance bearing date the sixth day of May shall be no bar to the obligation bearing date the first of May, which was not delivered till the 8th of May. Nota. Br. Obligation, pl. 40.——Vide Br. Faits, pl. 47. cites 1 H. 6. 4.

Faits, pl. 48. cites 1 H. 6. 8. Where a confirmation delivered after a grant bore date before it.——So of a *d feasance of a recognizance.* Br. Faits, pl. 60. 29 Ass. 47. * Br. Faits, Pl. 101. 5 H. 7. 27.—pl. 102. 18 H. 6. 8.

6. *Trespass* was laid the *first of June*, the Defendant *pleads a release until the 30th of May* (which was the day of the date) *absque hoc quod causa actionis accrevit post confectionem scripti:* this is naught, because the dies datus excludes the day of the date. And the *traverse* ought to be *absque hoc, that he was guilty after the 29th of May*, which is the day next before the day of the date. Pasch. 5 W. & M. B. R. L. P. R. 393.

7. If a deed bear date *before time of memory*, it is not pleadable, if it be not upon record, but the party may well give such deed in evidence. Perk. S. 120.

8. In an action brought by a feme sole upon an obligation, if the release of one who was her husband be pleaded, &c. the woman may say, that at the time of the delivery of the release he was not her husband, &c. and the *jury* shall be charged to *enquire of the time of the delivery, and not of the date*, notwithstanding that the woman in her plea doth not make protestation of the date, &c. And it is to be known, that he who pleads a deed, and he against whom a deed is pleaded, may *vary from the date of the deed* in the time of the delivery. Perk. S. 146.

9. Debt was brought on *bond* conditioned *to perform covenants in an indenture bearing even date* with the bond, (but *neither bond or indenture had any date).* Per Cur. they ought to have *averred a date* of the bond, and also that the indentures bore date the same with the obligation. Noy 21. Anonymus.

10. A deed poll was pleaded thus: (Et quoad diem & mensem sine datu) sed geren. datum in eodem anno 1638. The deed was to all christian people, &c. and concluded thus: in witness whereof the parties to these present indentures *their hands and seals interchangeably have set the day and year first above written*, 1638. But *there was no day or year named throughout the whole deed.* But no objection was made to it. Vide Carth. 340. Ward v. Everard.

[33]

11. Plea of payment of a bond such a day *post datum conditionis*, is well enough, and shall be intended post datum *obligationis*; for the bond and condition are but one deed, and the date of the one is the date of the other. Cro. E. 732. Forth v. Harrison.

12. When a man *declares* that he *leaſed* by indenture of ſuch a date, it ſhall always be *intended* to be delivered at the ſame time whereon it bore date, if it be not ſhewn with a *primo deliberat.* at another day; and he that pleads a deed of ſuch a date, cannot by *replication*, or other pleading, maintain it to be delivered at another time, for it would be a departure. Cro. E. 773. Hall v. Denbeigh & al.——cites 5 H. 7. 26. D. 167, 221.——Cro. E. 890. S. P.——But when it is ſaid, he demiſed May 1ſt, by indenture dated March 25th, it is neceſſary to be intended, that it was not delivered the ſame day it bore date, but upon the day of the demiſe, as it is alledged. Cro. E. 890. Houſe v. Laxton.

2 Rep. 4. b. *But if the date is miſtaken*, the party may declare or in his firſt plea plead, that *by deed bearing date ſuch a day, but primo deliberat. after* day the party granted, or become bound, &c. and ſo are D. 307. a. 315. a. Cro. E. 773, 890. 5 H. 7. 27. a. to be taken upon this difference. 3 Lev. 348, 349. Stone v. Bale.

13. *Averment* of *primo deliberatum* ought not to be received againſt a *deed inrolled*; for by the ſame reaſon that that might be averred, nunquam deliberatum may; and ſo upon the matter non eſt factum. 3 Le. 176. Holland v. Bonis alias Baines.——Savil 91. Holland v. Downes, S. C. contra. And the court were of opinion, that a *ſtranger ſhall not be eſtopped*, by the inrolment, but the parties ſhall be bound by it. For though the inrolment is reputed to be of the record, yet it is not a record created by any judicial act. For it is not like to a *recognizance*, and in all recognizances nul tiel record is a plea. The ſealing and delivery is the force of ſuch deeds, as deeds of bargain and ſale, &c. and not the inrolment. But in caſes of recognizances, there they take their force and effect by inrolment, and the conuſance only, and not by the delivery; and therefore the time of delivery may well enough be denied, which is but matter of fact; but the conuſance before the judge is matter of record, and by that the debt is created. But bonds, indentures, and deeds of feoffment take their force by the delivery; ſo there is a perfect act before the conuſance is taken, and before any inrolment; and judgment was given accordingly.——

Fitzh. Releaſe, 7. Perk. S. 146, 149. For every deed, which hath a date, ſhall be intended to be written the day of the date, but it is no deed before the delivery, and a deed cannot be delivered to take effect as a deed, before it be written.

14. Though a man may plead that a deed was delivered after the day of the date, yet he *cannot plead that it was delivered before the day of the date.* Vide Br. Faits, pl. 28. cites 8 H. 6. 6.—pl. 94. 12 H. 6. 8.—Vide tamen Br. Faits, pl. 99. cites 11 H. 6. 48. to the contrary.

After the delivery of a bond, *and before the date, the obligee died* inteſtate, yet judgment was given for the adminiſtrator. 3 Lev. 100. Denton v. Goddard.

Debt on bond dated the 15 *November*, 25 *Eliz.* upon *non eſt factum* pleaded, the jury found a bond dated 15 Novemb. 23 (25) Eliz. but *not ſealed till* 18 *Novemb.* 26 *Eliz.* Reſolved that the verdict was found for the plaintiff; for the iſſue non eſt factum being *generally pleaded*, it appears to be his deed; but it was ſaid, that peradventure by *ſpecial pleadings* the defendant might have helped himſelf. Cro. J. 136. Lane v. Pleadall.

15. If A. declares on a bond as bearing date the ſixth of May, he cannot on non eſt factum give *in evidence a bond bearing date at another day*, but he may give in evidence a bond that bears date the 6th of May though it was delivered at another day. 2 Salk. 463. in caſe of Cromwell v. Grunſden; and Holt Ch. Juſt. denied the caſe in 2 Cro. 136.

16. *Decla-*

16. *Declaration*, that the defendant the eighth of *September* 1689, per ſcriptum ſuum obligatorium *conceſſit ſe teneri*, &c. to the plaintiff, and upon oyer the bond bore date the eighth of *September* 1699, and for the variance a demurrer. And it was urged, that ſince the plaintiff varied the lien from the date of the bond, he ought to ſhew when it was firſt delivered; and the right way had been to *declare upon the bond with the date it bore, and* then to *ſay primo delibat.* at ſuch a time, and at this rate one might declare upon a bond after the action brought. *But* per Cur. ſince it is ſaid, that *ſuch a day conceſſit ſe teneri*, it is well, for that could not be without it were then delivered, Jud. pro Quer. 12 Mod. 651. Lane v. Green.

17. There is a *difference* between *declaring on* a deed, and declaring *of a deed*; as ſuppoſe in treſpaſs for cancelling a deed by the defendant, made by the defendant to the plaintiff; in the firſt caſe the date muſt be *ſet forth*, but in the other it need not, for here it is only a deſcription of the deed. Holt's Rep. 455, 456. Norris v. Ware.

18. If a deed has *no* date, or an *impoſſible* date, you *may declare that* the defendant by his deed on ſuch a day and year did ſo and ſo, and upon oyer there will be no variance; but if you ſay, that by his deed of ſuch a date, or bearing date ſo and ſo, and upon oyer the deed has no date, or an impoſſible one, it will be a *variance*. Per Holt. Farr. 38. Anonymus.

Pl. 2. In a declaration on a bond it was *dat. primo die Julii, anno regni regis Caroli ſecundi*, 1674, whereas there is no ſuch a date and it is a void date, and the plaintiff may alledge the deed made when he will; and though by the *profert hic in cur.* * he has confined himſelf, yet the cujus datus ſhall be *and ſtood of the delivery*, and not the date. *Cujus datus* ſhall be *the giving of which was, &c.* If it had been *geren' dat'*, it might have been otherwiſe, but here it is good enough; and judgment accordingly. 12. Mod. 193. Cromwell v. Grunſdale.——5 Mod. 285. S. C. but adjornatur.——Comb. 478. S. C. adjudged.——2 Salk. 463. S. C. * 12 Mod. 205. Pullen v. Benſon.

(Q) Day.

[1. IF a deed bears date at a day, where it appears *there is no ſuch day*, yet the deed is good, 20 E. 4. 1.]

[2. *And* he *may count of primo deliberatum at another day.* 21 E. 4. 1.]

For the pleadings vide (P 3.)

Br. Faits, pl. 28. cites 8 H. 6. 6. 3 Lev. 348. Sone v. Bale

[3. If a deed be dated 8 *December*, *without mention of the year of the king, or of God*, it is a void date, and the plaintiff may count of a delivery of it at any other day. 21 E. 4. 38. b.]

[4. *So* if a deed be dated 8*th day of December*, 78, and doth *not ſay, if it be the year of God, or of the king*, it is a void date, and the plaintiff may count of the delivery of it at any other day. 21 E. 4. 38. b.]

(R) Place. [*And Pleadings.*]

If a man bring *debt in C. B.* upon an obligation bearing date at *Berwick*, the plaintiff ſhall take nothing by his writ, becauſe he cannot vary from the place dated in the obligation, and the Common Pleas *hath not juriſdiction there.* But when a deed is pleaded bearing date at ſuch a place where the court hath not juriſdiction, if the deed be not anſwerable, the plea is good enough. Perk. ſ. 121. cites 2 E. 3. Oblig.

[1. IF a deed bears date at a place, and *there is no ſuch place in England*, yet the deed is good and ſuable, and ſhall be taken according to where the plaintiff counts. 20 E. 4. 1. Contra Perkins, ſ. 120. Becauſe he cannot vary from the date.]

[2. If a deed bears date *at C. in L.* and *there is not any ſuch vill as L.* yet the obligation is good. 3 H. 4. 4. b.]

[3. If a deed bears date *out of the realm*, it is good. 20 E. 4. 1. Contra Doct. & Stud. 62. 11 H. 7. 16. Perkins, ſ. 121. Contra 41 E. 3. 29. b. 20 H. 6. 28. b.]

[4. It ſeems if an action be brought upon ſuch a deed, if he *avers that the place mentioned* in the deed *is in any place in England*, the action will lie, for it is not traverſable; but if it be not alledged, but appears that it is dated beyond ſea, it is otherwiſe, and ſo the books may be reconciled; for then it cannot be tried.]

[5. 48 E. 3. A deed was dated *in H. which in truth was in Normandy*; *but in debt* upon it, *it was ſuppoſed in Kent*, and in the other *traverſed* that there was not any H. in Kent, and the other imparled. 48 E. 3. 3. b.]

[6. If an obligation be dated *at C. in London*, and there *is not any ſuch place in London, but in another county*, in an action upon it, one may alledge C. to be in London. 3 H. 4. 5.]

[7. If a deed be dated *apud manſionem meam*, it is good. 48 E. 3. 3. b.]

Perk. ſ. 120. ſays, that it is ſaid, that this is a void deed for the party, who uſeth the deed from the place dated within the ſame deed.

[8. So if it be dated *at H. in ſuch county*, and if *H. be not vill nor hamlet, nor in any of them.* 48 E. 3. 3. b. Dubitatur.]

* Folio 28.

[9. If a deed be *made out of the realm*, yet if it *has not any date*, * action may be brought here, *ſuppoſing it to be made in any place in England*, which is not traverſable. 20 H. 6. 44. b.]

Br. Faits, pl. 22. 22 H. 6. 12. Perk. ſ. 150.

10. A man may *plead* a deed to be delivered at another day than it bears date upon, but *not to be delivered at another place* than is compriſed in the deed. Br. Faits, pl. 28. cites 8 H. 6. 6.

11. He *who pleads a* deed *ſhall not vary* from the place where it bears date; *but he againſt whom a deed is pleaded may* ſay, that it was made by *dureſs of impriſonment at another place*, and in another county than it beareth date. Perk. ſ. 151.

12. *And therefore*, if in *quare ejecit* infra terminum, or terminum qui præteriit, or in formedon, &c. the *tenant pleadeth* the *releaſe* of the demandant *bearing date at Dale*, &c. and the demandant

mandant ſays, that he was taken by the tenant at Dale *in another county and there was impriſoned* by him, *until he made the deed* unto him; this is a good plea, and the matter ſhall be tried where the impriſonment was alledged, &c. and ſo a man may vary from the place which is compriſed in the deed; becauſe when a man maketh a deed by impriſonment, he to whom the deed is made, may put in the deed what date he will. Perk. ſ. 152. cites 8 E. 3. 3. 22 E. 3. 16. Viſne 7.

13. An obligation or other deed may be made *by abbot and covent out of their monaſtery*, for all the monks may be in another place, ſo that if the deed ſay, *datum apud London*, without ſpeaking *de domo capitulari*, ſuch a deed is good enough, although that their monaſtery were at Kingſton, &c. *But* if their deed ſay *datum in domo capitulari*, this cannot be but where the chapter is, &c. Perk. ſ. 153. cites 9 E. 4. 40. [36]

(R 2.) Avoided, how, or where it remains good.

1. IF a deed be *delivered* to the party himſelf *to be cancelled*, yet if it be not cancelled, and the other *gets it again*, it remains a good deed. Cro. El. 483. in the caſe of Croſs v. Powell.

(S) What Act or Thing at the making of a Deed will make the Deed void. [*Falſe Reading*].

[1. IF I am a man *not lettered*, and I deliver a writing, which is read to me contrary to that which is acknowledged in the deed, it is not a good deed. 9 H. 6. 59. b. 10 H. 6. 10.]

And an *indictment* lies for ſuch falſe reading, Sid. 312. K. v. Skerret, &c.

But if *I can read*, ſuch falſe reading will not be relieved, for it is my own folly. Skin. 159. Anonymus, pl. 6.

If a deed be *read otherwiſe than it is*, and thereupon the party executes it, it is not a good deed, if the perſon be *illiterate*. 2 Rep. 9. Thoroughgood v. Cole. —— And. 129. S. C. —— Mo. 148. S. C. —— Whether the party is *literate or illiterate is all one*. Kelw. 70. b. pl. 6. Mic. 21 H. 7. 11 Rep. 27. b. in Pigot's caſe. Hob. 226. in the caſe of Needler v. Biſhop of Wincheſter.

So where a *literate perſon became blind*, and a deed was read falſly to him, he was not bound by it. 12 Rep. 89. Shulter's caſe.

But if a perſon illiterate ſeal and deliver a *deed*, and *does not aſk to have it read* to him, he ſhall never plead illiterature after; but if it be read to him in other form he ſhall plead it after. Per Anderſon Ch. J. Mo. 184. pl. 326.

[2. If *agreement be to releaſe* 20 *l.* and the other *makes a general releaſe*, and he being *not lettered* delivers it by agreement as a releaſe for 20 l. only, this deed is void. 47 E. 3. 3. b. 17.] 11 Rep. 28. in Pigot's caſe.

[3. If agreement *be to releaſe all treſpaſſes, and in the deed is put* releaſe of *land*, and this is delivered by a man *not lettered*, as a releaſe only of treſpaſs, this deed is void. 44 E. 3. 23. 44 Aſſ. 30.]

A *bond* given by an illiterate perſon *by the perſuaſion of another*, who impoſed on him, telling him it was a thing of another nature, and that it would not damnify him, was ſet aſide, and ſo was the judgment obtained upon it, and the execution-money ordered to be repaid, and a *perpetual injunction*. Fin. Rep. 161. Jones v. Crawley and Wolſton.

[4. *So* where there is *not any agreement* to make any releaſe, but a *man comes to another not lettered, and prays him to ſeal a deed, ſaying that it ſhall be no prejudice to him*, and he *ſeals it without hearing it*; the deed is a good deed, becauſe he did not pray to hear it. 44 Aſſ. 30. 44 E. 3. 23. Dubitatur.]

[5. If a man for great age *cannot ſee to read*, and ſeals an obligation upon falſe reading, he ſhall avoid it. 3 H. 6. 52. b. Mich. 9 Jac. in the Star-Chamber, *Shuter*'s caſe cited 11 Rep. 28. reſolved, though he was lettered, for now he has all his intelligence by hearing.]

[37]

Br. Faits, pl. 37. 14 H. 8. 25. per Brooke.

[6. If a deed be read to a man *illiterate, to be upon condition, where it is without condition*, it is not his deed. 9 H. 6. 59.]

11 Rep. 27. b.

[7. If a deed be *read to a man illiterate, as a gift in tail, with a letter of attorney, where it is a feoffment in fee*, it is void in all, as well in the eſtate as in the letter of attorney; for all is but *one deed*, and by the livery ſecundum formam chartæ, nothing paſſes, the deed being void. 30 E. 3. 31. b. Curia.]

11 Rep. 27. b.

[8. If an obligation be read to a man illiterate, *that he binds himſelf by it in* 5*l. where it is* 100*l.* it is void in all. 30 E. 3. 31. b.]

11 Rep. 27. b.

[9. If a man *not lettered will make a feoffment*, and *upon one parchment, &c. two feoffments are contained*, and *only one is read* to him, yet the deed, for this feoffment which is read to him, is good. 30 E. 3. 32.]

Br. Faits, pl. 37. cites 14 H. 8. 25.

[10. If *three diſtinct obligations are* written *upon one piece of parchment* and *one* of them *only is read to the obligee*, and he being a man not lettered ſeals and delivers the deed, this is good for that which was read, and void for the others. 11 Rep. 27. b. Piggot's caſe.]

(T) What Act or Thing will avoid a Deed. Raſure, [*and Pleadings*].

Mq. 80. Arden v. Mitchel.

[1. RASURE will avoid a deed. 14 H. 4. 18.]

If a deed-poll be raſed *in a place not material*, the deed is not ſuſpicious for ſuch matter. Perk. ſ. 124.

As if a deed of *feoffment* be raſed in the *addition of the* name of the *feoffee, or* if the deed *comprehend dedi & conceſſi*, and *conceſſi is raſed*, the deed is not ſuſpicious for ſuch matter. Perk. ſ. 124.

But otherwiſe is it, if *dedi* be raſed, for the word dedi comprehends the effect and force of the word conceſſi, and more; for dedi *in a deed of* feoffment *comprehends* in it *a warranty* againſt the feoffor, and ſo doth not the word conceſſi. Perk. ſ. 124.

And although a deed-poll be raſed in a material place, as in the *name of baptiſm* of the grantor or grantee, if it appear that there was *no writing there before*, it is not very ſuſpicious. Perk. ſ. 124.

[2. Raſure

[2. Raſure *of the condition upon the back of an obligation* will make the obligation ſuſpicious. 41 E. 3. 10. b.] It will not make it void. Br. Faits, pl. 7. S. C.

If there be a raſure of a bond indorſed for *performance of covenants*, the indenture proving the bond makes it good. Mo. 10. pl. 37. Anonymus per Hale J.

[3. The raſure *of the date* of a deed will avoid the deed, becauſe *peradventure it was dated out of the realm.* 41 E. 3. 29. b. 44 E. 3. 42. b. adjudged.] Br. Faits, pl. 11. If the date *of a releaſe* be raſed in the place, it is very ſuſpicious, becauſe it may be it was dated out of the realm. Perk. ſ. 123. cites 44 E. 3. 42.

Plaintiff *altered the date of a bond* for performance of covenants from 84 to 85; per Cur. the raſure is in a *place not material*, and alſo tends to the *advantage of the defendant* himſelf who pleads it; and if the indenture had been void by it, the obligation had been ſingle. Le. 282. Lord Darry v. Sharp.

[4. *But* in this caſe if the plaintiff *avers, that it was dated in London, and ſhews a defeazance thereof, which bears date there*, it is good enough; for now the date is not material. 41 E. 3. 29. b. Perkins, ſ. 126.] [38] Br. Faits, pl. 9.

5. If the *name* of the grantor or grantee be raſed or interlined, the deed is very ſuſpicious. Perk. ſ. 123.

6. If there be a raſure of the *thing granted*, it makes the deed very ſuſpicious. Perk. ſ. 123.

7. So it is if the raſure is in the *limitation of the eſtate*, &c. Perk. ſ. 123.

8. If a man *grants* unto me a *rent-charge* by deed, which he hath iſſuing out of the land of another man, and the tenant attorns, and the *grantee* by his deed *reciting the ſame* grant, *regrants the ſame to his grantor*, yet it is not very ſuſpicious, becauſe it doth *rely upon another deed*, in which relier, (viz. recital) it is not raſed; *quære*, if ſuch deed be raſed in the *date of the place*, &c. Perk. ſ. 125.

9. *And* if in debt brought upon an obligation, the *date of the obligation* be raſed, and the plaintiff ſhews forth an *indenture of defeaſance proving the obligation*, the obligation is good enough. Perk. ſ. 126.

10. *So* it is of *indentures bipartite, tripartite*, or *quadripartite*, if *one of them or all* of them be interlined or *raſed in a material place*, they are ſufficient notwithſtanding the ſame, if ſo be they do *not vary in the words*. Perk. ſ. 126.

11. Raſing of *one indenture* after ſealing, does not make it void, if it *agrees* in words *with the other indenture*. Per Cur. Mo. 10. Anonymus. *But* if one indenture be raſed *in a place material*, and the other indentures or indenture are not raſed, and the indenture which is raſed doth *not agree in words*, in that place which is raſed, with them or that which is not raſed, the indenture raſed is very ſuſpicious. Perk. ſ. 127.

12. *Several perſons* enter into *ſeveral covenants*. If the deed be raſed in any clauſe which concerns them all, or in the *date*, the deed is avoided as to all; but otherwiſe the deed is intended ſeveral to every of them, ſo that the pulling off the ſeal of one is no diſcharge againſt the other. Cro. El. 546. Matthewſon v. Lydial.

13. In

13. In caſe of raſures and interlineations in *antient times*, the *judges adjudged* on their view the deed to be *void*, as appears 7 E. 3. 57. 25 E. 3. 41. 41 E. 3. 10. but of late times the judges have left this to be *tried by jurors*, whether the raſing or interlining was before the delivery. 10 Rep. 92. b. in Dr. Leyfield's caſe.

D. 261. b. pl. 28, 29. Anonymus. —Mo. 835. pl. 1125. S. P. Anonymus.

14. Raſing a deed *by the party himſelf* avoids the deed, though it be in a place not material, but raſure *by a ſtranger* does not unleſs it be in a place material. Per omnes J. Angliæ. Jenk. 232. cites 11 Rep. 27. Pigot's caſe.

If the indentures are of *bargain and ſale of land and tenements*, and the indenture which remaineth with the vendee is raſed, and the word which is raſed is *manor*, and in the other indenture the word which is raſed is *houſe*: and the vendor hath a manor and alſo a houſe in the ſame town where the lands ſold lie; the indenture which the vendee hath is greatly ſuſpicious, and ſo it is of interlining and other like things. Perk. f. 128.

15. *Leſſor raſes one of the parcels out of the leaſe*; this made all the deed void. Per omnes—But per Dyer, leſſee may plead this as a leaſe parol. Mo. 36. pl. 116. Anonymus.

Adad if the words which teſtify, that the grantor, obligor or feoffor, &c. *have put their ſeal* to the deed, are raſed, the deed is inſufficient notwithſtanding it be ſealed. Perk. ſ. 128. cites 40 E. 3. 1.

If it be in the ſum to be paid, it vitiates the bond.

16. A. is bound to B. in 20l. B. raſes out 10l. and makes the bond only for 10l. all the bond is void, and yet this act is to the *advantage of the obligor*. Arguendo Kelw. 161. b.

2 Bulſt. 248. in the caſe of Piggot v. Winchcomb.

[39]

17. A. made an indenture of covenants to ſtand ſeiſed to uſes according to perpetuities, and delivers this to a ſtranger, to the uſe of the covenantee, who hearing of it utterly diſagreed to it, upon which A. in every part of the deed raſed the *name of the covenantee and writ the name of J. S.* Lord Keeper Egerton decreed, that the deed was void as to all the benefit which the covenantor might have; but it is not therefore void for the uſes and eſtates to the other perſons; and that a *new delivery* is neceſſary, otherwiſe there is not any covenant for want of a covenantee. Mo. 300. Waferer v. Row.

18. *Drawing a line underneath* any words is no defacing or drawing them out. Cro. Jac. 542. Draycot v. Heaton.

19. A policy *altered by conſent* after it was underwritten, was held well. 2 Salk. 444. Bates v. Grabham.

[See (U) pl. 6.]

(U) Inter-

(U) * Interlining ſhall avoid a Deed. 14 H. 4. 18. [*And Altering.*]

* Folio 29.

[1. IF a deed be *altered in a point material* by the plaintiff himſelf or by a ſtranger *without the privity of the obligee*, be it *by interlineation, addition, raſure*, or by *drawing of a pen through the midſt of any word*, the deed by this becomes void. 11 Rep. 27. *Pigot*'s caſe, per Cur. reſolved, for it is not now the ſame deed.] Roll. Rep. 39. S. C. 2 Bulſt. 246. S. C.

[2. *As* if an obligation be made to a ſheriff to appear, &c. and in the obligation the name of the *ſheriff* is omitted, and after the delivery of it his *name* is interlined, either *by the obligee or by a ſtranger, without his privity*, yet the deed is void by it. 11 Rep. 27. *Pigot*'s caſe, reſolved per Cur.] If the interlineation be in a place not material, it does not avoid the bond,

&c. as where a bond was made to a ſheriff without the name of office, and in an action upon it *vicecomiti com. O.* was found interlined after delivery, but not found by whom; it was adjudged for the plaintiff, becauſe not in a place material. Mo. 835. pl. 1125.

[3. *But* if the deed be interlined in a thing *not material, by a ſtranger, without the aſſent of the obligee*, this ſhall not make the obligation void. Reſolved 11 Rep. 27. Pigot's caſe.] Mo. 835. pl. 1125. Anonymus. A. and B.

ſeal and deliver a bond to D. then by *conſent of all the parties*, the name, &c. of C. was interlined, and C. ſealed and delivered it. Reſolved it is good, and the obligation of all three. 2 Lev. 35. Zouch v. Clay.

Blanks were filled up with *conſent of obligors* after the execution of the bond, and held good. Mo. 547. Markham v. Gomaſton.——Cro. El. 627. S.C. held contra.

Vent. 185. Zouch v. Clay, takes no notice of the conſent of the parties, but that upon the delivery by A. and B. a *ſpace was left in which the name of C. was put in, who alſo ſealed and delivered it*; and held that the bond remained the ſame as to A. and B. and they could not take advantage of it, and it is the uſual practice for ſheriffs to make their bonds for appearance in this manner.

[4. But *otherwiſe* it is, if the interlining of the deed be *by the obligee himſelf, though* it be in a *thing not material.* Per Curiam, 11 Rep. 27. Pigot's caſe.]

[5. A man *leaſed* for years by indenture, reſerving rent, *and in the counterpart of the leſſor, 27 l. was reſerved, and* in the counterpart *of the leſſee but* 26 *l.* and after a controverſy grew between the leſſor and leſſee, which rent ſhould be paid, and the leſſor would have 27 l. and the leſſee would pay but 26 *l.* But *after the leſſee was content to pay* 27 *l. and ſo agreed* with the leſſor, and for this the *leſſee made a ſtroke in his indenture, and made it* 27 *l.* This makes his leaſe void. Fackman's caſe adjudged, cites Mic. 40 & 41 El. B. R. 76.] Cro. El. 627. cites it as Feckham's (the Dean of Paul's) caſe. [40]

[6. If A. *leaſe* land to B. by indenture dated 10 *Feb.* 27 *H.* 8. and after dies, and C. *the heir of A.* by indenture recites the leaſe, but *miſrecites it*, that is to ſay, reciting it to be dated 10 Feb. 28 *H.* 8. and then leaſes it by indenture to B. for years to commence after the expiration of the ſaid recited leaſe, and after the ſealing and delivery of this laſt leaſe, this *miſrecital is raſed* and reformed, *and made* 10 *Feb.* 27 *H.* 8. according to the true leaſe, *but it is not known by whom it is done, nor when* (a); this ſhall not avoid *the intereſt of the eſtate for years*, though it ſhall avoid the deed, becauſe the (a) Cro. Car. 399. S. C.

the deed is not of the eſſence to paſs the eſtate; but the eſtate being well paſſed, and it not being neceſſary to ſhew the deed for maintenance of the eſtate, the eſtate ſhall not be deſtroyed by it. (b) Hill. 10 Car. B. R. between Miller and Manwaring per Jones and Barkley contra Croke. Intratur Trin. 10 Car. Rot. 321. In this caſe Juſtice Jones cites Allen Swanwick's caſe in the Court of Wards to be reſolved, that the *raſure of a* deed of *feoffment doth not deſtroy the eſtate.*]

(b) Jo. 355. S. C.—Cro. Car. 397. S. C.

(a) It was ſo held per Jones and Harvey J. But Croke J. held contra, that as it is a leaſe by the deed, it is a contract by the deed; and the party intereſted raſing the deed, he determines the deed and his intereſt by his voluntary act, as if he had ſurrendered; and the contract being by deed, he may not determine the deed and the covenants; but *quoad himſelf* he doth deſtroy it, but perhaps *quoad the leſſor* it may have eſſence, if the leſſor will; but this is at his election, and not at the election of the leſſee. Cro. Car. 399. cites 11 Rep. 27. D. 261. 10 Rep. 97. in Dr. Leyfield's caſe, 7 E. 3. 57. 14 H. 8. 27. per Brook 44 E. 3. 42.

Adjudged good, being filled up by conſent. Mo. 547. S. C. ſays, it was afterwards ſo adjudged in a new action in B. R. upon demurrer, the plaintiff having pleaded the aſſent of A. and B.

[7. If *A.* at the requeſt of B. be *bound in a ſtatute with B. to C.* as his ſurety, and upon this *B. cauſes D.* his ſervant *to make a counterbond*, in which he and E. will be obliged *to A. to ſave him harmleſs* from the ſaid ſtatute, *and commands him alſo to leave out* of the condition of it *the chriſtian name of C. the place of his habitation, the county and his addition*, who does it accordingly, and after E. ſeals and delivers the counterbond as his deed, to the uſe of A. and after the ſaid *D. by the command of B. and by the aſſent of E. inſerts in the ſpaces the chriſtian name of C. the place of his* habitation and county, and his addition, and after B. ſeals and delivers the obligation; this is * a void obligation againſt E. by the ſaid addition in the ſpaces, though it was done by the aſſent of E. Adjudged Mich. 40 & 41 El. B. R. between Markham and Goneſtone.]

* Folio 30.

Cro. El. 627. S. C. but that is an action on the caſe brought by C. againſt D. in nature of a deceit for deſtroying the effect of the bond; and there Popham held, that if it had been *appointed* by the obligor *before the ſealing* and delivery thereof, *that it ſhould be afterwards filled up*, it might perhaps be good and not have avoided the deed.

A *bond is made ſingle* for payment of a ſum of money, and afterwards the obligee *indorſes a condition*, that if the obligor infeoffed the obligee by ſuch a day, the bond to be void. Adjudged per three juſtices againſt one, that the obligation was good; but three of the juſtices of B. R. were of opinion, that the judgment ought to be reverſed, though it was not; and about twenty years afterwards, three other juſtices of the C. B. in another caſe before them, were of opinion, that though B. R. did not proceed to reverſal, yet that if it came in argument now, it would be reverſed without great doubt; and per Fitzherbert, he might plead *non eſt factum*, for when the condition is written after the delivery, it is not the ſame deed that was delivered. Kelw. 162, 164. Mic. 3 H. 8.

Perk. ſ. 124.

8. If a deed be raſed or interlined in the *date in the name of parties, in the limitation of eſtate, in the name of the thing granted, or the rent reſerved*, it is ſuſpicious to enfeeble the deed, becauſe in a thing of ſubſtance. But if it be in *recital* or *addition*, or in other *word of explanation* in deeds, or *words of courſe* and form, this ſhall not impeach the credit of the deed, becauſe they are only matters of circumſtance. Per Manwood Ch. B. Mo. 230. in Fanſhaw's caſe.

[41]

There muſt be no omiſſion of any material

9. There is no book in the law, which avoids leaſes or grants of corporations for variance in any of theſe four circumſtances, viz. *addition, interpoſition, omiſſion, commutation*; if they retain the four firſt

firſt principles of ſubſtance, viz. *name* of *perſons*, of *houſe*, *foundations or dedication*, *and place known before* the foundation in which the houſe is ſituate. Per Manwood Ch. B. Mo. 235. in Fanſhaw's caſe. material part. And. 23. Dean and Chapter of Eaton's caſe.

10. Where words of *power reſerved* (as to grant, ſell, and demiſe, &c.) which give a larger power than before, are interlined, but there is *no proof when* theſe words were interlined, *or that it was by the direction of the grantor*, they muſt be looked upon as if they had been originally incorporated in the body of the deed. Per Reynolds Ch. B. Gibb. 214. Fitz-Gerald v. Lord Falconbridge.

11. An interlineation (if nothing appears againſt it (will be *preſumed to be at* the time of *making the deed*, and not after. Keb. 22. Trowell v. Caſtle.

12. A deed of revocation, and a new ſettlement made by that deed, though after the ſealing and execution thereof *blanks* were *filled up*, and *not read again* to the party *nor reſealed* and executed, was yet held a good deed. 2 Chan. Rep. 410. Paget v. Paget.

(U 2.) Actions and Pleadings, as to Raſures, Interlineations, Falſe Readings, &c.

1. IN a bond the *day was omitted*, and a ſpace left, and after delivery the *plaintiff inſerts* the day; per Dyer, the better pleading had been to plead the ſpecial matter, per quod ſcriptum prædictum perdidit effectum. Mo. 28. pl. 89. Anonymus.

2. It ought to be *ſpecially pleaded*, and not given in evidence. Mo. 66. pl. 179. Anonymus.

3. Action on the *caſe lies* againſt a *ſtranger* interlining a bond by order of the obligor, and ſo avoiding it; and a writ ſhall be awarded to enquire of damages. Cro. El. 626. Markham v. Gomaſton.

(X) Breaking off the Seal.

[1. IF the ſeal be taken away from the deed, it *is not any deed*. 11 H. 6. 27.] Where the ſeal is broken off, *non eſt factum* is a good *plea*; but if there is any ſpecial matter, the *jury* may find it. 5 Rep. 119. b. ——D. 112. pl. 50. Peres v. Biſhop.

[2. If there be *no manner of print remaining*, by which it may appear that it ever was ſealed, it ſhall avoid the deed. 14 H. 4. 30. b. Demurrer.] [42] Br. Faits, pl. 22. cites S. C. Perk. ſ. 135. S. P. *But* if there appear *any print* of the ſeal upon it, and the ſeal remains annexed to the deed, it is ſufficient. *But if* the ſeal be *ſevered* from the deed, notwithſtanding the print remains, the deed is inſufficient. Perk. ſ. 135. cites 7 H. 6. 18.

[3. If

Br. Faits, pl. 27. Perk. f. 136.

[3. If the ſeal be *once ſevered* from the deed, *and after ſewed together, and glewed* to *it again*, yet the deed is void by it. 7 H. 6. 18. Curia. Perkins, f. 135.]

4. If the ſeal of a deed be a little bruiſed, whether it be an antient or new writing, if *part of the ſeal remains upon which there is any print*, the deed is good enough; but if the part which remains to the deed has not any print, then the deed is inſufficient. Perk. f. 136.

Debt on bond againſt A. and B. Jury found, that *after iſſue joined, and before niſi prius* the ſeal of B. was taken from the bond, adjudged the bond was good. Owen 8. Michael's caſe.——For it was defendant's deed at the time when iſſue was joined, and the trial ſhall relate to that. Cro. El. 120. S. C.——Goldſb. 83. S. C.

5. Debt was brought upon a bond, and *after plea pleaded* the ſeal was broken; the jury were directed to find the ſpecial matter D. 59. pl. 12. Nichols v. Haywood.——This accident ſhall not be aſſigned for error. D. 59. pl. 12. Marg. cites 41 Eliz. Worſley v. Charnock.——Ibid. cites Michel v. Stockworth and Andrews.——Ow. 8. Michael's caſe, had it been *before iſſue joined*, it would have avoided the deed——cited 2 Show. 29.

6. Debt upon bond againſt two, the *ſeal of one* is broken; this avoids all the deed, though the *bond is joint and ſeveral*; for this implies jointly, and it is not material who broke the ſeal. D. 59. pl. 12. marg. cites Paſ. 3 Jac. B. R.——2 Show. 28. Seaton v. Henſon.

7. A. and B. *covenant with ſix, who ſeparatim covenant with A. and B.* one of the *ſeals of one of the ſix* is broken off; this does not avoid the deed. But if the *ſeal of A. or B.* who covenanted jointly had been broken, the deed had been defeated. 5 Rep. 23.——Cro. El. 408. Mathewſon v. Lydiate, S. C.——470. 546 S. C.——2 Bulſt 248.——cited Poph. 161.

8. A deed was left with Baron Snigg, and *by caſualty* of fire the ſeal was *melted off*. The defendant being a meer ſtranger, and owner of the land (the plaintiff by the deed claiming a water-courſe through it) pleaded a ſpecial *non eſt factum*; plaintiff moved, that he might plead the general iſſue, and then the jury might well find all the ſpecial matter for the court to judge upon: per Coke Ch. Juſt. we cannot aid in this (though Snigg made an affidavit); for if his right depends on a deed, if he loſe his deed, by this he loſes his right, and no remedy here for him; agreed per Curiam (abſente Doderidge); afterwards the book of 43 Eliz. c. 3. was remembered, that if one has a deed, and the party from whom he had it, takes it from him and pulls off the ſeal he may plead this deed without ſhewing it but ſhall plead that his adverſary has done this. It was urged, that *ne granta pas a ſtranger* may plead, but not *non eſt factum*; but an *executor* may plead non eſt factum. 3 Bulſt. 79. Moor v. Salter.

Palm. 403. S. C. Argol v. Cheyny.

9. Seals were broken off from a deed to *lead the uſes of a recovery*. Yet upon examination it was admitted to guide the uſes, it being proved to have been done by a little boy, and that the ſeals were once annexed, and being compared together, the raſures of the parts agreed. Lat 226. Anonymus.

(X 2.) *Cancelled* Deeds. The Effect thereof at Law.

1. CANCELLED deeds were allowed to be *given in evidence*, proof being firſt made of the truth of their being cancelled. Het. 138. Beckrow's caſe.

2. Commiſſioners of bankrupts had *aſſigned a bankrupt's goods to A. B. C. and D.* But his deed of aſſignment was afterwards cancelled, and a *new deed made to A. B. and C. only*, who without D. brought an action for the goods, and per Rainsford and Wild Juſt. (Hale Ch. Juſt. being ſick) though the cancelling of the prior aſſignment does *not alter the property*, but that it *remains in A. B. C. and D.* and though D. is not party to the action, yet the others upon Not guilty pleaded ſhall recover damages in trover for two parts of the goods, and ſhall not be nonſuited; but the defendant might have pleaded this in abatement of the writ for ſo much. But having pleaded Not guilty, they, though jointenants with one another, ſhall recover damages for their parts; to which Sir Will. Jones, of counſel for the plaintiff, hæſitanter ſubmitted. 2 Lev. 113. Nelthorp and Farrington v. Dorrington.

3. The court declared, that though the deed appeared cancelled, yet it was a good deed, and that the cancelling thereof did not deveſt the *eſtate of the truſtees therein named*, and that the truſt thereby created ought to be performed. 2 Chan. Rep. 100. Leech v. Leech.

4. *Grant of an office to A. and B.* for their two lives and the life of the longeſt liver of them, *B.* keeps the deed without being produced; which in trial of an action brought by *A.* appeared to be cancelled; it was inſiſted, that the eſtate in the office was thereby deſtroyed; but per Cur. not as to A. unleſs it appeared that A. had a hand in the cancelling it. Vent. 297. Woodward v. Aſton.

5. A *rent* or other *grant* is *not loſt* by the deſtruction of the deed, as a bond or *choſe en action* is. Per Cur. Vent. 297. Woodward v. Aſton.——The property remains the ſame. 2 Lev. 113. Nelthorpe and Farrington v. Dorrington.——2 Vern. 476. Lady Hudſon's caſe cited there.

Quære per the reporter, if the party himſelf cancels it. Vent. 297.

6. A father having taken diſpleaſure at his ſon, made an additional jointure on his wife by a *voluntary conveyance*, which he kept in his own power, and being afterwards reconciled to his ſon, the father cancelled the additional jointure, and died. The wife after his deceaſe found the cancelled deed, and recovered by virtue of it. Cited per Lord Wright, 2 Vern. 476. as Lady Hudſon's caſe.—— Cited per Lord Wright, Ch. Prec. 235.

(X 3.) Cancelled Deeds relieved in Equity.

1. A *bond* was taken away fraudulently and cancelled. Decreed, that the *widow* ought to have ſatisfaction out of her huſband's eſtate by whom the bond was cancelled, and as much benefit, as if it had been uncancelled. Fin. Rep. 184. Brown v. Savage.

2. A *bond torn* may be relieved in equity. Per Finch C. Obiter. Vern 78. in the caſe of Wilcox v. Stuart.

3. A. deviſed his lands to ſeveral relations, at the funeral a younger brother of the heir at law ſnatches the *will* out of the executor's hands, and tore it in many ſmall pieces, the pieces, (eſpecially of that part in which the land was deviſed) were picked up and *ſtitched together*. A bill was brought to eſtabliſh the will; and decreed the deviſees to enjoy againſt the heir, and he to convey to them, though no direct proof was made, that what was done was by his direction. 2 Vern. 441. Haines v. Haines.

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4. A. by anſwer confeſſed he had in a paſſion *burnt his marriage articles*, but it being proved, that he had produced them at a commiſſion after the time he pretended he burnt them, he was *committed to the Fleet*, and though he made oath he had them not, and could not produce them, yet the court would not diſcharge him, till he *conſented to admit, they were to the effect in the bill.* 2 Vern. 561. Sanſon v. Rumſey.

(X 4.) Remedy againſt Perſons Cancelling and Deſtroying Deeds.

1. A. delivered a deed of B. to J. S. who *tore it in ſport without malice, by misfortune and chance.* Both A. who delivered the deed, and J. S. who tore it, were *impriſoned*, and the deed was *inrolled* immediately. Br. Faits, pl. 88. cites 3 E. 3.

2. If a man *finds a bond*, and cancels it, *treſpaſs vi & armis* lies, for he deſtroys the thing found. Cro. E. 723. Watſon v. Smith.

3. *Action on the caſe* lies for tearing off the ſeal of a deed, by which J. S. granted to the plaintiff *unum annualem redditum ſive annuitatem* of 10l. for his life, though the plaintiff ſhewed not, whether it was an annuity or a rent, or that it was the ſeal of the grantor, or the ſeal of the ſame deed, but only ſigillum eidem annexat'; or that he loſt the annuity; yet it was adjudged for the plaintiff. Cro. J. 255. Aſh v. Brudnell.

4. *A. on the marriage of his ſons ſettled ſeveral lands* in this manner, viz. *as to part, to* the uſe of *himſelf for life*, and after to the uſe of *his ſon for life*, then to his *firſt and other ſons in tail*, and for want of ſuch iſſue to the uſe of *the plaintiff, who was his brother,*

and

and his heirs; and *as to other part* of the lands to the uſe of the *ſon for life*, and after to the uſe of the *wife for her jointure*, then to the *firſt and other ſons in tail*, and for want of ſuch iſſue, to the *plaintiff and his heirs*; the *ſon and wife died without iſſue* in the life-time of A. and after their deaths *A. got the ſettlement and cut it in pieces*; but the counterpart was intire, and in the hands of A. and the *bill* was brought to *diſcover* it, and have it preſerved; and the *counterpart* being confeſſed in the anſwer, the plaintiff obtained an order at the Rolls to have it brought into court, and a motion was made to have that order diſcharged, for that the remainder to the plaintiff was meerly voluntary, and therefore he ought not to have any aid from a court of equity; but the court would not diſcharge the order, but made the *deed* be *brought into court, there to remain, and thereby hinder A. from ſelling the eſtate* from the plaintiff. Trin. 1691. Abr. Equ. 168. Brookbank v. Brookbank.

5. 2. *Geo* 2. *c.* 25. *ſ.* 3. *If any perſon ſhall ſteal, or take by robbery, any Exchequer bills, Bank-notes,* South-Sea *bonds,* Eaſt-India *bonds, dividend warrants of the Bank,* South-Sea *company,* Eaſt-India *company, or any other company, ſociety, or corporation,* bills of exchange, *Navy bills or debentures,* Goldſmiths notes *for payment of money, or other* bonds *or warrants, bills,* or promiſſory notes *for the payment of any money, being the property of any other perſon, or of any* [45] *corporation, notwithſtanding any of the ſaid particulars are termed in law a* choſe in action, *it ſhall be deemed and conſtrued to be felony of the ſame nature and in the ſame degree, and with or without the benefit of clergy, in the ſame manner as it would have been if the offender had ſtolen or taken by robbery any other goods of like value with the money due on ſuch orders, tallies, bills, bonds, warrants, debentures or notes, or ſecured thereby, and remaining unſatisfied; and the offender ſhall ſuffer ſuch puniſhment as he ſhould or might have done, if he had ſtolen other goods of the like value with the money due on ſuch orders, tallies, &c.*

(Y) What Act or Thing will avoid a Deed. [*In part or in all.*]

Pl. 4.

[1. IF divers *ſeveral perſons make ſeveral covenants in one deed* with one another, and *no joint covenant*, and the *ſeal of one of the covenantees* is broken off, yet this ſhall not avoid the deed as to the others. Tr. 2. Ja. B. adjudged between Alabaſter and Hickman. 5 Rep. 22. b. 23. adjudged. Matthewſon's caſe.]

11 Rep. 27. in Pigot's caſe. Godb. 212. Hob. 12. S. C.

[2. If an *under-ſheriff covenants* with his high-ſheriff to ſave him harmleſs of all fines and amerciaments for any eſcape, and covenants alſo, *that he will not execute any writ of execution above the ſum of* 20*l.* though this laſt covenant be againſt the law and void; (becauſe by the ſtatute 27 El. cap. 12. the under-ſheriff takes his oath to execute all proceſs) yet this doth not make the other covenants void. M. 11 Ja. B. between Sir Daniel Norton and Symms, adjudged. Tr. 12 Ja. B. ſame caſe adjudged.]

Godb. 212. S. C. And *difference* was taken between a *bond made void by ſtatute* and *by common law*, for upon the ſtatute of 23 *H.* 6. if a ſheriff will take a bond for a matter againſt that law, and alſo for a debt due, the whole bond is void; for the letter of the ſtatute is ſo, for a *ſtatute is a firſt lex*, but the common law doth divide according to common reaſon, and having made that void that is againſt law lets the reſt ſtand; as is 14 H. 8. fo. 15. Hob. 14. in caſe of Norton v. Simms.

[3. *In the ſaid caſe*, if the under-ſheriff obliges himſelf in an *obligation*, with condition *for the performance of covenants* in the ſaid indenture, though *ſome of the covenants are againſt the law, and void*, yet the obligation is not void by it, but he is bound to perform the good covenants in the indenture. Tr. 12 Ja. B. adjudged, *the covenants being ſeveral*, between Sir Daniel Norton and Symms.]

Pl. 1.

[4. If *divers covenant jointly* by a deed to do a thing, and after *the ſeal of one of the covenanters is broken off* from the deed, this ſhall make the deed void as to all the other covenantors. 5 Rep. 23. Matthewſon's caſe.]

[5. If *two are bound* in an obligation, and after *the ſeal of one is* diſſolved and *taken from the obligation*, this makes the obligation void as to the other, the ſeal of whom remains to the obligation not hurt; inaſmuch as the one is diſcharged by the taking off his ſeal, and by conſequence the other alſo. 3 H. 7. 5. 11 Rep. 28. b. Pigot's caſe.]

[6. If a deed *contains divers diſtinct and abſolute covenants*, if *any* of the covenants *be altered by addition, interlineation or raſure*, this miſfeaſance ex poſt facto ſhall avoid all the deed. 11 Rep. 28. b. Pigot's caſe. 14 H. 8. 25, 26.]

[46]

[See (E a) (F a) (S) per tot. (U) 7.]

(Z) Who ſhall have them.

[1. IF *feoffee with warranty bail the charters* concerning the land to another, *and after infeoffs the bailee* of the land *with warranty*, the bailee ſhall not have the charters to him bailed, becauſe the bailor ought to have them to vouch over when he ſhall be vouched. 39 E. 3. 17.]

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[2. If a man makes a *feoffment in fee*, no deeds or evidences paſs to the feoffee, but only the deed of feoffment itſelf. 18 H. 7. Kell. 3.]

Unleſs the feoffor *gives them to the feoffee*. Per Huſſey. Br. Charters de terre, &c. pl. 54. 6 H. 7. 3.——*But againſt a ſtranger* the feoffee ſhall have an action of detinue for thoſe charters which concern the lands, if he cannot make title by the feoffor, or thoſe who claim title by the feoffor. F. N. B. 138. (G).

3 Keb. 711. S. P. adjudged Warwick v. Braddon. Carth. 316. Reynell v. Long, S. P.

[3 If a man makes feoffment in fee to J. S. to the uſe of J. N. in fee, the deeds belong *to the feoffee, and not to the ceſty que uſe*, though he has not any eſtate continuing in him, for he was only the conveyance now ſince the ſtatute of 27 H. 8. For before the feoffee ought to have it, and the *ſtatute hath not expreſsly given the deeds* to the ceſty que uſe. D. 10 El. 277. 58. Curia, 37 El. B. Reſolved

Reſolved between (a) Sacheverell and Bagnall. H. 6 Ja. B. R. per Cur. præter Walmſley, between the Counteſs of (b) Huntington and Sir Anthony Mildmay.] (a) Cro El. 356. S. C. (b) Cro. J. 217.

Walmſley Juſt. ſaid, that in one ERIN's caſe, wherein he was of counſel, it was held, that the deed appertained to the feoffee, and not to ceſty que truſt. Cro. E. 357.

[4. If a man makes *feoffment in fee* of land, *without any warranty*, the feoffee ſhall have all the charters, deeds and evidences concerning the land, as incident to the land, to the intent that by them he may defend the land. Co. Lit. 6.] They belong to the feoffor to have his *warranty paramount*, and the feoffee ſhall not have them, unleſs there be a covenant between them to that purpoſe. Br. Charters de terre, pl. 15. 44 E. 3. 1. per Thorpe.——Ibid. pl. 38. 39 E. 3. 17. per Knivet, quod non negatur.——For the evidences are as it were the ſinews of the land, and the feoffor being not bound to warranty has no uſe of them. But evidences which *concern the poſſeſſion, and not the title of the land*, the feoffee ſhall have. Co. Lit. 6.

[5. The ſame law is when a feoffment is made *with a warranty only againſt the feoffor and heirs*, for the feoffee cannot recover in value upon this warranty. Co. Lit. 6.]

[6. If feoffment be made of land *with warranty upon which the feoffor is bound to warranty, and to render in value*, there the feoffor, becauſe he is bound to defend the title, ſhall have all deeds *which comprehend warranty*, of which he may take advantage. Co. Lit. 6.] Unleſs there be an expreſs grant of the deeds. Reſolved 1 Rep. 1. b. Lord Buckhurſt's caſe.

[7. *So* in this caſe the feoffor ſhall have ſuch deeds, *which may ſerve to dereign the warranty paramount.* Co. Lit. 6.] As if *A. infeoffs B. with warranty to him and his heirs and aſſigns*, and *B. by deed infeoffs C. without warranty*, and *C. infeoffs D. with warranty*, yet C. ſhall have the firſt deed and the ſecond alſo. 1 Rep. 1. b. Lord Buckhurſt's caſe.

[8. *So* in this caſe the feoffor ſhall have all deeds and evidences, which are *material for the maintenance of the title* of the land. Co. Lit. 6.] [47] 1 Rep. 1. b. Lord Buckhurſt's caſe. For as the feoffor is bound to render in value, there is great reaſon that he ſhould have all the evidences material or requiſite to defend the title, and the feoffee has truſted to his warranty, by which he ſhall vouch the feoffor. 1 Rep. 1. b. Lord Buckhurſt's caſe.

[9. *But* when a feoffment is made *with warranty*, the feoffee ſhall have the evidences *which concern the poſſeſſion, and not the title* of the land. Co. Lit. 6.] *As court-rolls, &c.* for they are concomitant and incident to the poſſeſſion. 1 Rep. 1. b. Lord Buckhurſt's caſe.

[10. If a *leaſe for life* be made, the *remainder over in fee*, this deed appertains to the lord during his life. 12 H. 4. 20. b.] 2 Ca. Caſ. 42. Br. Charters de terre, pl. 34. 33 H. 6. 22.

[11. And *not to him in remainder.* 7 H. 6. 1. 10 Rep. 93. b. Dr. Leyfield's caſe.] *But* where the deed is *delivered to the remainder man*, he may detain it. Br. Charters de terre, pl. 16. 47 E. 3. 18.

[12. If *leaſe for life* be, the *remainder in tail*, and *donor releaſes to the leſſee, who dies*, this deed doth not appertain to him in remainder. If a man makes a leaſe for

years, and afterwards *confirms his eſtate in fee*, mainder. (It ſeems it is intended that this enlarges the eſtate of the leſſee.) 9 H. 6. 54.] the heir of the feoffee ſhall have the *deed of the leſſor for years*, as well as the deed *of confirmation*, becauſe the deed doth make the confirmation good. And ſo of every deed which makes his title, or a releaſe, or the like, without which his title ſhall not be ſure, and he ſhall have an action of detinue for them. F. N. B. 138. (K) cites 9 E. 4. 53.

13. If gift in *tail be to A.* remainder *to B. in tail*, and then *A. dies without iſſue*, B. ſhall have the deed, which nota for clear law. Br. Charters de terre, &c. pl. 52. 3 H. 7. 15.

The heir in tail ſhall have a writ of *detinue againſt the diſcontinuee* for the deed of intail, by which the land was given. F. N. B. 138. (H). cites 18 E. 4. 15. 44 E. 3. 1. 10 E. 4. 9.

14. The deed of intail, *upon diſcontinuance of the intailed eſtate*, belongs to the diſcontinuee, and not to the heir, for he has no poſſeſſion of the land. Per Rede, and Keeble and Tremaile accordingly. But per Fairfax and Huſſey, the deed belongs to the heir, for it is no chattel, nor paſſes by gift de omnibus bonis & catallis; and replevin lies not of a deed, for it is an inheritance as the land is, and of the nature of the land, and ſhall go to the heir. And if tenant in tail *cancels or burns the deed*, the heir is without remedy for the deed, but not for the land, for he ſhall have formedon though it was of rent, and this without monſtrance of it, for it is in the right. But in avowry he ſhall ſhew the deed, for it is in the poſſeſſion. Br. Charters de terre, &c. pl. 53. 4 H. 7. 10.

15. If land be given *to A. for life*, *remainder over* [*to ſeveral*] by deed, *any of them who firſt gets the deed* ſhall retain it. And therefore whoever has any land contained in the deed, where others have the reſidue of the land, yet he that has this parcel, may on account thereof retain the deed. Per Fairfax and Huſſey. Bro. Charters de terre, &c. pl. 53. 4 H. 7. 10.

F N. B. 138. (F.) 38 H. 6. 24. b. 25. pl. 1.

16. *Deed of intail, after the tail determined*, belongs to the donor, and in caſe of his death to his heir, and he may have detinue for it; and the original and counterpart are but one deed in law, and both belong to the donor or his heir. Br. Faits, pl. 51. 38 H. 6. 25.——Br. Charters de terre, &c. pl. 47. 38 H. 6. 24.

[48] Cro. E. 496. in caſe of Kelſack v. Nicholſon.

17. *Tenant in fee ſimple may give* the deed or charter of his land to whom he will, but * *otherwiſe of a tenant in tail*; for in the laſt caſe the heir ſhall have it, but not ſo of the fee-ſimple. Br. Faits, pl. 86. 9 H. 6. 60.

* The iſſue ſhall have all the deeds notwithſtanding that his father gave them away, for *it may be that the donor was in by diſſeiſin, and after the diſſeiſee releaſed to him*, the iſſue ſhall have this releaſe. Br. Charters de terre, pl. 36. 9 E. 4. 52.

Ibid. pl. 36. 9 E. 4. 52.

18. *Leaſe to A. for life* remainder *to B. in fee*, after the death of A. the deed belongs to B. but if a *releaſe be to A. only*, this does not belong to B. after A.'s death. Bro. Charters de terre, pl. 6. 9 H. 6. 54.

19. If *A. infeoffs B. on condition*, and *B. breaks the condition*, the deed belongs to the feoffor again; for it ſhall not remain as an evidence againſt him or his heirs afterwards. Br. Charters de terre, &c. pl. 5. 39 H. 6. 36.

20. If I am *infeoffed* with warranty *to me and my heirs*, and after *I infeoff A. in fee, and bind my heirs to warrant*, and die, if any one

one gets the deed by which I was infeoffed, my heir ſhall have thereof *detinue by ſpecial count*, and non ratione terræ. Br. Charters de terre, pl. 58.

21. If A. infeoff B. with warranty *to him, his heirs, and aſſigns, and B. infeoff C. with warranty*, though C. may vouch A. as aſſignee, yet he ſhall not have the firſt deed; for B. has made warranty to C. and B. may be vouched, and therefore B. ſhall have the firſt deed to have his voucher over. 1 Rep. 1. b. the fourth reſolution in Lord Buckhurſt's caſe.

Nota, if *A. infeoffs B. with warranty*, and *B. infeoffs C. by dedi*, that B. during his life ſhall have the charters, which comprehend warranty, and which ſerve for the neceſſary defence of the title. But his *heir* ſhall not have them, but the feoffee. Per Coke, 1 Rep. 2. b.

22. One *parcener* may have the charters *which concern her purparty only*, and ſhall have detinue thereof againſt her ſiſter on a ſpecial count. F. N. B. 138. (G) the notes there.

23. The heir ſhall have a detinue of charters, *although he hath not the land*; *as* if I be *infeoffed with warranty, and I infeoff another with a warranty in fee*, my heir ſhall have a detinue of that deed by which I am infeoffed, becauſe he may have advantage of the warranty. F. N. B. 138. (L) cites 9 E. 4. 53.

24. *And* if my *father* be *diſſeiſed, and dieth*, I ſhall have a detinue for the charters, although I have not the land, and the executors ſhall not have the action for them. F. N. B. 138. (L.)

25. After a leaſe is determined, the *counterpart of the leaſe* belongs to the leſſor. Jenk. 254. pl. 46.

26. *Counterpart* of a deed, *by which a rent is reſerved* on a feoffment, does not paſs to the vendee by bargain and ſale of the rent, as incident, for it is not the original deed by which the rent was at firſt reſerved. Per omnes, except the Ch. Juſt. who ſays, that this counterpart waits upon the intereſt, and is good evidence for it. Yelv. 224.

27. When the common or ſtatute *law gives lands*, it gives the means to keep them, as the evidences. Arg. God. 323.

28. If A. be ſeiſed of a ſeigniory, rent, advowſon, or any *thing which lies in grant*, and grants it over to B. with warranty, and B. grants it to C. with warranty, C. ſhall have the firſt deed, becauſe it is neceſſary to the making his title, and without it he cannot make any defence againſt A. or any claiming by him; and when B. grants to C. the rent or advowſon, C. ought to have the effect of his grant, and B. cannot in derogation of his grant detain any thing which is of neceſſity, and of the eſſence of his grant. 1 Rep. 1. b. fifth reſolution in Lord Buckhurſt's caſe.

Mo. S. C. 488. to 503.

[49]

29. If A. makes a feoffment with *warranty*, and dies, *the heir of the feoffor* ſhall have all charters, which the feoffor himſelf might detain (though the heir has nothing by deſcent) by reaſon of the poſſibility of the deſcent after. 1 Rep. 1. b. ſixth reſolution in Lord Buckhurſt's caſe.

30. The *lord by eſcheat* ſhall have all the charters, which concern the ſame land, becauſe (as Popham gives the reaſon) he is in *in le poſt, and cannot vouch*; and therefore the feoffor ſhall not detain the evidences,

Br. Charters de terres pl. 59. cites 20 E. 4. 14.

evidences, for he can be at no prejudice. 1 Rep. 2. ut ſupra, cites 10 E. 4. 14. b. per Moyle.

Br. Charters de terre, pl. 11.

31. A. by deed *infeoffed B. and C. and to the heirs of B.* and the deed of feoffment, and other evidences are delivered to B. and afterwards *B. dies, C. ſhall have the deed by which he was infeoffed*, becauſe it makes his eſtate; *but not the antient deeds*, for they were delivered to B. the other jointenant, for the aſſuring his inheritance. 1 Rep. 2. cites 34 H. 6. 1. a.

Br. Charters de terre, pl. 11.

32. *And if A.* after ſuch feoffment *releaſe to B. and C.* and *delivers the deed to B.* C. ſhall not have it, for *C's eſtate was perfect without this deed.* 1 Rep. 2. cites 34 H. 6. 1. a.

Br. Charters de terre, pl. 11.

33. *But* per the reporter of the year-book, if a *releaſe be made to two, who have joint eſtate by defeaſible title*, and the deed is delivered to one of them, who dies, in this caſe the other who ſurvives ſhall have it, becauſe *it perfects his eſtate.* 1 Rep. 2. b. cites 34 H. 6. 1. a. 6 H. 7. 3. b. 21 H. 7. 33. a. according to the reaſon of this caſe.

34. It was ſaid that if A. *infeoff B. and C. to them and their heirs*, and *gives the antient deeds to B.* and *B. dies*, C. ſhall have all the deeds, and not the heir of B. for he can have no loſs by not having them, or benefit by having them, as C. may; and C. ſhall have them as things which go with the land. 1 Rep. 2. b. in Lord Buckhurſt's caſe.

[See (H a) Sutcliff v. Conſtable (S a)]

(A a) Who may juſtify the Detaining them.

[1. ONE *coparcener* may juſtify the detaining of the charters of the land in coparcenary againſt the other in detinue, for they belong to her as well as to the other. 3 H. 6. 19. b.]

[2. *After partition*, the one *coparcener* cannot juſtify the detaining againſt the other the charters of the land, which ſhe alone has allotted to her. 3 H. 6. 19. b.]

2 Roll. 45. (F) pl. 9. contra.

[3. If *tenant in fee-ſimple gives the charters* concerning the land to another, the *donee*, though he *has nothing in the land*, yet he may juſtify the detaining them *againſt the heir who has the land.* 10 H. 6. 20. b.]

4. A *leaſe for life* is made *to A. remainder to B. in fee*, if the *deed is delivered to B.* he may retain the deed. Br. Charters de terre, pl. 16. 47 E. 3. 18.

[50]

Mo. 222. S. C.

5. *Grantee of deeds by tenant in tail* cannot detain the deed of intail againſt the iſſue after the death of the grantor; but it is otherwiſe of ſuch grant by *tenant in fee-ſimple.* Cro. E. 496. in caſe of Kelſack v. Nicholſon.

6. Several writings left with counſel for his opinion, in order for ſale of the land, were *delivered to a ſcrivener by conſent of the parties, who finding a deed concerning the intereſt of a third perſon, delivers it to him*; upon complaint to the court, he was commanded to produce

produce the deed to be delivered again to the parties, they conceiving it to be *an abuſe in his practice*, which was under the regulation of this court. Vent. 46. Parry's caſe.

[See Attorney.]

(B a) Kept private by, or in Cuſtody of the Maker.

1. THE condition of a *bond* was *to convey lands to his ſon* to enjoy after the obligor's death. In debt the defendant pleaded, that he made a feoffment to a ſtranger to the uſe of himſelf for life and after to the uſe of his ſon in tail. This upon demurrer was held to be *no performance* as it was pleaded, for the infant was not made party to the conveyance, nor had he any deed or aſſurance to prove his eſtate, ſo as he is not ſure thereof, nor can have any knowledge perhaps of ſuch an eſtate, nor means to prove the uſes limited, which was not the intent of the condition. Cro. E. 625. Stutfield v. Somerſet.

2. A. is *bound to make a releaſe to B.* it is not ſufficient to make it, and *deliver it to a ſtranger* to the uſe of the plaintiff. Cro. E. 826. cites 20 E. 3. Aud. Quer.

3. A *bond to a daughter*, found after the father's death ſeveral years, was ſet aſide; and Lord Wright ſaid, it appeared to be the father's intention, that no uſe ſhould be made of it, but only *to protect him from taxes*, as ſhe had owned ſhe took the intent to be; and it was without condition, and payable immediately; and he always kept it by him, and therefore if ſhe had got it from him, and put it in ſuit againſt him, he thought equity would have *relieved* him againſt it, it being voluntary, and only for a ſpecial purpoſe. Ch. Prec. 183. Ward v. Lant.

But where a *voluntary ſettlement* was *made to truſtees* and their heirs, in truſt to receive the rents, &c. and put them out from time to time *for the benefit of one of his daughters*, and entred into a bond to the ſame truſtees for payment of 1000 l. for the uſe of the ſame daughter at a day certain, but kept both deed and bond, and received the profits of the eſtate till his death, on a bill by the daughter for a ſatisfaction out of the profits from the time of the ſettlement made, and of the 1000 l. from the time it was made payable, Lord Wright ſaid, they were the father's deeds, and he could not derogate from them, and decreed the intereſt of the bond from the time; but as to the profits of the eſtate, plaintiff and defendants agreed to ſet the profits of the lands againſt the daughter's maintenance. But though the father had by his will given her a *legacy in ſatisfaction* of the bond, yet the court would not tie her up to that, but left her to her election. Ch. Prec. 210. Barlow v. Heneage.

4. A *bond* for 1500 l. was made at the time of a will, and ſhewn to the obligee with his will, and afterwards found with his will; and it being for a like ſum which he had promiſed ſome years before to give to the obligee, on his marrying the obligor's daughter in law, and whoſe fortune was in the obligor's hands, but not adjuſted; Lord Harcourt looked upon it to be only *in nature of a legacy and voluntary as againſt creditors.* Ch. Prec. 370. Loeffes v. Lewen.

5. A.

5. A. *conveys* his eſtate to the *uſe of himſelf for life, with power to mortgage ſuch part as he ſhall think fit*, remainder to the truſtees to ſell and pay all his debts, but *continues in poſſeſſion*, and *keeps the deed*. He becomes indebted afterwards by judgments, bonds, and ſimple contracts. The deed of truſt is fraudulent, as againſt creditors by bond and judgment, who having *no notice of the ſettlement*, ſhall not come in in average only with the other creditors. 2 Vern. 510. Tarback v. Marbury.

(B a 2.) Take by a Deed. Who ſhall not, though named in the Premiſſes.

LEASE was made *to A. and B. his wife, & primogenito proli*, habendum to them, and the longer liver of them ſucceſſively during their lives; and then the huſband and wife had iſſue a *daughter born afterwards*. Per three juſtices the daughter had no eſtate, becauſe ſhe was not in eſſe at the time of the grant. Ow. 152. Stephens's caſe.

(B a 3.) Loſt Deeds, &c. In what Caſes Actions lie at Law, though the Deeds are loſt.

1. ACTION lies not for a deed *determined*, or for the *counterpart* of an indenture, *in which a warranty is contained*, without a *ſpecial grant*. Brownl. 222. Sutcliff v. Conſtable.

2. Where a *demiſe* is made of lands, rendring rent, though the leaſe be loſt or miſlaid, the landlord *may ſue for the rent, and declare on a demiſe in general*, without ſaying, it was a leaſe in writing; and ſo you may in all caſes, where it is not a thing that lies in grant, &c. Per Cur. 2 Vern. 98, 99.

[See Trial (B f. 6.) Loſt Deeds.]

(B a 4.) Where in Caſes of Deeds loſt Actions ſhall be brought on the Counterpart.

A. Covenants with B. to make an aſſurance of land before Mich. by indenture, A. dies, the covenant unperformed, and the original deed comes *into the hands of the executors of A.* B. brought a writ of *covenant on the counterpart*; and per Cur. it does not lie without the deed itſelf. Per Walmeſley, he may have an action of detinue to recover the deed. Noy. 53. Yelverton v. Cornwallis.——In caſe of a *mortgage loſt* it was decreed, that the counterpart

counterpart ſhould be allowed as an original, and admitted as ſuch at any trial, &c. Fin. R. 239. Briſcoe v. Earl of Denbeigh & al'.

(C a) Who ſhall take or be bound by the Deed. [52] One not named in the Premiſſes as a party.

1. A. *diſſeiſed B.* and then *A. infeoffed J. S.* by deed, thus, viz. *Know all men*, &c. *Quod ego* A. *per aſſenſum & conſenſum B. dedi* & conceſſi, & hac preſenti, &c. *unto J. S.* and that be done before any entry made by B. theſe words, (*per aſſenſum & conſenſum* of A.) ſhall not bind him, but that he may enter, notwithſtanding that it be true, that the feoffment was made with his aſſent and conſent; for when he is diſſeiſed, he hath but a right, which ſhall not depart from him, if not by extinguiſhment; and it ought to be at leaſt by deed, and made unto him, who at the leaſt hath the poſſeſſion of the freehold in the ſame land at the time, &c. And in this caſe the feoffee had not any poſſeſſion at the time of the feoffment, and the diſſeiſor cannot enter in the name of the diſſeiſee, and reveſt the poſſeſſion in the perſon of the diſſeiſee, for the diſſeiſor himſelf is in poſſeſſion, and he cannot enter upon himſelf, &c. So it cannot be, that the diſſeiſor doth make this feoffment, *as ſervant* to the diſſeiſee, for it is made in the name of the diſſeiſor, &c. Perk. S. 156.

2. *And* if a *ſtranger had entred in the name of the* diſſeiſee, and by his commandment had made a feoffment in the name of the diſſeiſee, & *per aſſenſum & conſenſum* of the diſſeiſee *by a deed*, containing in it a warrant of attorney to make livery of ſeiſin, by ſuch feoffment the diſſeiſee ſhall be bound. Perk. S. 157.

3. *If J. S. be infeoffed* to have and to *hold to J. S. and T. K.* and *livery* of ſeiſin is made *unto J. S.* according unto the deed, it is void unto T. K. Perk. S. 164. cites 12 E. 3. 77. 5 H. 4. 2.

4. *But if livery* of ſeiſin had been made *unto T. K.* according unto the deed, then he takes by the livery of ſeiſin, and not by the deed. Perk. S. 164.

5. If I *leaſe* land *to J. S.* habendum to him for twenty years, *remainder to J. K. in fee*, he ſhall take the fee-ſimple, and yet he is not named in the premiſſes. Arg. Pl. C. 158. in caſe of Throgmorton v. Tracy—160. S. P. arg'.

6. One granted to a baron and feme, being tenants for years in poſſeſſion, that they ſhould have the lands for their lives, and granted further by the ſame deed, that *after their deaths their children ſhould have the land for* 40 *years*. Per three juſtices, the children ſhall take *by way of remainder*, though there be no word of remainder in the deed; and as a remainder they may take it, though they are not parties to the deed. Cro. E. 10. Anonymus. ——— One may take an *executory eſtate*, or by way of remainder, that is not party to a deed. Cro. J. 563. Greenwood v. Tyler. S. C. cited per Brown J. Cart. 60.

7. *Leſſor deviſed to his leſſee for years* his land for the ſame term he had before, *paying the ſame rent* at the ſame days, and *under the ſame covenants* which were in the former leaſe. Adjudged it was not a condition, but only a *covenant*, or rather a truſt. 2 Show. 40. cites the caſe of Martindale v. Martin. Cro. E. 288. —— Godb. 99. pl. 114.——And. 197. Maunchel v. Doddington alias Michel v. Dunton. Adjudged that they were vain words.——Ow. 54. S. C. they are not either condition or covenant, cited per Popham. Poph. 8. as Michel's caſe.——

8. In *copyhold* grants a perſon may take by being named in the habendum only. Cro. E. 323. Downs v. Hopkins.

[53] 9. A demiſe was thus, ſc. This indenture made, &c. between A. of the one part, and *B. his wife, and their children lawfully begotten at the aſſignment of the ſaid B. of the other part.* B. and his wife had a child born at the time, and after had ſeveral other children. But per tot. Cur. The child then born, or thoſe born afterwards, took nothing. And per Ayliff Juſt. The child then born ſhould have taken, had it not been for the words (at the aſſignment) but by reaſon of thoſe words the ſaid child is excluded. 4 Le. 64. Trecarram v. Friendſhip.

But where it was *& eorum diutius viventi ſucceſſive* it gave no remainder. Hob. 313. Windſmore v. Hulbert.——Godb. 51. S. C. argued.—S. C cited Cro. Jac. 564.

10. A. made a *leaſe to B.* by deed poll, *habend' to B. and his wife and daughter ſucceſſive, ſicut ſcribuntur & nominantur in ordine.* B. and his wife died; per Cur. the daughter has a good eſtate *in remainder*, and theſe words make the grant certain enough. 4 Le. 246. Grubham's caſe. Cro. J. 563. S. C. Greenwood v. Tyler. (a)

(a) But there it is reported thus: the deed was made between A. of the one part, and B. of the other, by which A. *demiſed the land to B. and his wife and daughter, habend. to them, ut ſupradictum eſt, & eorum diutius viventi ſucceſſive, for term of their lives*; ſo that the firſt part ſhews that all ſhall take, and not the habendum only; and this is much inforced by the word (ut ſupradictum eſt) and the (ſucceſſive) is before the limitation for all their lives, and it was adjudged accordingly; but upon error in the Exchequer Chamber, the juſtices doubting, they moved the parties to compound, who did ſo.

11. Where A. and B. are named only in the premiſſes of the indenture as parties of the one part, and C. of the other part though J. S. is *afterwards named* in the deed, it is a void deed as to him, and no *covenant* made to him, or by him, is good; for he is a ſtranger to it, and his ſealing and delivery is not material. Per Coke arg. and he agreed the caſe put on the other ſide. 4 E. 2. Where a bond was made by J. S. and *ad majorem rei ſecuritatem inveni J. D. fidejuſſorem*, and J. D. put his ſeal to it, this was held his deed, for it is not mentioned whoſe deed it is, and ſo it is the deed of both which are named and put their ſeals, &c. Cro. E. 56. Eaſt Skidmore, &c. v. Vaud Stephens.—And Wray ſaid, they conceived the matter in law accordingly in the principal caſe, which was of an indenture between parties, and a releaſe made by one not party, but who was covenanted with, and who covenanted in the deed, and executed the deed, was held not good.

Poph. 182. cites 2 E. 4. 20. Br. Faits, pl. 42. 39 E. 3. 9. —Perk. S. 158. ſays it has been ſo held, yet adds a quære.

12. A. bargains and ſells land by indenture inrolled to B. and there was a proviſo, viz. *proviſo ſemper*, and it is covenanted, granted, &c. *that J. S.* (who was *a ſtranger*) *ſhall dig in the land for*

for mines. Adjudged, that this proviſo doth not make a condition or covenant, but a grant. Mo. 174. Lord Huntington v. Lord Mountjoy.

13. *Articles* were made *between A. of the one part, and B.* (not ſaying of the other part) by which *A. lets B. a houſe at* 10 *l. a year, payable quarterly; and whereas the ſaid B. hath agreed and taken the houſe aforeſaid, paying the rent quarterly, &c. and leaving it in good repair, and that the ſaid rent may be ſatisfied as aforeſaid, be it known unto all men, that I J. K. do covenant for myſelf, &c. on the behalf of the ſaid B. that the ſaid B. ſhall pay the rent, and perform the other covenants,* &c. and this deed was ſealed by B. and J. K. In an action of covenant brought on this deed by A. againſt J. K. the defendant upon oyer demurred generally; but after argument the court was clear in opinion, that the action lay upon this deed againſt the defendant. Carth. 76. Salter v. Kidgley.

14. He, that is no party to the deed, can neither *give or take* any thing by it, &c. except it be by way of *remainder.* Arg. Carth. 77. in caſe of Salter v. Kidgley.——cites 3 Cro. 56. 2 Inſt. 673. 2 Roll. 220. 2 Cro. 359. 1 Inſt. 352.——See 2 Lev. 74.

Co. Lit. 231. A leaſe was made by A. *to B. habend' to B. and M. his wife for their lives,* et eorum diutius viventi *ſucceſſive* uni poſt alterum *ſicut ſcribuntur & nominantur in ordine.* Adjudged a good remainder in M. Cro. J. 372. Wheadon v. Sugg.

15. One, that is not party to a deed *made between parties,* cannot *take* by the deed, unleſs by way of remainder. Per Levins Juſt. 3 Lev. 139. in caſe of Gilby v. Coply.——Hutt. 88. Windſmore v. Hobert.——Hob. 313. 314. Greenwoods's caſe.

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2 Inſt. 673. S. P. but if it be *without a (between) &c.* as omnibus Chriſti fidelibus, &c. though it be by deed indented, a bond, covenant or grant may be made to divers ſeveral perſons not parties. Trin. 29 Eliz. B. R. Scudamore v. Vandenſtene.

If *A. gives land, to have &c. to B. and his heirs,* this is good, though the feoffee is not named in the premiſſes; but this is only by conſtruction of law, ut res magis valeat, &c. Co. Lit. 7. S. 1.

16. A man cannot *take immediately,* where he is not party; but where do you find that a man cannot *give* without being a party? In a deed of feoffment a warrant of attorney to A. not a party, is good now, though formerly held to be otherwiſe. Per Holt Ch. J. Show. 59. in caſe of Salter v. Kidley.——Carth. 76. S. C.

17. Why cannot a man *oblige himſelf* by a deed, if there be expreſs words for it, and he ſeals it? ſuppoſe at the end of an indenture it be, *and be it known unto all men, that A. B. for himſelf covenants, &c.* and he ſeals it, why ſhould not this oblige him? Per Holt Ch. Juſt. Show. 59. in caſe of Salter v. Kidley.——Carth. 76. S. C.

A. made a leaſe to B. and B. covenanted to do ſeveral things; and it was contained in the deed, that the *ſaid B. found W. as his ſurety for performance of thoſe covenants;* and then is added, *for performing which covenants we bind ourſelves,* & utrunque noſtrum per ſe, &c. this is a good deed againſt W. and covenant was brought againſt him in the life of B. and well lies. Br. Faits, pl. 6. cites 40 E. 3. 5.

18. One

18. One that is *party* to a deed *cannot covenant with another that is no party*, but a meer ſtranger to it; *but* one that is *no party* to a deed *may* covenant *with another that is a party*, and thereby oblige himſelf by ſealing the deed. Per Holt Ch. Juſt. and judgment accordingly. Carth. 76. Salter v. Kidgly.

Covenant may be brought on a deed poll, but then the party muſt be named *in the deed*

19. In a *deed poll* there may be a *covenant* in behalf of a third perſon, but not in an indenture; therefore where there is a covenant between A. and B. that ſuch a ſum of *money ſhall be paid to C.* it is not good. Arg. 8 Mod. 116. in the caſe of Lowther v. Kelly. —cites Inſt. 47. a.

1. Salk. 197. Green v. Horn.—An indenture of *charterparty* not being between parties, by which one covenants *with a ſtranger* to the indenture *to pay money to another ſtranger*, both of whom are named in the indenture, is good; and an action of *debt* being brought thereupon by the ſtranger, and the count being by *teſtatum exiſtit*, was held good, though in debt and not in covenant, and though brought by him alone, to whom the money was covenanted to be paid. 2 Lev. 74. Cooker v. Child.——S. C. cited Lutw. 305. and reſolved accordingly in the caſe of Lucke v. Lucke.

20. Where a deed *runs in the firſt perſon*, ſigning and ſealing makes a man a party, though not named therein. 1 Salk. 214. Nurſe v. Frampton.——— 3 Lev. 140. in caſe of Gilby v. Copley.

Cro. J. 653. 21. A *ſervant* ſold his maſter's beaſts, and *took a bond in his own name* for the money, *but to the uſe of his maſter*; adjudged, that the maſter cannot bring the action, becauſe he was no party, and he could not releaſe it. Arg. 8 Mod. 116. in caſe of Lowther v. Kelly. ——— cites Lev. 235. Offly v. Ward. ——— 2 Lev. 74. Cooker v. Child. ——— 3 Lev. 138. Gilby. v. Copley.

[See (F) pl. 1.—Condition—Eſtate.]

[55] (C a 2.) Bound who, and by what. Perſons not named in a Deed.

THERE were two obligors, the *name of one* was omitted *in the bond*, but *both ſigned and executed*. He whoſe name was omitted, knowing nothing of the omiſſion, was applied to to give freſh ſecurity, which he agreed to; but after, upon diſcovery of the omiſſion, he refuſed, the other being run away; this is a proper matter to be relieved in equity. 3 Ch. R. 99. Croſby v. Middleton.—Per Cowper, Ch. his hand and ſeal is ſufficient evidence, and the omiſſion is a ſufficient accident for equity to relieve againſt. 101.—— But where a blank was left for the *chriſtian name* in the bond, and the ſurname was inſerted, and after the obligor ſubſcribed both chriſtian and ſurname, it was adjudged ſufficient. Cro. J. 261. Dobſon v. Keyes.

(C a. 3) Ad-

(C a. 3) Advantaged or bound. One not named in the Premiſſes.

1. IF *A. gives lands to have* and to hold *to B. and his heirs*, this is good, though the feoffee is not named in the premiſſes. And yet no well adviſed man will truſt to ſuch deeds, which the law by conſtruction makes good, ut res magis valeat; but when form and ſubſtance concur, then is the deed fair, and abſolutely good. Co. Lit. 7. a.

2. The plaintiff deſired to be relieved for a leaſe made by the defendant to him for years, which the defendant endeavoured to impeach, becauſe *in the premiſſes of the leaſe there is no leſſee named*, but only in the habendum; and the cauſe being referred to the two Lord Chief Juſtices and the Lord Chief Baron, they certified their opinion in law, that the leaſe was good in law, notwithſtanding the leſſee was not named in the premiſſes of the leaſe, but in the habendum only; and therefore it was decreed accordingly, that the plaintiff ſhould hold the ſaid leaſe. Cary's Rep. 122, 123. cites 21 & 22 Eliz. Butler v. Dodton.

If a man grants land by deed, *naming no perſon in the premiſſes, habendum to B.* it is not a good grant, becauſe he was not named in the premiſſes, the which is to deſign the perſon and the thing, and the habendum to limit the eſtate. 2 Roll. 67. Grant (K a) pl. 13. cites M. 37 Eliz. B. R. per two Juſtices. Contra Co. Lit. 7.

[See (C a) per tot.]

(D a) Who may take or be bound by it. One not ſigning it.

1. IN the queen's *patent* there was a clauſe for *repairing* and leaving in repair. Reſolved, that though the leſſee only takes by the patent, and it is not made by him, yet this is as a *covenant* on the leſſee's part to bind him and his aſſigns; for when he takes by the patent, he conſents to all therein, and the words in that clauſe are as ſpoken by him, and it is a covenant that runs with the land. Cro. J. 240. Lord Ewre v. Strickland.——Arg. S. C. cited, Lane 78. in caſe of Sawyer v. Eaſt.

S. C. cited, and S. P. reſolved. Cro. J. 522. in caſe of Brett v. Cumberland.

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2. If there be *two leſſees*, and *one only ſeals the counterpart*, yet the other ſhall be bound by the *covenants* contained in it. Arg. 2 Brownl. 71. in caſe of Portington v. Rogers.——So of *feoffees* where he that did not ſeal entred and agreed to the eſtate conveyed. Arg. 2 Roll. R. 63. cites 38 E. 3. 8. a.——S. C. cited, D. 13. b.——Jo. 309. S. C. cited, per Barkley Juſt.——Arg. Lane 78. cites 38 E. 3. 8. that a man, that takes benefit by a leaſe which he never ſigned, ſhall be bound by a nomine pœnæ contained in it.

Arg. 3 Buſſ. 163.

3. If

3. If *leſſor ſeals, and not the leſſee*, it is as good againſt him, as if both had ſealed, in the caſe of an indenture, for an indenture is the mutual deed of both. Fin. Law, 8vo, 109.

4. A *feme covert* is bound by the *covenant* by the *acceptance* of the eſtate. Per Barkley J. Jo. 309. cites 3 H. 6. 4. 26. b. 43 & 45 E. 3.

5. An eſtate for life was made by indenture, with *remainder over upon condition*. The tenant for life ſeals, and dies. The remainder man enters by force of the remainder, he is bound to perform the conditions, becauſe he takes by the deed. Arg. 3 Bulſ. 163. cites 59 E. 3. 22.

6. A *promiſſory note to pay* 100 *l. for ſo much South-Sea ſtock* obliges the perſon to transfer the ſtock, by his *accepting the note*. Gibb. 2. Anonymus.

[See (F) pl. 2. (H 2.)]

(D a 2.) Not Party or Privy, &c. In what Caſes an Agreement to a Remainder, Leaſe, &c. ſhall make the Perſon ſo agreeing liable to all Conditions annexed to ſuch Eſtate, though not Party or Privy to ſuch Leaſe, &c.

1. A *Leaſe* is made by indenture to *A. and B.* and *A. ſeals*; *B. does not, but enters* and occupies. B. is liable to the *rent*, per Thorpe. And Finch. ſaid, that this is a good leaſe; for his agreement charges him. But he ſhall not be charged by a *condition in groſs* in the deed, which is no parcel of the leaſe, but a thing by itſelf, and *collateral*, unleſs he ſeals the leaſe. Br. Dette, pl. 80. 38 E. 3. 8.

Br. Faits, pl. 25. S. C.

2. But the principal caſe was, an action of *debt* was brought upon an indenture of leaſe to A. and B. with a *penalty of* 20 *l. for not performing conditions*; and A. ſealed, but B. did not, but agreed and entred as above, and was ſtill living, and yet the writ being brought againſt A. only, was abated. Br. Dette, pl. 80. cites 38 E. 3. 8. but ſays, quod mirum, for he thinks this is not like a penalty for non-payment of rent annually, for *it is a reſervation*. Ibid.

[See Condition.]

(D. a. 3) Bound or advantaged Who; By the Words of one Party only.

See (G. a)

1. IF a man makes a *leaſe* of land *by indenture reſerving rent*, and in the deed are no words of the leſſee, but the *leſſee ſeals the deed*, and enters and pays the rent, and after refuſes, yet he is compellable; for being by indenture it is the deed of both parties. Br. Eſtoppel, pl. 147. cites 45 Aſſ. 14.

2. One ſhall be bound *by putting his ſeal* to a deed indented *and delivery* of the ſame, though the words in the deed are ſpoken only by another man; and therefore if a man makes a *leaſe to me of my own land by deed indented, for years*, without ſaying any more, by this deed I ſhall be concluded, and yet there are no words of mine in the deed. Perk. S. 159. cites 14 H. 6. 22.

3. *And if* there be father and ſon, and the *father is ſeiſed* of land in fee, and a *ſtranger leaſes the ſame to the father by deed indented for years*, and the *father dies*, the leſſee by this deed ſhall conclude the heir of the leſſor to ſay that his father died ſeiſed in his demeſne as of fee, and yet there are no words of the father in the deed, &c. Perk. S. 159. cites 43. E. 3. 17.

The year book does not ſeem to accord with this; for that is of a leaſe made *by the father to a ſtranger for life of the ſtranger*, by which the father *bound himſelf and his heirs to warranty*; but it ſeems not clearly reported, nor does this point of Perkins appear clear in Fitzh. Abr. Eſtoppel, pl. 9. And in the year book it is not ſettled whether the father at the time of the leaſe was ſeiſed in fee, or had any thing in the land, or whether the grandfather was not then tenant in tail and ſurvived the father.

4. An *indenture* was between lord and tenant, *reciting*, that the *tenant held* of the lord *by homage, fealty, and* 10 s. *rent. the lord confirms* his eſtate, *ſalvo antiquo dominico, & ſervitio*; and it was held, that though it was indented, and both ſealed, yet becauſe it is a recital, and all are the words of the lord only, therefore it ſhall not *eſtop* the tenant to plead hors de ſon fee. Br. Faits, pl. 4. cites 35 H. 6. 34.

(E. a) Where one Part being void ſhall avoid the Whole

See (S) (U) pl. 7. (I)

1. IN debt upon an *obligation of* 20 l. the defendant *pleaded not lettered, and that it was read to him as* 20 s. *which he had paid*, and ſhewed an acquittance thereof, *and as to the reſidue not his deed*, and the plea was held good. Br. Non eſt factum, pl. 8. cites 9 H. 5. 15.

S. C. cited 11 Rep. 27. b. by the reporter in his obſervations upon Picot's caſe, and ſays that this caſe being of one intire ſum, proves without queſtion, that if there are *two abſolute and diſtinct clauſes* in one deed, and the one is read to the party, and the other not, that the deed is good for the clauſe which was read, and void ab initio for the reſidue; and that though the deed conſiſting of *one intire ſum was void for the whole*, as is agreed in 14 H. 8. and 30 E.

30 E. 3. 31. b. yet it was wisely done by the defendant's counsel in 9 H. 5. 15. a. to plead the truth of the case, and not to leave the matter upon any question in law, when the truth of the matter will oust all questions.

2. *Some of a convent sealed* a deed *by dures*, this made the whole deed void, for the deed is intire; and if it be void in part, it is void in all, though the *greater number did agree*. Br. Faits, pl. 52. 38 H. 6. 27.

S. C. cited per Coke 11 Rep 27. b in Pigot's case.

3. If *three obligations* are *written in one parchment, and one is read to him and no more*, it is his deed as to this part and not for the rest. Br. Non est factum, pl. 11. cites 14 H. 8. 25. per Pollard, to which Brudnell agreed.

4. *So* where an *obligation* is *in two several* 10 l.'s and it is *read for one* 10 l. *only* it is his deed for the one 10 *l.* and not for the other 10 *l.* and a deed razed in part where more is writ to it, or is interlined after the making, this shall avoid the deed, per Pollard to which Brudnell agreed. Br. Non est factum, pl. 11. cites 14 H. 8. 25.

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5. If *two join or are joined* in a deed, *whereof one has no capacity*, (as a monk or feme covert) yet it is good either to charge or benefit the person able, though void as to the other. Br. Faits, pl. 37. cites 14 H. 8. 25. per Brudenell Ch. J.

6. A *recognizance* was made *to Sir Nich. Bacon Kt. Lord Keeper* of the Great Seal, *and to 2 others*, and this *was taken* and acknowledged *before the said Sir Nich. Bacon Kt. Keeper of the Great Seal*; upon demanding the opinion of the justices if this was good or not, they thought that as to Sir Nicholas Bacon it was void, but as to the other 2 it was good enough. D. 220. b. pl. 14. Pasch. 5 Eliz. Sir Nicholas Bacon's case.

7. A deed may be good in part, and void in part; *as* if a deed be *read to a man unlearned*, and *part* is *interlined*, it is good for so much as was read, and void for the rest, per Hutton J. Ley 79. in case of the Bishop of Chichester v. Freeland. —— But *rasure* avoids the whole deed. Mo. 35. pl. 116. Trin. 4 Eliz. Anon.

It is good in part and void for the rest. Br. Faits, pl. 37. cites 14 H. 8. 25. per Fitzherbert.

8. A. is *bound* to infeoff J. S. of one manor, and *to disseise J. N.* of another manor. It was said arguendo, that the bond is void in the whole, and cited 14 H. 8. 25. Godb. 213. in the case of Norton v. Symms.

Hob. 14.

9. Where there are *legal covenants* and covenants *against law* in the same deed, the last are void, and the first stand good. 11 Rep. 27. b. per Coke in Pigot's case. —— Cites 14 H. 8. 25, 26. &c.

10. As to a deed's being good in part, and void in part, Coke thought there was a difference when a deed *is void ab initio*, and when it becomes void *by misfeazance ex post facto*. 11 Rep. 27. in Pigot's case.

11. *Also* there is a difference *when the deed, which is void in part ab initio, consists upon the whole, and when upon diverse several clauses.* Per Coke, ut supra.

12. *Also*

12. *Alſo* there is a diverſity when the *ſeveral clauſes are abſolute and diſtinct*, and *when though ſeveral, yet one has dependency on the other*, ut ſupra.

13. *A bond void in part by a ſtatute law* is void in toto; but at *common law* it is good as to the legal part, and void as to the illegal. Arguendo 2 Jo. 90, 91. cites 3 Rep. 82, 83. Twine's caſe. The ſame difference was taken and reſolved. Hob. 14. Trin. 12 Jac. C. B. in caſe of Norton v. Simmes.——*As* upon the ſtatute of 23 H. 6. if a *ſheriff takes a bond* for a point againſt that law, and for a due debt alſo, the whole bond is void. For the letter of the ſtatute is ſo, and a ſtatute is a ſtrict law; but the common law doth divide according to common reaſon, and having made that void which is againſt law, lets the reſt ſtand.

14. Where the *grant* is void, the *covenants in it* are alſo void, and ſo is a *bond of performance* of covenants. Lev. 45. Mich. 13 Car. 2. B. R. (ſays he heard it was ſo reſolved.) ‡ Caponhurſt v. Caponhurſt. Yelv. 18. Mich. 44 & 45 Eliz. B. R. Soprani v. Skurro.

S. P.——Owen 136. held, that the covenant ſhall bind, though the deed is void. Paſch. 10. Jac. Waller v. Dean and Chapter of Norwich.——* 1 Salk. 199. cites the caſe of Caponhurſt v. Caponhurſt, and diſtinguiſhes between *dependent* and *independent covenants*, that the firſt are void, but not the other. Mich. 10 W. 3. B. R. Northcott v. Underhill.——* S. C. & P. 2 Brownl. 161, 164, 165. Paſch. 10 Jac. C. B. in caſe of Waters v. the Biſhop of Norwich.——‡ Raym. 27. S. C. adjudged.

(E. a. 2) Deeds voidable, by whom and when. [59]

1. *THE* grants of ſome perſons are voidable *by themſelves and their heirs, and* by *thoſe who ſhall have their eſtates for ever.* And the grants of ſome perſons are voidable *by the grantors only during certain time*, and ſome are voidable *after the death of the grantor by the heirs of the grantors*, and not by the grantors, or by any other perſon during the life of the grantors, &c. Perk. 2. S. 2. cites Bract. l. 2. 5.

(F. a) Void or voidable only, what Deeds are.

See Enfant (B) (C) (D) —Void and voidable.

1. A *bond, releaſe, or feoffment*, and the like, *made by dureſs*, is not void, and therefore the party cannot ſay *non eſt factum*, nor ſhall have aſſiſe, but may enter and avoid them by plea; for ſuch deeds are not void, but voidable. Br. Faits, pl. 68. cites 2 E. 4. 20. See (F. a. 2) pl. 1.—So if the feoffor makes a *letter of attorney to deliver ſeiſin*, and all is done by dureſs of impriſonment, and livery of ſeiſin is made by force thereof; this is a diſſeiſin to the donor; but that does not prove that the deed of feoffment and the letter of attorney are void, for then the donor might *traverſe* them, which he cannot do, &c. And impriſonment ought to be made for the making of a deed, &c. Perk. 8, 9. S. 17. cites p. 41 E. 3. 9.

2. *So* of a deed *by an infant*, though *otherwiſe of a* * *feme covert.* See (N) pl. 2, 5, 6. * For a bond made by feme covert is merely void, even though ſhe has a ſeparate eſtate, but yet her executors or her huſband, if he poſſeſſes himſelf, after her death, of any of her effects, are liable to pay the money borrowed; her ſeparate eſtate being all a truſt eſtate for payment of debts. Per the Maſter of the Rolls. Trin. 1723. 2 Wms's Rep. 144. Norton v. Turvil.

3. It is a common known rule, that *all* ſuch gifts, grants or *deeds* made *by an infant*, which do not *take effect by delivery of his hand*, are void, but ſuch gifts, grants or deeds made by an infant, by matter in deed or in writing, which take effect by delivery of his own hand, are voidable by himſelf and his heirs, and by thoſe which ſhall have his eſtate. Perk. 6. S. 12.

4. An *uſurious bond* is not void, but voidable by plea. Per Warburton J. 2 Brownl. 163. in the caſe of Walters alias Waller v. the Dean and Chapter of Norwich.

See Acceptance.—Confirmation.—Eſtate.—Voluntary Conveyances.

(F. a. 2) Voidable Deeds made Good by ſome after Act.

1. IN debt, the Prior of D. avoided an *obligation by dureſs*, made by the Prior his predeceſſor to the convent; and the plaintiff eſtopped him by *defeaſance made after* he was at large upon the ſame obligation; and the beſt opinion was, that it is a good eſtoppel. And ſo it appears, that a deed made by dureſs is not void, but voidable. Br. Faits, pl. 87. cites 35 H. 6. 17.

2. If an *infant infeoffs* or makes a leaſe to B. and delivers it with his own hand, this is not void but voidable only; and if, *when of age, he ſays, God give you joy* of it, this is an affirmance. Per Mead J. 4 Le. 4. pl. 15. Anon.

Kelw. 18. b. per Wood J. 4 Le. 15. per Gawdy J.

3. *Feoffment by huſband and wife of the wife's land*, rendring rent; the huſband dies, the *wife accepts the rent*, this ſhall bind her. Arg. 2 Brownl. 141. in caſe of Portington v. Rogers.——So that her deed is not void. Cro. El. 769. Trin. 42 Eliz. B. R. Shipwith v. Steed.

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(G. a) Deed-Poll, and what is conſidered as ſuch; the Effect thereof, and Difference between it and an Indenture.

1. A deed-poll is that which *is* plain without any indenting; ſo called, becauſe it is cut even or polled; every deed that is pleaded ſhall be *intended* to be a *deed-poll, unleſs* it be *alledged to be indented*. Co. Lit. 229.

2. A deed-poll *is* that which is *only* the deed *of the grantor*.——An *indenture is* that which is the *mutual* deed of both. Fin. Law, 8vo. 109.

3. Heretofore a deed indented was called *charta chirographata*, or charta communis, becauſe each party had a part. And a deed-poll was called *charta de una parte*. Co. Lit. 143. b.

4. Though a deed of *defeaſance of a ſtatute* be *indented*, yet it is but in the nature of a deed-poll, and the words of the defeaſance are

are the act and words of the conuſee only; and if the conuſor and conuſee deliver a ſeveral deed to one another, and there be a variance in any point material, it ſhall be taken according to the deed delivered by the conuſee. 2 And. 58. Hollingworth v. Wheeler.

5. An *indenture not being between parties* is in nature of a deed-poll, ſo as one may covenant with a ſtranger to the indenture. 2 Lev. 74. Hill. 24 and 25 Car. 2. B. R. Cooker v. Child.

S. C. cited Lutw. 305. and reſolved accordingly. Trin. 1 Jac 2. Lucke v. Lucke. —— S. C. cited 3 Lev. 139. in the caſe of Gilby v. Copley. ——An indenture by the words *hæc indentura teſtatur*, is all one with a deed in the firſt perſon. 3 Keb. 115. Coker v Child.

6. A deed of covenants, being only a deed-poll, is, for that reaſon, the *deed of the defendant only*, and therefore the covenants *cannot be mutual*. 8 Mod. 41. Paſch. 7 Geo. 1722. Lock v. Wright.

7. A contract by deed-poll cannot make that to *paſs*, which another then enjoys, but is void. Arg. Pl. C. 433. b. in the caſe of Smith v. Stapleton.

8. *A. by deed-poll covenants with B.* to ſell land to B. for 200 *l.* *and B. by the ſame deed covenants with A.* to pay the 200 *l.* —— B. firſt delivered the deed to A. as his deed, and then A. ſealed and delivered it to B. as his deed; adjudged, that this was the deed both of A. and B. and that he, that has poſſeſſion of it, may have action of covenant againſt the other, notwithſtanding the firſt or ſecond delivery of it: for it is ſufficient to bind both. 2 And. 30. Mich. 37 and 38 Eliz. Croſs v. Powell.

S. P. 2 And. 41. Trin. 38 Eliz. Anon. —— Cro E. 482. Trin. 38 Eliz. S. C.

9. Upon a recordare, the defendant avowed for damage-feaſant, and the plaintiff made title at common law, and the defendant ſhewed a deed indented, running thus, *noverint me J. abbatem de E. dediſſe to the plaintiff* tale tenementum, &c. *pro quo idem the plaintiff renunciavit totam communiam ſuam* quam habuit in B. &c. and it was held there, that notwithſtanding *part of the words are in the firſt perſon, and part in the third perſon*, and though the words renunciavit; &c. are all the words of the abbot, and not the words of the plaintiff who releaſed; yet becauſe it is by deed indented, and both have ſealed and delivered it, it is therefore good; but it was held, that becauſe it is *renunciavit, and does not ſay to whom*, &c. (for it ought to be, renunciavit præfato abbati), &c. that therefore the deed is not good. Per Babbington, & per Cur. Br. Faits, pl. 1. cites 9 H. 6. 35.

Perk. S. 160. ſays, that though it is ſaid by ſome, that if in a deed indented between two, both ſpeak by words, within the deed, but the words of one are in the firſt perſon, and the words of the other in the third perſon, that all the words in the deed ſhall be ſaid to be ſpoken by him who ſpoke in the firſt perſon, yet ſuch ſaying is nothing to the purpoſe.

10. Though * the words of an indenture are the *words of both parties*, yet is otherwiſe in a deed-poll; for there the leſſee is *not eſtopped* † to plead, that the leſſor nihil habuit in tenementis, &c. Arg. 8 Mod. 312. in the caſe of Shipwith v. Green. —— Gawdy Serjeant agreed, that in deeds-poll the words ſhould be *taken ſtrong againſt the grantor*, but otherwiſe in indentures; for there the words ſhall be taken according to the intent of the parties, being the

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* Le. 246. Trin. 32 Eliz. B. R. Thomas v. Ward. —— Roll. Rep. 169 arguendo cites D. 152.

Arg. Roll. Rep. 80.—Ow. 152. cites Whitchcot v. Fox.

the words of both. Le. 318. in the case of Scovell or Scobell v. Clavel or Cavel——But this must be intended of *material* words, and not of every minute and *descriptive word* and circumstance. Per Cur. 8 Mod. 313. Skipwith v. Green.

——Cro. J. 398. Pasch 14. Jac. B. R. Whitchcot v. Fox.——Co. Lit. 47. b.——Carth. 248. Hilman v. Hore. See Estoppel. (N)

10 Mod. 47, 48. Lord Say and Seal's case. The words of an indenture put *in the generality*, shall bind both parties, and be taken to be the agreement of each. Per Gawdy, Cro. El. 567. in the case of Russel v. Gulwell.

11. If there be a *variance between the indenture* to the conusor of a statute and that to the conusee, though that of the conusee to the conusor is but in nature of a deed-poll, &c. yet, so far as the variance is, it is utterly void. 2 And. 58. Hollingworth v. Wheeler.

(H a) *Counterparts* of Deeds, and where they vary from the Originals.

1. IF there happens to be any variance *between the indenture and counterpart*, it shall be taken as the deed of the grantor is; and the other shall be intended only the misprision of the writer. Fin. Law, 8vo. 109.

2. *So* of a *defeasance of a statute by deed-poll*, if there is one delivered by the cognizee to the cognizor, and another by the cognizor to the cognizee, if they differ in a point material, it shall be taken according to the deed of the cognizee delivered to the cognizor; and though these deeds were indented, yet as to this purpose of a defeasance it is but in nature of a deed-poll, and so far as the variance is, it is utterly void. 2 And. 58. Hollingworth v. Wheeler.

3. A. infeoffed B. of a manor, rendring for certain closes, parcel of the manor, 60 *l. rent* per ann. A. *assigns the rent to C.* by bargain and sale inrolled; the counterpart sealed by B. was delivered to C. who lost it, and A. found it and *tore it*. Upon an action brought by C. against A. for tearing the counterpart, it was held by all but the Chief Just. that this being only a counterpart, and *not being particularly granted*, it does not pass to the plaintiff as incident; but the Ch. Just. held, that this counterpart waits upon the interest, and is good *evidence* for it. Yelv. 223. Sutcliff v. Constable.

4. Though a *condition may be pleaded* by indenture sealed with the seal of the other party; yet a *conveyance cannot* be pleaded by deed, unless sealed with the seal of the party agent, scil. the feoffor grantor, lessor, &c. 3 Le. 95. Gurney v. Saer.

2 Vern. 380. S. C.

5. A counterpart of a settlement in tail was admitted as sufficient *evidence*, that there was such a settlement, and a conveyance was decreed accordingly. Ch. Prec. 116. Eyton v. Eyton.

(I a) Du-

(I a) Duplicates.

1. *TWO patentees of the ſame office* for their lives; one has the real patent, the other only a duplicate. The principal patent was wrote per warrantiam de privato ſigillo auctoritate parliamenti, and a little under the ſeal of the other was wrote the word (duplicate); he, that had the principal patent, ſurrendered it in the abſence of the other patentee beyond-ſea, and took a new patent to himſelf and another, and the firſt patent was cancelled; it was the opinion of ſeveral, that when the *principal patent was cancelled*, the force of the duplicate was gone in law; becauſe no title can be made by this patent, becauſe it was granted and ſealed by the Chancellor at his pleaſure, and without any warrant from the king to do it. D. 179. b. Kemp v. Hales.

2. If a fine is levied by huſband or wife of lands which he has in right of his wife, and there is a deed made at the ſame time to declare the uſes thereof, and afterwards this *deed is loſt*, and then *another* is *made to the ſame effect and dated as the firſt*, that deed is ſufficient to declare the uſes of the fine. Per Holt Ch. Juſt. Holt's Rep. 735. in the caſe of Buſhell v. Burland.

3. Where a perſon has a large eſtate, and *ſells the biggeſt part*, and is conſtrained to *deliver all the deeds* to the purchaſor, by which he has none left to make out the title to the reſidue by; upon the vendor's moving the court, that the parties to the conveyance to him might be *ordered to execute a duplicate of the conveyance* to be kept by him, Lord Keeper Wright ſaid he looked upon it to be *within the covenant for further aſſurance*, and ordered that a duplicate ſhould be executed, but that it ſhould be *indorſed* upon it, that this was only a duplicate. Abr. Equ. Caſ. 166. Mich. 1700. Napper v. Allington. —— But the matter being moved again by the other ſide, the order was diſcharged; for that the decree being once executed, the court had no more to do in it. Ibid.

(K a) In what Caſes they ſhall be brought into or remain in Court.

1. UPON *non eſt factum* found againſt the deed, it may be kept in court; but otherwiſe on a *collateral iſſue*. 1 Salk. 215. Fitch v. Wells.

2. Per Cur. If you had (a) *denied* the deed, according to Weymark's caſe, it is to remain in court *till the cauſe be tried*; *ſecus* it ſhall only remain *for the term in which* it is brought in; but the moſt it goes is, that *upon imparlance* granted, it ſhall remain in court *till* the *defendant*

(a) S. P. and per Hanke, if the party wants it to plead it in another action

he ought to shew it, and he may have a *writ to the justices* to remove the deed to shew it. Br. F. N. B.

defendant pleads; as in an action upon a bond, if it be by *bill*, the defendant *after imparlance* may crave oyer, and therefore there it must remain in court, *till* the *party is put to plead*, that he may in that case have oyer of it. 6 Mod. 233. in the case of Selby v. Green.——

Br. Faits, pl. 20. cites 12 H. 4. 8.——A certiorari was granted. Br. Faits, pl. 85. cites

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Mo. 807. S. P. in the case of Cole v. Moor.

3. Where deeds and muniments do *concern as well* the defence of the *tenant for life*'s title, who also possesseth the deeds, *as the* right of another in *reversion or remainder*, it is usual to have them brought into this court for the avoiding all perils, and the indifferent custody of them. Cary's Rep. 26, 27. cites 40 Eliz. Dixies v. Hillary.

——But, at law, if the tenant for life has a deed whereby the reversion and inheritance is in another, he may detain it against the reversioner. Per Finch C. Hill. 32 & 33 Car. 2. 2 Chan. Cases 42. Earl of Banbury v. Briscoe.

Fin. R. 161. Nurse v. Yarworth. —301. Mason v. Goodburn. Two *coheirs*, one

4. It was ordered that a settlement which *concerned very much the estates of two persons* should be brought into court for its safest custody, and both parties have the use of it as they have occasion; and both may if they please have copies attested. Hill. 32 & 33 Car. 2. 2 Chan. Cases 42. Earl of Banbury v. Briscoe.

claimed the whole under a will, the other insisted on an *intail* not docked, and on a bill brought by him it was ordered, that the deeds be brought into court for the plaintiff to have the liberty of inspecting, though the will is not set aside. 9 Mod. 99. Foire v. Sidenham.——

5. If a *deed belongs to two*, and *he, who has the deed, dies*, the other shall have a subpœna to deliver the deed to him for maintenance of his title, per Pigot. Quod non negatur. Bro. Conscience, pl. 3. cites 9 E. 4. 41.

6. A. on the marriage of his son conveys lands to the use of *himself for life*, then to *his son for life*, then to the *issue of his son in tail*, and for default of such issue, then *to his brother and his heirs*; the son and wife died without issue, living A. who got the settlement, and cut it in pieces; but on a bill of discovery brought by the brother, the court inforced the bringing the counterpart into court by A. though it was objected, that the remainder to the brother was meerly voluntary; and so A. was prevented from selling the estate. Trin. 1691. Abr. Equ. Cases 168. Brookbank v. Brookbank.

Every *remainder-man* has a right to come into this court for aid, to compel persons to bring in the deeds and evidences relating to the estate. Per Cur. Hill. 11 Geo. 9 Mod. 132. per Cur. in Canc. in the case of Reeves v. Reeves.

7. A *subpœna ducens tecum* was awarded against the defendant to bring in certain deeds, and shew cause why they should not be delivered to the plaintiff; the defendant shewed, that the *mortgage was upon condition for payment of* 40*l.* at a day, and *before the day the mortgagor sold the same to the plaintiff*, and delivered the estate *by livery and seisin*, whereby the condition was extinct, and yet the *defendant offered to give* 100*l.* It was ordered that the deeds should be delivered to the usher of the court, but not to the plaintiff without special order. Cary's Rep. 74, 75. cites 18 & 19 Eliz. Witford v. Denny.

8. *Administrator*

8. *Adminiſtrator durante minori ætate* of one *co-heir* who was executor was decreed at the ſuit of the other co-heir, to bring the writings of the real eſtate into court, that the plaintiff may have copies of them, and try her title at law. Mich. 26 Car. 2. Fin. R. 136. Maplet v. Pocock.

9. A *forged* bond or warrant of attorney ſhould be *lodged in court*. Cumb. 339. The King v. Lewis.—It cannot be torn or defaced by law, but muſt be kept, that the King may proceed upon it againſt the criminal. Vern. 66. Frankland v. Hampden.

(L a.) *Detinue* of Deeds. Action. Who ſhall have it. [64]

IN detinue of a bag of *charters*, plaintiff counts of a *bailment by his father to re-bail him or his heirs*, and counts ſpecially of a charter by which A. infeoffed one B. and though he *makes no title to the land* in the charter, yet he ſhall have a delivery, and the count was awarded good. Br. Chartres de terre, pl. 31. cites 19 H. 6. 41.

(L a 2.) Pleadings in Detinue of Deeds.

1. IN detinue of *charters* the *count* ought to *mention the land* which the charters concern, and the *value* of the land; for the plaintiff in this action recovers the charters, and if they are *deſtroyed*, the value of the land in damages. Jenk. 21. pl. 39. Br. Chartres de terre, pl. 7. cites 9 H. 6. 60.

But in *treſpaſs* for taking and detaining, it is good, without mentioning the land, eſpecially after a verdict, for in treſpaſs, damages only are recoverable, and not the charters. Jenk. 20. pl. 39.——For the taking contra pacem, Br. Chartres de terre, pl. 26. cites 21 E. 3. 28.

2. Where the count is of a *box of charters ſealed*, there is no need to mention the matter contained in the charters. Per Brown Clerk. Quod non negatur. Br. Chartres de terre, pl. 4. cites 9 H. 6. 18. Otherwiſe, if not ſealed, he muſt count of a ſpecial charter

Ibid. pl. 37. cites 39 E. 3. 7, 8.

3. If A. has *deeds to which he has no title, and loſes them*, and B. finds them, A. ſhall not have detinue without *requeſt*; but otherwiſe of him who *bails* goods or deeds. Br. Chartres de terre, pl. 9. cites 33 H. 6. 26.

4. Where the *heir brings detinue* of charters, he ought to count upon a *requeſt poſt mortem anteceſſoris*. Br. Charters of Land, pl. 10. cites 33 H. 6. 29, 30. per Priſot.

5. Where plaintiff counts of a cheſt, bag or *box ſealed*, he *ſhall not ſhew what charters*; for if they are open, he may *demand the charters only, and not the box*, for the box belongs to the executors, and

and this will not go to the count for the box only, but all the count ſhall abate, per Thorpe. And Finch. ſaid, that he might have counted of a box incloſed, and that it is *not traverſable if incloſed or not.* Nota, Br. Chartres de terre, pl. 13. cites 41 E. 3. 2.

6. In detinue of a *cheſt of charters*, it is no plea to *ſay that it was a hamper*, for it is not *traverſable*; but only if he detains the charters, or not. Br. Chartres de terre, pl. 15. cites 44 E. 3. 1. per Thorpe.

7. Detinue of *charters by which A. infeoffed his anceſtor* of Black-acre, &c. and *counts of his own bailment*, and found for the plaintiff to the damage of 40s. And if the deed cannot be found, 40*s. for the detinue, and* 100*l. for the deed.* It was moved in arreſt of judgment, becauſe he *made no privity to the anceſtor as heir*; yet becauſe he counted of his own bailment, it was awarded, that he ſhall recover the deed, if it can be found, and 40s. damages; and if the deed cannot be found, then 100l. for the deed, and 40s. damages. Br. Chartres de terre, pl. 28. cites 7 H. 6. 31.

8. Where one demands charters *as heir to the land*, he ſhall *ſhew the certainty of the land, and where it lies*; but otherwiſe
[65] where he demands *by privity of bailment of his father to rebail to him or his heirs*, and the father dies, and he demands by this bailment, there he may count generally of land in A. and *alibi* in the county of M. but otherwiſe where he demands as heir. Br. Chartres de terre, pl. 30. cites 19 H. 6. 10.

9. In detinue, plaintiff counts of a *charter, by which J. S. infeoffed him of Black-acre*, and the charter came to the defendant by trover, and the *defendant intitles himſelf to the land, abſque hoc, that the defendant infeoffed the plaintiff*; and per Townſend and Brian J. this is a good plea. Br. Chartres de terre, &c. pl. 51. cites 2 H. 7. 1.

10. *But* if he had counted, that he detained a charter *containing that J. S. infeoffed him*; now the feoffment is not traverſable. Per Townſend and Brian J. Br. Chartres de terre, &c. pl. 51. cites 2 H. 7. 1.

11. Detinue of charters lies well by reaſon of the poſſeſſion *without ſhewing how the defendant came by them.* Per Cur. Br. Chartres de terre, pl. 65. cites 9 H. 5. 14.

12. In *detinue* of charters *by two*, if the *defendant delivers them to one* of them, though out of court, he ſhall be excuſed againſt the other, and ſo in dower againſt two, who plead detinue of charters. F. N. B. 138. (G) the notes there.

13. Though plaintiff counts upon bailment by indenture, yet non detinet is a good plea, notwithſtanding the indenture. Br. Barre, pl. 110. cites 10 H. 7. 24.

(L a 3) Bar; What is a good Plea in Bar in Detinue of Charters.

1. DETINUE of charters as heir, *baſtardy* is a good plea. Br. Chartres de terre, pl. 64.

2. A. brought detinue of a box of *charters* againſt J. S. and *counts that B. and C. were poſſeſſed of them as of their proper goods, and bailed them to the defendant to deliver to the plaintiff.* J. S. pleads, that he is *ſeiſed of twenty acres in D. which the charters concern, and* that he *was poſſeſſed of the charters till B. and C. took them from him, and that after they delivered them to him prout in the count*, and therefore he detains them, prout ei bene licuit; the plaintiff *replies*, that *before J. S. had any thing, W. R. was ſeiſed* of the twenty acres, *and poſſeſſed of the charters, and gave the box and charters to B. and C.* by which they were poſſeſſed, *and then W. R. died ſeiſed and J. S. intruded, and B. and C. bailed the box and charters to J. S. to deliver to the plaintiff*, and prays delivery, and *J. S. rejoins and maintains his bar, abſque hoc, that J. S. intruded, &c.* and per Cur. It is no plea, but he ſhall anſwer to *the title of W. R.* for that *is the ſubſtance and not the intruſion*, quod nota. Br. Chartres de terre, &c. pl. 55. cites 5 E. 4. 85.

3. Detinue *of a cheſt of charters, and of one ſpecial charter*, by which land was given to his father in fee by J. N. of which land the father died ſeiſed and he entered, &c. the defendant to the ſpecial charter *proteſtando*, that the plaintiff is not ſeiſed, &c. pro placito *ſaid, that J. N. gave to the father of the plaintiff, and to W. S. who ſurvived the father, and* that *W. S. gave* the charter *to the defendant*, and *to the reſt waged his law*; and all held good. Br. Chartres de terre, pl. 73. cites 10 H. 6. 20.

4. In detinue of charters, the defendant *ſaid, that the plaintiff delivered them upon condition*, that *if the feme of the defendant ſurvived the plaintiff*, that he ſhould retain them, and *ſaid that his feme is yet living*, and a good plea *without title*. Br. Chartres de terre, pl. 68.

See Traverſe (K a)—Bailment (G)—Detinue.

(L a 4) Damages in Detinue of Charters, what; and the Difference between Damages in Detinue and Treſpaſs. [66]

1. IN *treſpaſs for carrying away of charters*, the defendant pleaded Not guilty, and was *found guilty to the damage of* 100*l.* and the defendant brought error upon the judgment given thereupon, becauſe the *plaintiff did not ſhew the quantity of land in his count*, S. P. ibid. pl. 119. cites 20 Aſſ. 2. S. P. Br. Count. pl.

86. cites S. C. and 20 Aſſ. 3.

ſo that the jury could not know the damages, and yet the firſt judgment was affirmed, inaſmuch as the plaintiff *in treſpaſs of charters, ſhall not recover damages according to the quantity of the tenements compriſed*; for he did not demand the charters, as *in writ of detinue of charters*; therefore, in the one caſe he ſhall recover damages only for the taking, and in the other *he ſhall recover the charters*; *and in caſe they are burnt or deſtroyed, then damages to the value of the tenements*; but here he ſhall recover damages only for the taking contra pacem. Note the diverſity. Br. Error, pl. 61. cites 21 E. 3. 28.

2. Detinue *of a box of evidences*, the *defendant prayed garniſhment againſt two* who *came and made title* to the evidences, and the *plaintiff other title*, and the box was opened, and the evidence of every one delivered to him to whom it belonged, and the plaintiff recovered damages againſt the garniſhee. Br. Damages, pl. 41. cites 7 H. 4. 7.

3. *And* if the *garniſhees have had aſſiſe againſt the plaintiff, and recovered in default of thoſe charters*, yet the *plaintiff ſhall not recover* damages in this action of detinue *to the value of the land loſt*, per tot. Cur. Br. ibid.

(M a) Pleadings, where there muſt be *Profert* or *Monſtrans* of the Deed. In what Caſes in general and the Reaſon thereof.

And it is not enough for the party to ſay, that the rent, &c. *which could not paſs without deed* was granted to him, but the court muſt ſee and adjudge of it, or elſe the right appears not, and the adverſe party may cauſe the deed to be inrolled, which makes it a part of the plea, whereupon the court ſhall judge whether it maintains the plea or not, per Hobart Ch. J. Hob. 233.—And that the court may ſee that there is no rafure, interlining or other defect to avoid it. Arg. 1. Le. 310. in caſe of Maidewell v. Andrews.——And whether it binds the party. per Glyn, Ch. J. Sty. 439. in caſe of Dod v. Herbert.

1. THE *reaſon why* deeds are ſhewn to the court is, becauſe it belongs to the court *to judge of the ſufficiency* or inſufficiency of them. 6 Rep. 38. Bellamy's caſe, alias Walker v. Bellamy.——And whether they were *duly executed*, and if they are *abſolute or conditional* and revocable. 10 Rep. 93. b. Dr. Leyfield's caſe.

If the *defendant is privy to the deed*, he ſhall have oyer and view of it, but *not where the plaintiff does claim by a ſtranger*. Br. Oyer de Faits, &c. pl. 21. cites S. C.

2. Where the plaintiff uſes a deed, as a deed of *grant of the anceſtor of the defendant*, he ſhall have oyer and view of the deeds, and e contra, if he *claims by a ſtranger*, Note a diverſity. Br. Monſtrans, pl. 85. cites 8 Aſſ. 7.

3. In aſſiſe, if the *plaintiff makes title to the reverſion* by grant of the defendant, he ought to ſhew deed, for otherwiſe, it is not good, ſo it ſeems, if he makes ſuch title by a ſtranger. Br. Monſtrans. pl. 86. cites 8 Aſſ. 11.

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Br. Monſtrans, pl. 141. cites S. C.

4. In *mortdanceſtor of a rent charge*, the aſſiſe was taken without ſhewing ſpecialty. Br. Monſtrans, pl. 88. cites 11 Aſſ. 29.

5. Formedon

5. Formedon in remainder does not lie without ſhewing ſpecialty, and yet when it is ſhewn the party tenant ſhall not have anſwer to it. Br. Formedon. pl. 33. cites 21 E. 3. 49.

6. *Quod ei deforceat* lies well without ſhewing any record. Br. Monſtrans, pl. 16. cites 41 E. 3. 30.

7. In treſpaſs, a *gift of trees* may be pleaded without ſhewing deed thereof. Br. Monſtrans, pl. 147. cites 42 E. 3. 23.

8. In *ſcire facias, upon a recovery of an annuity*, the plaintiff need not ſhew deed; for the record ſuffices per opinionem. Br. Scire Facias, pl. 209. cites 3 H. 6. 40.

9. It was agreed, that where a man *declare upon ſpecialty*, and does not ſhew it, *or pleads releaſe*, or the like, *or record*, and does not ſhew it, and they *demur in law for the not ſhewing* that this is *peremptory*, quod nota. Br. Peremptory, pl. 13. cites 7 H. 6. 19.

10. *Annuity*, the defendant demanded judgment of count, becauſe it was granted, *upon condition contained in the deed*, and the *plaintiff had not made mention of the condition in the count*, but *the roll was otherwiſe*, and there it appears that the *plaintiff ought to make mention of the condition in his count, if* it be *contained in the deed, and he to be performed of the part of the plaintiff*. Br. Count, pl. 9. cites 9 H. 6. 15, 16.

11. *Contra if* the condition be *indorſed upon* the deed, *and not contained in the deed*; for this ſhall come in of the part of the defendant, note a diverſity. Ibid.

12. In *debt upon an obligation and* in debt *by executors*, upon teſtament; the *obligation* and *the teſtament* ſhall be ſhewn in the declaration. *Contra of deed in remainder*, and where the deed ſhall be ſhewn in the * count, there variance is material, and it ſhall abate the writ. Br. Variance, pl. 56. cites 14 H. 6. 1.

* *Orig.* Covenant.

13. In every caſe where the *king is party*, a man ſhall ſhew the deed, whether it belongs to him or not. Br. Monſtrans, pl. 11. cites 35. H. 6. 8. per Danby.

14. A man may plead a deed, *by way of defence*, without ſhewing it. Per Littleton Choke and Brian. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

15. *So* where a man may plead a deed *without privity*, he ſhall have the plea without ſhewing the deed. Br. Monſtrans, pl. 61. cites 14 H. 8. 4. per Fitzherbert.

16. A *difference* was taken *between letters patents, and other matters of record, which of their own nature are of record*, and *matters in fact*, that the firſt might be pleaded in the ſame court of record, where they are inrolled without ſhewing them, though they were not pleaded before. But though a deed be inrolled in a court, yet it cannot be pleaded in the ſame court without ſhewing it, 5 Rep. 74. b. in Wymark's caſe in a note by the reporter, cites 21 E. 4. 49. a. The Abbot of Waltham's caſe.

17. Where a man does *not claim the thing granted, as incumbent, who* pleads that J. S. granted the next preſentation to W. N. who preſented him, he ſhall not ſhew the deed, for he *does not claim the patronage, but only the incumbency*, per Brian. Br. Monſtrans, pl. 125. cites 21 E. 4. 50.

18. Note,

* S. P. ibid. pl. 52. cites 12 H. 7. 11. But Brook makes a quære of it.

18. Note, that the deed of tail belongs to the heir in tail, and if the father breaks it, yet the heir ſhall have *formedon*, though it be * *of rent*, without ſhewing of the deed; for formedon is in the right; *contra* of *avowry* or *aſſiſe*, for *this is in the poſſeſſion*. Br. Formedon, pl. 44. cites 4 H. 7. 10.

19. *Conditions to defeat chattles*, may be pleaded without a deed, but not conditions to defeat freeholds; as of a leaſe for years, or grant of a ward, the condition may be pleaded without deed. But where it is pleaded to defeat a franktenement, *be it in perſonal action or real*, it muſt be pleaded by deed. 11 H. 7. 22. b. pl. 12. per Vaviſor. Quod fuit conceſſum. per tot. Cur.

[68] 20. The *grantee of a common* may plead a *releaſe* made *to the tenant of the land in diſcharge* of his beaſts without ſhewing it; becauſe he juſtifies in his own right, and there is no privity between the party who made the releaſe and him. Per Brudnel J. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

21. *He who hath not the intire fee*, need not ſhew the deed. Br. Monſtrans, pl. 72. Marg.

22. *In any title or bar*, or other matter, *where land*, or other thing *ſhall be gained or loſt*, the party ſhall not be enforced to ſhew *more than what makes for him*. Pl. C. 410. a. in caſe of Newys and Scholaſtica v. Larke.

23. *As* in aſſiſe, a man may plead in bar a *feoffment*, which is upon condition *without mentioning the condition in it*. Pl. C. 410. a. b.

24. *So* of *obligation on condition*. Ibid. 410. b.

25. And *ſo* of an *act of parliament*, in which are divers branches. But per Harper J. if in the act there be a proviſo or exception, or other matter which goes to every branch, there the party ought to *plead* ſuch *proviſo*, &c. becauſe ſuch proviſo, &c. is parcel of every branch ſo that the branch is not perfect law without it. Ibid.

26. *But* of *matters of record* where the record in *parcel makes for the party*, as fine or recovery of one acre, where there are in the record 20 acres, there all the record muſt be ſhewn; becauſe the original is intire, and ſo is the record grounded upon it. Pl. C. 410. b. in caſe of Newys and Scholaſtica v. Larke.

27. A deed that is requiſite *ex inſtitutione legis*, muſt be ſhewn in court, though it concerns a thing collateral and conveys, or transfers nothing. As in caſe of attornment by corporation which muſt be by deed, there the deed muſt be ſhewn; ſecus where it is *ex proviſione hominis*; as where the condition of a leaſe is that the leſſee ſhall not aſſign but by deed and not by parol. There he might plead the aſſignment without ſhewing the deed; an aſſignment by parol being then ſufficient, had it not been provided againſt by the condition. 6 Rep. 38. Paſch. 3. Jac. C. B. Bellamy's caſe. ——Alias Walker v. Bellamy.

*Roll. Rep. 13. S. C.—Pl. C. 232. Roll. Rep. 328. Curtis v. Dowtie.

28. Where the deed is but an *inducement to the action*, it need not be mentioned in the declaration. 2 Buls. 228. * Babington v. Matthews.——Style 193. Meers v. French, S. P.—Cro. E. 217. Vantry v. Alpen. S. P.——Cro. J. 43. Dent v. Oliver.——Cro. J. 70. Dagg and Kent v. Penkevon.—Jo. 377. Stockman v. Hampton.——Cro. Car. 442. S. C.—Sty. 264. King v. Weeden.

29. *But*

29. *But* where it is *in bar*, it is otherwiſe. Jenk. 305. pl. 80. 316. pl. 4.

30. In all caſes where a *thing cannot be demanded but by deed*, the deed muſt be produced. But where it may be demanded either by deed, or without deed, it is otherwiſe. Per Glyn Ch. J. Sty. 459. in caſe of Dod v. Herbert.

31. A profert hic in curia, is not neceſſary in a *ſuggeſtion*. 2 Show. 303. Trin. 35 Car. 2. B. R. Sands v. Exton.

32. Where A. has *bound himſelf to make a deed, and is ſued for not doing it*, it is not enough to ſay that he made the deed, viz. leaſe, bond, &c. but he muſt ſet it forth that the court may judge of its ſufficiency; for it ought to be a good deed; but if it be *to deliver*, or *ſhew*, or *produce a deed* (that is) a deed *already made*, there it is enough to ſay that he delivered, or ſhewed, or produced it. Per Holt Ch. J. 2 Salk. 498. Armit v. Bream. Mich. 3. Annæ. B. R.—6 Mod. 244. S. C.

See Bar. Que Eſtate (C).

(M a 2) Where the Deed or Record muſt be ſhewn preſently. [69]

1. NOTE for law, that if a man *pleads a record as dilatory*, viz. in abatement of a writ, &c. he *muſt ſhew it preſently*. Per Babington. Br. Monſtrans, pl. 4. cites 3 H. 6. 15.

S. P. ibid. pl. 76. cites 21 H. 7. 9. per Frowick Ch. J.

2. *E contra where he pleads it in barr*; for there the other may ſay that nul tiel record, and the other may have day to bring it in, per Babbington, quod non negatur. Br. Monſtrans, pl. 4. cites 3 H. 6. 15.

S. P. ibid. pl. 76. cites 21 H. 7. 9. per Frowick Ch. J.

(M a 3) Where it ſhall be ſhewn in the Declaration, or not till demanded.

1. IN *waſt by him in remainder*, if the *deed and the writ vary*, yet it is no matter; for he is not bound to ſhew the deed unleſs the defendant demands it, and if he demands it, the *action does not lie by him in remainder without ſhewing deed*; for *this action is not properly founded upon the deed*. Br. Variance, pl. 108. cites 10 H. 6. 8.

2. *In debt upon an obligation, or as executor* upon teſtament, the obligation or teſtament ſhall be *ſhewn in the declaration*, and there variance between the writ and * obligation, or teſtament, is material to the writ. Br. Monſtrans, pl. 74. cites 14 H. 6. 5.

* S. P. And *ſo in quare impedit* which varies from the ſpecialty. Br. Variance, pl. 108. cites 10 H. 6. 8.

3. *Contra*

Br. Monſtrans, pl. 80. S. P. For the formedon is not founded upon the deed. cites 36 H. 6. 16.——*S. P. and ſo in waſte by him in remainder. Br. Variance, pl. 14. cites 41 E. 3. 23.

3. *Contra* upon * *formedon in remainder*, and there deed ſhall *not* be ſhewn *till it is demanded*, and there variance is not material. Br. Monſtrans, pl. 74. cites 14 H. 6. 5.

4. Debt by an adminiſtrator, the plaintiff ſhewed the *letters of adminiſtration upon* the declaration, but *not in the declaration*, in which it appeared that the adminiſtration was committed to B. and the *defendant imparled*, and at the day the defendant *ſaid that there is variance* to the writ, becauſe the letters which were ſhewn bore *date at C. and not at B.* and by the opinion of the court, the plaintiff ſhall not be compelled to ſhew the letters again, becauſe they were ſhewn at firſt as they ought; for letters of adminiſtration ſhall be ſhewn upon the declaration; and an *obligation ſhall be ſhewn in the declaration*, and ſhall remain always in court; but e contra of letters of adminiſtration, for it may be that the plaintiff hath another ſuit upon it in another court, and therefore ſhall not be ſhewn but once, and *the ſame law of teſtament*; but if it had been in one and the ſame term, or if the letters had been *entered verbatim*, then may the defendant plead ſuch variance after imparlance. Br. Monſtrans. pl. 82. cites 36 H. 6. 31.

5. *Formedon in remainder*; the tenant demanded the deed, the demandant would not ſhew the deed, the tenant ſhall go ſine die; and yet if the tenant had anſwered without demanding the deed it had been good, quod nota in ſcire facias. Br. Monſtrans, pl. 83. cites 38 H. 6. 19.

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(M a 4) What ſhall be ſaid a ſufficient Shewing.

1. IN aſſiſe of eſtovers, a deed of grant was ſet forth, by which H. the defendant had granted to the plaintiff and his heirs 20 *load of wood, of which the plaintiff had* 16 *of the gift of Richard his father*, and ſhewed only the deed of the defendant, and not of his father who granted the 16 load, and yet good; for it is a good grant of 20 load by the defendant, though his father never granted 16. quod nota. Br. Grants, pl. 69. cites 20. Aſſ. 8.

2. *Aſſiſe againſt* 2, the *one pleaded a deed in barr*, and would not that his companion ſhould be aided thereby; and the *other pleaded the ſame deed* in barr for his part; and the *plaintiff demurred becauſe he did not ſhew it*; per Mombray, it ſuffices by the ſhewing of the other, by which the plaintiff made title. Br. Monſtrans, pl. 142. cites 40 Aſſ. 34.

3. If a man ought to ſhew a deed, and does not ſhew it, but a *confirmation* of it, it is not good, quod nota bene. Br. Monſtrans, pl. 134 cites 12 H. 4. 23.

4. A *deed inrolled* muſt be ſhewn, and *not the inrolment*; and therefore if the deed be loſt all is loſt. Br. Monſtrans, pl. 137. cites 19 H. 6. 6.

5. *Error*

5. *Error* to reverſe a judgment in C. B. *in debt*, where the plaintiff declared, *that* the *defendant* decimo octavo Maii quarto Caroli, *conceſſit ſe teneri* to the ſaid Sir Richard Greenvill *in* 280*l. ſolvend. upon requeſt, et profert* hic in curia *ſcriptum prædictum*, quod debitum prædictum in forma prædicta teſtatur, cujus dat. eſt eiſdem die & ann.: the defendant demands oyer conditionis ſcripti obligatorii prædicti; which being read, he pleads payment; and iſſue thereupon, and judgment given for the plaintiff; and the *error aſſigned, becauſe he does not declare*, according to the uſual courſe, *quod per ſcriptum obligatorium conceſſit, nor any writing mentioned in the former part of the declaration: So* it doth *not appear* to the court, *that there was any writing* obligatory, and that being faulty in ſubſtance, no plea or verdict may make it good. But all the court were of opinion, becauſe he ſhewed the writing, whereby he demands the debt, and the defendant by his plea ſhews that it is an obligation with a condition, and iſſue is taken thereupon, and found for the plaintiff, that the declaration is good enough; at leaſt it appears to the court that the plaintiff has a juſt debt, and good cauſe to recover; wherefore the judgment is good, and was affirmed. Hill. 6 Car. B. R. Cro. C. 209. Sir Wm. Courtney v. Sir Rich. Greenvill———cites Co. Rep. 45.——7 Rep. 25. a.——8 Rep. 133. b.——8 H. 7. 71.——18 E. 4.

(M a 5) Second Time, &c. where Deed ſhall be ſhewn after a former Shewing.

1. IN *execution* W. of C. *brought debt againſt B. and recovered* 100*l.* and 80l. damages, and now he ſued *ſcire facias againſt the tertenants*, and they demanded the ſhewing of the *teſtament*, and were ouſted by award, becauſe it was *ſhewn in the firſt ſuit*, and is entered in the end of the declaration, quod proferunt hic in curia literas teſtament. &c. quod nota. Br. Monſtrans, pl. 66. cites 24 E. 3. 30.

2. *Scire facias*, the *defendant pleaded a releaſe*, the *plaintiff denied it*, and upon this they are at iſſue, the *plaintiff is nonſuited*, and *brings another action* upon it, and there the defendant pleads the ſame deed again *remaining in the cuſtody of the court* as a deed denied, judgment, ſi actio; and a good plea, and this without ſhewing the deed of releaſe; for it remains with the court, quod nota. Br. Monſtrans, pl. 67. cites 24 E. 3. 73. [71]

3. A man was *indicted of murder*, and pleaded a charter of the king which was allowed, and after *in appeal* of the ſame murder, the *defendant was arraigned again*, and the plaintiff was nonſuited, and the defendant was arraigned upon the declaration, and pleaded how he pleaded a charter before, et non allocatur, without ſhewing it; but he may plead all the firſt record of diſcharge, and have day to ſhew it. Br. Monſtrans, pl. 36. cites 11 H. 4. 41.

4. *Debt by an executor and ſhews the teſtament*, as he ought, and the defendant makes defence and *imparles* to the next term, he cannot Br. Oyer de faits, &c. pl. 16. cites 38

H. 6. 2. *Br. Eſtoppel. pl. 80. cites S. C. —Br. Variance, pl. 44. cites S. C.

cannot plead variance; for the plaintiff *is not obliged to ſhew the teſtament again*, and then the *variance of the name of the executor* in the writ and in the teſtament cannot be tried; for it may be that the executor muſt ſhew the teſtament in another court in another action the ſame day. Br. Monſtrans, pl. 53. cites * 19 H. 6. 7.

Br. Monſtrans, pl. 80. cites 36 H. 6. 16. S. P. *Br. Eſtoppel, pl. 80. cites S. C. —Br. Variance, pl. 44. cites S. C.

5. *So, of formedon in remainder*, he ſhall ſhew the deed preſently, and ſhall not be compelled to ſhew it again *in another term*; and therefore the defendant was ruled [to anſwer] over. Br. Monſtrans, pl. 53. cites * 19 H. 6. 7.

S. P. And then it is always apparent. Br. Variance, pl. 44. cites S. C. Br. Monſtrans, pl. 80. cites 36 H. 6. 16. S. P. *Br. Eſtoppel, pl. 80. cites S. C.

6. *Contra of an obligation*; for it remains always in court. Br. Monſtrans, pl. 53. cites * 19 H. 6. 7.

7. Where a man *ſued execution* by capias *in Chancery, upon a ſtatute merchant returnable in C. B.* 15 Hill. there per tot. Cur. he ſhall not have execution if he does not ſhew the obligation again, though he ſhewed it in Chancery before. Br. Monſtrans, pl. 73. cites 37 H. 6. 6.

8. *E contra* in execution *upon ſtatute ſtaple*; for there the capias is returnable in Canc. and liberate ſhall iſſue there, therefore once ſhewing ſuffices for all; for *it is all in one court*; *contra* where it is *in another court*. Br. Monſtrans, pl. 73. cites 37 H. 6. 6.

(M a 6) Excuſed by Fraud or Force.

This caſe in 5 Rep. 75. a. in Wymark's caſe is ſtated by the reporter thus, ſcilicet, *feme ſole ſeiſed for life, leſſee did waſte, the baron releaſed and delivered the deed into an indifferent hand to deliver to defendant on certain conditions to be performed*; the *defendant performed* the conditions; the *baron got the releaſe and detained it* from the leſſee; *and he and his feme brought action of waſte*; the leſſee upon this ſpecial matter ſhall plead the releaſe without ſhewing it. Coke ſays it is a good caſe, and cites 42 E. 3. 18. a.

1. *WAST by baron and feme againſt tenant for life*, the tenant *pleaded that the baron had releaſed to him in fee*, and *by indenture, which he ſhewed* to the court, *it was agreed* between them, that *if the baron acquitted the tenant of a ſtatute merchant to N. that the releaſe ſhould be void*, and ſaid that he hath not acquitted him, judgment, &c. and *ſhall ſhew the indenture, but not the releaſe*, Thorpe aſked where is the releaſe? Kirton ſaid it was bailed into an indifferent hand, and the defendant has a writ of detinue pending upon it in this court now; and becauſe he did not deny the indenture, judgment, &c. Per Belke. he muſt ſhew the releaſe; for where debt is brought upon an obligation of 100 l. and he ſhews the indenture of defeaſance proving it, and not the obligation, the action does not lie. Per Finche. Demurr if you will, and then diſpute after. Per Belke. the indenture is not our deed —— and the other e contra. Br. Monſtrans, pl. 38. cites 42 E. 3. 18.

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2. Where the *conuſee takes the defeaſance from the conuſor with force, and ſues execution upon the ſtatute*, the conuſor ſhall plead it without

without ſhowing the indenture, per juſtitiarios; for though he may have treſpaſs of the taking, yet the conuſee may deny, and then the action of treſpaſs is gone, and yet his executor may ſue execution. Br. Monſtrans, pl. 26. cites 47 E. 3. 25. 26.

3. *So*, where an *obligation is delivered into an indifferent hand* upon certain condition performed to deliver it to the obligee, and he retakes it with force before the condition performed, and brings debt upon it. Br. Monſtrans, pl. 26. cites 47 E. 3. 25, 26.

4. *Or*, where the *obligee makes an acquittance, and after retakes it by force, and brings debt*, the defendant ſhall be aided by plea without ſhewing the ſpecialty. Br. Monſtrans, pl. 26. cites 47 E. 3. 25, 26.———quære hoc, for contra 1 H. 7. 14. ibid.

5. In aſſiſe the tenant *pleads a feoffment of the anceſtor of the plaintiff unto him*; the *plaintiff ſaid*, that it was *upon condition, &c.* and that the condition was *broken and he re-entered, and that the tenant entered and took away the cheſt in which the deed was, and yet detains the ſame.* The plaintiff ſhall not in this caſe be forced to ſhew the deed. Co. Litt. 226. a.

6. In caſe upon a *policy of inſurance*, plaintiff declared upon a writing, without ſaying, Hic in curia prolat. It was moved for the defendant, that as his caſe is, he cannot plead Non aſſumpſit, but a ſpecial plea grounded upon the writing of which he *has no counterpart, neither is it* * *entered in the office* of aſſurance; and therefore that ſince the plaintiff declared upon it, he ſhould be ruled to make a profert in curia, that the defendant might ſee it. And for the plaintiff it was inſiſted that he need not count on any writing, but on an agreement generally by policy of aſſurance; and that no oyer can be demanded, nor hic in curia prolat. Keble reports, that for theſe reaſons, Twiſden J. held that the defendant ſhould not have a copy; but that per Cur. præter Twiſden, wherever the plaintiff declares upon a writing, the court on affidavit, that he has no part of it, will let him have a copy. But where the *declaration is on an agreement generally, and the writing but evidence*, they will not grant it. But at laſt the *parties agreed to take and give a copy* to try it the ſame term. Siderfin reports that the Ch. J. and Windham J. held that in action on the caſe, where the plaintiff *declares upon a writing*, it is in the diſcretion of the court to grant oyer or not; but Twiſden e contra; but that all agreed, that if the *plaintiff would ſtrike out* of his declaration, the words *(per ſcriptum)* then *the perpetual imparlance* ſhould be diſcharged; and at laſt the plaintiff agreed that defendant ſhould have oyer. Vide Sid. 386. and Keb. 430. Mich. 20 Car. 2. B. R. Suiſter alias Suſter v. Cowell alias Coel.

* Twiſden J. ſaid that it is not uſual to regiſter policies of aſſurance when an action on the caſe is brought upon them; but only when they are put in ſuit before the commiſſioners; which is the more dilatory way. 2 Keb. 430. S. C.

7. In *quare impedit*, the plaintiff declares on a grant of the advowſon to his anceſtor, and ſays hic in cur. prolat., but had not the deed to ſhew; there was an *affidavit* in court *that defendant had got the deed* into his hands; ſo it was prayed that plaintiff might take advantage of *a copy*, which appeared in an inquiſition found tempore Ed. 6. Per Cur. When *debt on bond to perform covenants* in a deed is brought, and the defendant cannot plead covenants performed without the deed, becauſe the plaintiff has the original deed,

If the party, who would plead the deed, has it not, he ought to move the court, and the court will order

that he ſhall have the deed, or a copy of it. Sic dictum fuit. Sid. 50. pl. 13. Mich. 13 Car. 2. B.R. The court ſometimes will compel the *plaintiff to give a copy* of an indenture to defendant, if he *ſwears that he never had a part*, or that he hath *loſt it*; but this is ex gratia curiæ, and not ex debito juſtitiæ. 1 Sand. 9 Mich. 18 Car. 2. Jevens v. Harridge.——6 Mod. 237. Mich. 3 Annæ B.R. Cook v. Remington.——264. Mich. 3 Annæ. B. R. Ward v. Apprice.——S. P. and if it be loſt, the court will on affidavit compel the party to *ſhew his counterpart, and be to plead thereto*, otherwiſe they *will* grant an *imparlance*. Cro. J. 429. Trin. 15 Jac. B. R. pl. 5. Anon.

deed (and perhaps defendant took not a counterpart of it) we uſe to grant *imparlances* till the plaintiff brings in the deed; and upon evidence, if it be proved, that the other party has the deed, we admit copies to be given in evidence. But here the law requires the deed to be produced. You have your remedy for the deed at law; we cannot alter the law, nor ought to grant an imparlance. Mod. 266. pl. 17. Trin. 29 Car. 2. C. B. Anon.

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See Policy of Inſurance. (B)

(M. a. 7) Excuſed, by Accident.

1. IF there be *iſſue in tail of a gift of rent* in tail, &c. (which cannot paſs but by deed) *and the gift be executed*, the heir in tail ſhall have *formedon* without ſhewing deed; for he is *aided by the ſtatute of W. 2. cap.* 1. if the deed be burnt or loſt. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

2. *So* where it is *by way of defence*. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

3. *But* otherwiſe it is of *a ſtranger to the tail*, he *ſhall not have an action nor make defence*, unleſs he ſhews the deed. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

S. P. ibid. pl. 112. cites 9 H. 7. 23. per Vaviſour. Br. Formedon, pl. 44. cites 4 H. 7. 10.

4. If tenant in *tail of rent* granted by deed breaks the deed, and dies, the heir in tail ſhall have *formedon* without ſhewing the deed; for this action is in the right. But he ſhall not have *avowry* nor *aſſiſe*, if he makes title by gift of rent, if he does not ſhew the deed; for it is in the poſſeſſion. Per Huſſey and Fairfax. Br. Monſtrans, pl. 108. cites 4 H. 7.

(M. a. 8) By Detainer by another, who has Right to it.

1. *ASSISE* by an infant *againſt* 2. the *one pleaded in bar a deed of feofment, with warranty of the anceſtor of the plaintiff*, in which deed all the tenements were compriſed, *and would not ſuffer his companion to have the deed*; and the other ſaid that the anceſtor by the ſame deed, &c. ut in alia barra. Per Mowbray, becauſe the deed is in the hands of the other, who hath right thereto, and he cannot deraign it out of his poſſeſſion; therefore he ſhall have advantage of it without ſhewing the deed; by which the plaintiff made title; quod nota. Br. Monſtrans, pl. 56. cites 40 Aſſ. 34.

(M. a. 9) By Detainer in another Court, &c. in another Suit, &c.

1. IN aſſiſe the tenant pleaded a *releaſe, which was before denied by the ſame plaintiff in an oyer and terminer*, and there remained to be tried, and did not ſhew the deed; and upon good advice it was adjourned into bank; and there, *becauſe the oyer and terminer was diſcontinued*, the defendant ſued to have the releaſe; but it was ſaid to the defendant that he ſhould have his releaſe before them ſuch a day at his peril. Quod nota. Quære what ſhould be done if the oyer and terminer had not been diſcontinued, ſo that it might have been tried? Br. Monſtrans, pl. 100. cites 38 Aſſ. 10. Rep. 74. b. per the reporter in Wymark's caſe. cites 12 H. 4. 8. a. b. and 43 E. 3. 27. a. acc. For *lex non cogit ad impoſſibilia*.

If a deed be denied in one court by which it remains there, it may be pleaded in another court without ſhewing it. 5

2. In treſpaſs, the caſe was that *tenant in tail leaſed for years* and died, *the iſſue confirmed* the eſtate of the termor by deed, and after entered, and the tenant re-entered, and he brought aſſiſe, and the tenant pleaded the confirmation; the plaintiff denied the deed, by which the *deed remained in court as a deed denied*, and the plaintiff brought treſpaſs alſo againſt the ſame tenant, and he pleaded the leaſe, and the other pleaded the tail, and that he is heir, and the defendant pleaded the ſame confirmation, and *vouched it in the hands of the juſtices of aſſiſe as a writing denied*; and per Hanke. he ſhall not plead this without ſhewing it, clearly; but he may have a writ to the juſtices of aſſiſe to have it to ſhew, and the plaintiff paſſed over, and denied the deed. Br. Monſtrans, pl. 38. cites * 42 H. 4. 8.

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* It ſeems it ſhould be 12 H. 4. 8.

(M. a. 10.) Where they, or the Eſtates, &c. which they relate to, are executed.

1. IN *quare impedit*, the plaintiff made title becauſe *B.* was *ſeiſed of the manor of P. and the advowſon appendant*, and *preſented*, &c. *and B. died ſeiſed*, and the *premiſſes deſcended to three daughters, who aſſigned* the manor and advowſon *to A. their mother in dower*, and the church being void A. preſented, &c. and the *eldeſt daughter granted her third part* of the manor with her third part of the advowſon *to J. S. in fee*, and A. attorned, and *J. S. granted it to the father of the plaintiff in fee*, and *A. attorned and after died*, by which *the father* of the plaintiff *entered into the third part of the manor and died ſeiſed, and the plaintiff as heir entered*, and ſo the plaintiff has the eſtate of the eldeſt daughter, and ſo it belongs to him to preſent; and the defendant demanded judgment for not ſhewing of the deeds of the grant of the reverſion. Per Thorpe,

where a *reverſion is granted*, and the *tenant attorns*, the tenant for life *dies*, and the *grantee enters*, it ſhall be good title in aſſiſe without ſhewing the deed of grant of the reverſion; becauſe the *poſſeſſion was executed*; and per Cur. becauſe the plaintiff is in poſſeſſion *by deſcent*, therefore he need not ſhew the ſpecialty; and if the grant was of the land without the advowſon, it is ſaved to the defendant by way of anſwer. Br. Monſtrans, pl. 65. cites 24 E. 3. 52.

2. In *falſe impriſonment*, where the defendant *juſtifies by a warrant* to him ſent; *by all the juſtices*, this plea is good, without ſhewing any thing of the warrant; for it may be that it is *returned* before the juſtices. Br. Monſtrans, pl. 96. cites 27. Aſſ. 36. per Sharde.

3. In *treſpaſs*, the plaintiff counted, that he had *bona waviata by grant of the king*, and ſeiſed ſuch waif, and the defendant came and carried it away: and there it was held, per Finche. that where a man *has been in poſſeſſion of the thing*, and brings a writ of treſpaſs, as here, he need not ſhew the charter of the king; and *e contra, where he demands* by the charter *a thing, of which he had not poſſeſſion before*. Quære. Br. Monſtrans. pl. 13. cites 40. E. 3. 10.

Co. Litt. 226. a. S. C. and adds a nota, that the defendant being iſſue in tail was remitted to the eſtate tail.

4. In ejectment by J. N. againſt C. the defendant pleaded that *A. gave* a manor *to B. and M. his wife in tail*; B. and M. had iſſue C. and that after *B. and M. gave* the manor to *J. S. upon condition that he ſhould leaſe the* manor to J. N. for a term of years, the remainder to B. and M. that afterwards J. S. leaſed the manor *to J. N.* the plaintiff, *the reverſion to himſelf*, that *B. died, and M. entered and died* ſeiſed, and *C. entered as iſſue in tail*, &c. judgment, ſi actio. Chell. objected that C. the defendant maintained his entry for a condition broken, which lies in ſpecialty, and yet he did not ſhew it, &c. But Belknap ſaid that the thing was executed, for which reaſon no deed need be ſhewn, and if this matter was found by verdict of aſſiſe, it was good, &c. Fitzh. Monſtrans, pl. 141. cites T. 44 E. 3. 22.

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5. The plaintiff need not ſhew a *fine*, nor any deed when it is executed; contra if it be executory; per Hill, and Hanke. Br. Formedon, pl. 23. cites 11 H 4. 39.

Br. Nugation, pl. 4. cites S. C.—Ibid. pl. 10. cites S. C.

6. *When a remainder is veſted* or executed, *deed* of remainder *ſhall not be ſhewn after*; per Threſam, and Huſſey ad idem. *In aſſiſe* the plaintiff intitled himſelf by remainder, he need not ſhew the deed; becauſe by his ſeiſin it was veſted and executed: and *the ſame law in formedon* if the remainder be once veſted. Br. Monſtrans, pl. 75. cites 14 H. 6. 26.

7. If *iſſue in tail be of a gift of rent* in tail, &c. which cannot paſs but by deed, yet *if the deed be executed*, the heir in tail ſhall have *formedon* without ſhewing the deed; for he is *aided by the ſtat. of W. 2. cap.* 1. if the deed be burnt or loſt. Br. Monſtrans, pl. 60. cites 15. E. 4. 16.

Br. Pleadings, pl. 121. cites S. C.

8. He, who juſtifies to make *replevin by warrant of the ſheriff, muſt ſay that he hath returned his warrant* to the ſheriff; for otherwiſe

wife he ſhall ſhew it to the court. Quod nota, per Cur. Br. Monſtrans, pl. 126 cites 21 E. 4. 66.

9 *Commiſſioners*, who ſit by commiſſion, and *after return their commiſſion* into bank, may juſtify by it, without ſhewing the commiſſion. Per Fineux Ch. J. Br. Monſtrans, pl. 172. cites 13 H. 7. 14. and 20 H. 7. 6.

10. Where *land is given for life, or in tail*, the *remainder over in tail*, &c. and the tenant for life, or the tenant in *tail, dies without iſſue*, and he in remainder enters; there, *if diſcontinuance*, diſſeiſin, &c. *is made, ſo that the heir in tail* in remainder, *or* he in *remainder in tail is to make title* by this remainder, he need not ſhew deed of the remainder as in formedon in remainder; becauſe the remainder was executed before. Quod nota. Br. Monſtrans, pl. 1. cites 18 H. 8. 4. —— And ſo is T. 34 E. 3. quod nota in a writ of entry ſur diſſeiſin. Br. ibid.

11. If three tenants in common of an *advowſon* make *compoſition to preſent by turn*, and every one of them has preſented by his turn once by virtue of the compoſition; in a *quare impedit* brought after between them, the plaintiff need not ſhew the compoſition; becauſe it was executed: but otherwiſe, if it was not executed; and between coparceners compoſition may be made without writing, becauſe by the common law they are privies, and as one heir, and compellable to make partition; and ſo diverſity. Held per Shelly and Fitzherbert J. and many of the ſerjeants. D. 29. pl. 194. Hill. 28 H. 8. Anon.

12. A *licence* that is executed and has no continuance need not be ſhewn. 6. Rep. 38. Paſch. 3 Jac. C. B. Bellamy's caſe.

A licence in its nature cannot be without writing, and there did not any intereſt paſs thereby, but a reſtraint only ſet upon a liberty, and it is a thing *executed*; and his aſſignee to whom he had aliened part by virtue of the licence, perhaps has it for the fortifying his eſtate. Cro. J. 102. Walker v. Bellamy.

* 13. A *warrant executed* by a bailiff is returned to the ſheriff, and therefore need not be produced in juſtification of a treſpaſs of aſſault, &c. in arreſting a perſon by vertue thereof. But it is otherwiſe in a juſtification for a rent-charge, or ſuch things as have *continuance*. Cro. J. 372. Trin. 13 Jac. B. R. Bateman v. Woodcock.

* Roll. R. 221. per Coke; and by him and Doderidge it is the ſame of a *grant of next avoidance* after grantee has preſented. S. C. —— S. P. 3. Lev. 225. Mich. 36 Car. 2. C. B. in caſe of Aylesbury v. Harvey.

14. *So* of a deed or * *leaſe determined*. Arg. Pl. C. 149. in caſe of Throgmorton v. Tracy.

* S. P. 3. Lev. 205. ut ſup.

15. In replevin the defendant juſtified, by a *condemnation before the juſtices of peace* upon the ſtatute of exciſe for the non entry of ſtrong waters, and a *warrant made thereupon* to levy 20s. ſet for a fine; exception was taken, becauſe there was no profert hic in curia of the warrant. But per Cur. the ſtatute does not require that the warrant be under hand and ſeal, but only in writing, and no writing is to be ſo pleaded unleſs it be a deed; and that, of things executed, a deed need not be ſhewn: and cited 7. Rep. in the end of Bellamy's caſe, and ſo judgment was given for the defendant.

3. Lev. 204. 205. Mich. 36 Car. 2. C. B. Ayleſbury v. Harvey.

16. In *treſpaſs* of aſſault, battery, wounding and *impriſonment* the defendant juſtified by *warrant of the council of ſtate in Barbadoes, &c. for commitment of the plaintiff*; exception was taken, becauſe the *warrant* was not ſhewn; but it was anſwered that it lay not in their power, becauſe it was *delivered to the Proveſt Marſhall*, as his authority for the capture and detention, and therefore did belong to him to keep; and judgment was given accordingly for that and other reaſons, and ſo a former judgment reverſed. Show. Parl. Caſes, 24. Dutton v. Howell and al.

[See (M. a. 11.) pl. 1. **Reverſion** (S)]

(M. a. 11) In what Caſes, in Reſpect of the Thing Sued for being grantable without Deed, or not.

1. IF a *man purchaſes rent-ſervice, and gets ſeiſin*, he ſhall have aſſiſe without ſhewing deed thereof, and yet it cannot be purchaſed but by deed; and this, *by reaſon that it is of common right*, therefore need not ſhew ſpecialty after ſeiſin. *Contra of a rent-charge and rent-ſeck*; and the reaſon is, becauſe the rent *may be claimed by que-eſtate* without ſhewing deed, where it is claimed as parcel or appendant to the manor where the land is; becauſe the *manor or land may paſs by livery without deed, and then the rent goes with it.* Br. Monſtrans, pl. 91. cites 22 Aſſ. 53.

2. In aſſiſe of *rent*, he, who *preſcribes in himſelf and his anceſtors, and in thoſe whoſe eſtate he has*, ought to ſhew deed of the rent; for que eſtate cannot be of rent without deed; by which the plaintiff *ſhewed deed of the grant* of the rent to his anceſtor, *but* did *not* ſhew deed *of commencement of the rent*, and therefore ill, by the beſt opinion; for a man may preſcribe in himſelf and his anceſtors, &c. without ſhewing deed, but not in a que eſtate of a thing which cannot be granted without deed, without ſhewing deed thereof: *contra of acquittall* in him and thoſe whoſe eſtate the lord has in the ſeigniory, or common appendant, or eſtovers appendant, &c. there he may preſcribe by que eſtate without ſhewing deed. Br. Preſcription, pl. 29. cites 24 E. 3. 23. 39.

3. A *corporation* cannot make a *leaſe*, *releaſe*, nor *give command*, or *licence* but by deed, which ſhall be ſhewn. Br. Monſtrans, pl. 127. cites 21 E. 4. 19. 75.

4. He, who is a *mere ſtranger* to a deed of releaſe, and has no means to come by it, and the * deed goes *in diſcharge* of him, may plead it without ſhewing the deed; per Brudnel and Pollard juſtices. Contra by Brook and Fitzherbert J. *But* they all agreed, that he who was *privy in eſtate*, as leſſee for years, feoffee, &c. *and all who claim*

* *Orig.* Suiſt.

claim intereſt in the land, cannot plead the deed without ſhewing it. Quod nota bene. Br. Monſtrans, pl. 161. cites 14 H. 8. 4.

5. If a man pleads a conveyance of a *rent*, or the like, which cannot paſs without deed, and does not produce the deed in plea, it *is not holpen by the ſtat. 27 Eliz. 5. of demurrer.* Per Hobert Ch. J. Hob. 233. in pl. 295.

6. *Leſſee for years claims a way* to his houſe *by a que eſtate* without ſhewing the deed, and held good by 3 juſtices againſt one; becauſe the leſſee has not the deed, and it is but a *conveyance* to the action, which is grounded on the diſturbance done to him in poſſeſſion. Cro. J. 673. Slackman v. Weſt.——Palm. 387. S. C. Cited 3 Mod. 52.

7. *But* if he claimed a *rent* or * *common in groſs*, which cannot paſs without deed, it had been otherwiſe; for there he could not ſhew *que eſtate* without ſhewing the deed, how he came by the eſtate. Cro. J. 673. Mich. 21 Jac. B. R. Slackman v. Weſt. [77]

* Yelv. 201. Hill. 8 Jac. B. R. Farmer v.

Hunt. S. P.——and Brownl. 220. S. C.—And Cro. J. 271. S. C.——See 2 Mod. 277. Birch v. Wilſon.

8. An *arbitrament* under ſeal is no deed, and the arbitrament may be made without deed, and therefore is not neceſſary to be produced in court; for it is but a writing under hand and ſeal. Per Glyn Ch. J. Sty. 459. Trin. 1655. Dod v. Herbert. The deed of a thing, which cannot paſs without deed, ought

to be ſhewn to the court. Arg. Comb. 98. cites Dy. 277. 1 H. 7. 12. Cro. Car. 143. 10 Rep. 94. Yelv. 201. Hob. 233.—— *But though* a thing will paſs *without deed*, yet if the *party pleads a deed and makes a title thereby*, he muſt come with a profert. Arg. 2 Mod. 64 cites 1 Le. 309. Roll. Rep. 20. —And yet in ſome caſes where a thing cannot paſs without deed, as a remainder, or reverſion, a deed need not be ſhewn; but contra after execution. Br. Monſtrans, pl. 55. cites 21 H. 6. 23. per Fulthorp, to which Yelverton agreed.

[See Que Eſtate (C)]

(M. a. 12) The Difference between Oyer and Monſtrans of Deeds and Records.

1. NOTE a *diverſity* between *monſtrans of deeds or records, and* the *oyer of them*; for he who pleads the deed or record, or that declares upon the deed or record, to him it belongs to ſhew the deed or record, but the other againſt whom the record or deed is pleaded or declared, ſhall demand the oyer of the record or deed, which his adverſary brought againſt him. Br. Monſtrans, pl. 165. Oyer of a deed or record *is always to be had by him who is to be charged by it* and *not by him who pleads it*;

for he who pleads it, or declares upon it ſhall ſhew it. Br. Oyer de faits, &c. pl. 15. (bis)

2. When oyer of a deed is prayed, it is intended that the deed is in court, and the *(ei legitur)* or reading of it is the act of the court. Sid. 308. Mich. 18 Car. 2. in caſe of Jevons v. Harridge.

3. When a deed is pleaded with a profert hic in curia, the very *deed itſelf is by* * *intendment of law immediately in the poſſeſſion of the court*; and therefore when oyer is craved, it is of the court, and not * Sid. 308. Mich. 18 Car. 2. B.R. in caſe of

Jevons v. Harridge.

not of the party. And *after oyer* is craved the *deed becomes parcel of the record*, and the court muſt judge upon the whole; and the *demand* of oyer *is a kind of plea*, and may be counterpleaded. 3 Salk. 119. pl. 2. 3. 4.

(M. a. 13) Monſtrans, in what Caſes there muſt be a Monſtrans or Profert, though the Deeds cannot be traverſed when pleaded or ſhewn.

Br. Traverſe per ſans, &c. pl. 58. cites S.C. —Deed of formedon

1. IN *formedon in remainder* the defendant ought to ſhew the deed, and yet the deed is not traverſable. Br. Monſtrans, pl. 48. cites 21 E. 3. 49. Br. Traverſe per Sans, &c. pl. 128. ibid. pl. 324. cites 14 H. 6. 1.

in remainder is not traverſable: for he ſhall *not ſay ne dona paſt by the deed* but *ne dona paſt* only. Br. Traverſe, pl. 145. cites 14 H. 6. 1. nota. Br. Forger de faits, pl. 20. cites 10. E. 4. 1.

[78] He muſt ſhew the deed; for the *ſtatute is if he hath quarrel*, which is *intended by action of covenant*.

2. *Forger* of deeds lies, where *termor prays to be reſceived, and ſhews a forged deed of leaſe*; for per Moile, he cannot be reſceived without ſhewing deed; and this deed ſhall not be traverſed upon the reſceipt, per Danby and Chocke. Br. Forger de Faits, pl. 15. cites 9 E. 4. 37.

Ib'd. and Br. Reſceit, pl. 75. cites 9 E. 4. 30. Br. Traverſe per ſans, &c. pl. 128. cites 9 E. 4. 37.

3. Executors ſhall not have action before *probat of the teſtament*, but if it be written on the back, quod probatum eſt, &c. this ſhall not be traverſable, but only whether he was executor or not, and not whether he proved the teſtament. Br. Travers, pl. 129. cites 9 E. 4. 47.

(M. a. 14.) Monſtrans of Deeds. Act of Law. Where Perſons come in by Act of Law.

Debt on a bond aſſigned by commiſſioners of bankrupts, and becauſe he comes in

1. A *tenant by ſtatute ſtaple* or *elegit*, that has extended an *abbot's leaſe*, or a leaſe made out of an abbot's leaſe, is not bound to ſhew it, becauſe he comes in by act of law; but any other that comes in under the leaſe, muſt ſhew it. Per tot. Cur. Brownl. 38. Mich. 10 Jac. Anon.——5 Rep. 75. a. in Wymark's caſe.

by act in law, and hath no means to ſhew the obligation; it was adjudged upon demurrer to be good enough without ſhewing it in court; as *tenant by ſtatute merchant or* tenant *in dowre* ſhall have advantage of a *rent-charge* without ſhewing the deed. Hill. 6 Car. B. R. Cro. C. 209. Gray v. Fielder. 10 Rep. 94. in Leyfield's caſe.——Jenk. 305. pl. 80. Co. Litt. 225. b.

2. If a *guardian* in chivalry in right of the heir had *entered for condition broken*, he might have *pleaded the eſtate* to have been *upon condition* without ſhewing any deed; becauſe his intereſt was created by the law. Co Litt. 225. b.

3. So

3. *So* of *tenant in dower.* Co. Litt. 225. b.

4. *But* the *lord by eſcheat*, though his eſtate be created by the law, ſhall not plead a condition to defeat a freehold without ſhewing it; becauſe *the deed belongs to him.* Co. Litt. 226. a.

5. *So* a *tenant by the curteſy* ſhall not plead a *condition made by his wife and a re-entry* for condition broken without ſhewing the deed, for though his eſtate be created by law, yet the *law preſumes that he had the poſſeſſion of the deeds* and evidences belonging to his wife. Co. Litt. 226. a.

(M. a. 15) Monſtrans, &c. By what Perſons. Aſſignees.

1. WHERE a *covenant* is annexed to a thing, *which* of it's nature *cannot paſs without deed* at firſt, in ſuch caſe the *aſſignee* ought to be in by deed, otherwiſe he ſhall not have advantage of the covenant; *but* where the covenant is not ſo, but *runs with the eſtate*, the aſſignee ſhall have covenant without ſhewing any deed of aſſignment. Cro. E. 373. 436. Hill. 37 Eliz. B. R. Noke v. Awder.

2. A *licence to leaſe land* need not be ſhewn by aſſignee; for he does not claim by it any eſtate in the land, but it is merely *collateral to the intereſt of the land*, and only pleaded to excuſe the forfeiture of the leaſe: and not like a *releaſe* or *confirmation*; for they give or transfer a right. 6 Rep. 38. Paſch. 3 Jac. C. B. Bellamy's caſe.—Alias Walker v. Bellamy. [79]

3. Where the *condition of a leaſe* is, *that* the *leſſee ſhall not aſſign but by deed* and not by parol, there he may plead the aſſignment without ſhewing the deed, an aſſignment by parol being ſufficient, if it be not provided againſt by the condition. Ibid.

4. In *debt* upon a leaſe for years by the aſſignee *of the reverſion*, it was aſſigned for error, that he claimed by grant of the reverſion, and did not ſhew that it was by deed; and without a deed or fine a reverſion cannot paſs; and for this and another error principally the judgment was reverſed. Cro. C. 143. Mich. 4 Car. B. R. Long v. Nethercote.

(M. a. 16) By Baily or Servant.

1. IN treſpaſs the defendant juſtified as ſervant *of a collector to diſtrain for* 10*s. tax*, and prayed aid of his maſter, and the plaintiff prayed that the defendant ſhew the letters patents by which his maſter was made collector; and was not compelled to ſhew them; for *the power of the maſter is the act of parliament*, which granted the tax, and not the letters patents. Br. Monſtrans, pl. 58. cites 22 H. 6. 42.

But if a man diſtrains for rent due to a corporation, or other perſon as bailiff and is not their bailiff, and has no deed for the doing it, yet it is good if the party, &c. agrees to it; for it is not traverſable whether bailiff or not, if he to whoſe uſe, &c. agrees to it. Br. Travers, per, &c. pl. 3. cites 26 H. 3. 8.

2. *But* where a man *juſtifies as ſervant of another*, or *makes conuſance in replevin* by reaſon of a rent-charge, he ſhall ſhew the deed of grant which was agreed; for there the deed is the effect of the title. Contra ſupra. Br. Monſtrans, pl. 58. cites 22 H. 6. 42.

3. A baily, or ſervant, who *juſtifies for a rent granted to himſelf*, ought to ſhew the deed of grant. Br. Monſtrans, pl. 125. cites 21 E. 4. 50. per Brian.

S. P. For it belongs to his office likewiſe to cut trees, &c but to be attorney to *make livery and ſeiſin*, &c. it muſt be by deed. Br. Corporations, pl. 51. cites S. C.

4. Baily *of a dean and chapter may juſtify to cut trees to repair* or make the pales of the dean and chapter's park, *without ſhewing ſpecialty how he was made baily*; for he is but an officer or ſervant to them, and for their uſe. *But* e contra of them who *claim intereſt from* the dean and chapter, as a leaſe or licence to take trees, &c. Br. Monſtrans, pl. 113. cites 12 H. 7. 25. 26.

He who *juſtifies as ſervant of a corporation and by their commandment* muſt ſhew deed; but *baily* ſhall not. Br. Corporations, pl. 54. cites 7 E. 4. 14. and Trin. 10 E. 4. acc.—But ſee ibid. pl. 56. cites 12 E. 4. 9. 10. Contra per Littleton.—If a man *pleads the frankeſnement of a dean and chapter, and that he entered by their command*, he muſt ſhew a writing of their command; by the beſt opinion. Br. Corporations, pl. 59. cites 18 E. 4. 8.——*So* of ſervant of *mayor and commonalty*. Ibid.

5. If a man *appears* as bailiff *in aſſiſe* for the defendant, the plaintiff ſhall not have traverſe, that he is not his bailiff. Br. Bailie, pl. 9. cites 15 H. 7. 17. per Townſend.

6. If there are 2 *coparceners* and one diſtrains, ſhe may avow for herſelf, and *juſtify* as bailiff to her companion, and it is not traverſable if ſhe be bailiff or not. Br. Baillie, pl. 9. cites 15 H. 7. 17. per Colowe.

7. A ſervant, &c. who *pleads a releaſe*, ought to ſhew it. Per Fitzherbert and Brooke. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

[80] 8. It is a maxim, that where a man is a *ſtranger* to the deed, and *doth not claim the thing* compriſed in the grant, *or any thing out of it, nor* doth claim any thing *in right of the grantee as bailiff or ſervant*, there he ſhall plead the patent, or deed, without ſhewing it. 10 Rep. 94. Hill. 8 Jac. Dr. Leyfield's caſe.

9. In treſpaſs of carrying away trees; defendant ſaith, that long before the plaintiff had any thing in the place where, &c. one *P. was ſeiſed in fee, and by indenture demiſed to J. S. the ſaid cloſe*, &c. *excepting the wood and underwood thereupon growing*; habend. for the life of one A. *and further covenanted, that it ſhould be lawful for the ſaid J. S. and his aſſigns to take neceſſary fireboot and houſeboot*, &c. and defendant ſaith, that J. S. aſſigned over his eſtate to the ſaid A. and that he as ſervant took the ſaid trees for neceſſary fireboot, &c. to be expended upon the premiſſes, and avers the life of A. and it was thereupon demurred, becauſe he *juſtifies by force of a covenant in an indenture*, and does not ſhew the indenture, it being a thing which cannot be granted without deed; and the plea was held

held to be ill and adjudged for the plaintiff. Cro. J. 291. 292. Mich. 9 Jac. B. R. Purfry v. Gryme.

10. In aſſault and battery, the defendant *juſtified* as ſervant to J. S. for that the *plaintiff came to fiſh in the ſeveral piſchary of his maſter*; and judgment being given for the defendant, a writ of error was brought and 2 exceptions taken. 1. That whereas the defendant had *intitled his maſter in his plea of juſtification to the ſeveral piſchary by the king's letters patents*, he had not ſhewn, that the king was ſeiſed of this ſeveral piſchary jure corronæ, and ſo it might be that the king had no power to grant it. 2. That he did not ſhew *the letters patents*, which he ought to do, becauſe he derives a title by them: and a rule was given to ſhew cauſe why the judgment ſhould not be reverſed. Sty. 15. Paſch. 23 Car. B. R. Jones v. Young.

(M. a. 17) By Bailiff, or other Officer of the King.

1. A man *may* be bailiff of the king *without patent*. *Contra* of a *forreſter*. Br. Monſtrans, pl. 153. cites 33 H. 6. 3. S. P. Br. Baillie, pl. 2. But he cannot be *ſheriff* or *eſcheator* without patent. cites 33 H. 6. 2. by the beſt opinion.—S. P. Br. Baillie, pl. 45. cites 7 H. 7. 10.

2. In treſpaſs the defendant may juſtify *by command of the king, though he be not the king's bailiff*, nor other officer, quod nota by award; and therefore it ſeems that he may do it without ſhewing a deed or writing thereof. Br. Monſtrans, pl. 79. cites 39 H. 6. 17.

3. Where a man makes *cognizance to diſtrain* as bailiff of the king's manor, *for rent or ſervices* arrear, *and prays aid of the king*, he ſhall have it without ſhewing the patent how he is made bailiff; becauſe he claims to the uſe of the king. *But if he claims* of the king *to his own uſe*, there he ſhall ſhew the patent. Br. Monſtrans, pl. 64. cites 15 H. 7. 17.—Br. Baillie, pl. 9. cites S. C.—Br. Aid del Roy, pl. 51. cites S. C. per Vaviſor. He may be baily of the king without patent, though he cannot be grantee but by patent. Br. Travers per ſans, &c. pl. 118. cites S. C. per Vaviſor.—A diſtreſs taken by one as baily who *is not bailiff* is good, if the king agrees to it. Br. Travers per &c. pl. 3. cites 26 H. 8. 8. Br. Baillie, pl. 1. S. P. For whether bailiff or not is not traverſable, cites 26 H. 8. 8.

(M. a. 18.) By Ceſty que Uſe, Truſt, Covenantor, &c. [81]

1. THE tenant of the land cannot plead a releaſe made by ceſty que uſe to the feoffee without ſhewing the releaſe. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

2. A. *gives land to J. S. and J. N. and their heirs, to the uſe of* himſelf and the heirs of his body, and *for default* of ſuch iſſue *to the* *But* upon covenant with a

Stranger to the uſe of the ſtranger he muſt ſhew the deed. D. 277. Marg. pl. 58. ſays it was ſo reſolved 4 Eliz. B. R.——In pleading the *grant of an advowſon* after the ſtatute of 27 H. 8. *to one to the uſe of another in taile*, it was held per tot. Cur. that ceſty que uſe need not ſhew the deed, becauſe it belonged to the grantee and not to ceſty que uſe; but that he ought to *ſhew that it was granted by deed*; but Walmſley contra. that he ought to ſhew the deed, becauſe the grant is not good without deed, and ſo differs from D. 277. Eſtoff's caſe, Cro. J. 217. Hill. 6 Jac. B. R. Huntington (Earl) v. Mildmay.

In a caſe upon the ſame point, the ſame objection was made as by Walmſley; but reſolved contra for the reaſon above in D. 277. and alſo becauſe ceſty que truſt has *no remedy in law to get poſſeſſion* of the deed: and alſo, becauſe he *is in merely by operation of law and not in the per*. Carth. 316. Trin. 6 W. M. B. R. Reynell v. Long.

the uſe of B. and his heirs; A. dies without iſſue, B. brings a formedon; but the opinion of the court was prima facie, that he need not produce the deed, becauſe it *belongs to the feoffees*, and not to him. D. 277. a. Trin. 10 Eliz. Eſtoft v. Vaughan.—Cro. Car. 441. Stockman v. Hampton. S. P.

S. P. and alſo becauſe the *eſtate is executed by the ſtatute of uſes*, and ſo the party is *in by the law*; as tenant in dower, tenant by ſtatute ſtaple or merchant, who have a rent-charge extended to them. Cro. C. 441. 442. Hill. 11 Car. B. R. Stockman v. Hampton.

3. *And* the court was likewiſe of the ſame opinion, becauſe the remainder *might commence without deed*. D. 277. b. pl. 58. Trin. 10 Eliz. pl. 58. S. C.

Cro. J. 217. Huntington v. Mildmay.—Jo. 377. Stockman v. Hampton—Carth. 315. Reynell v. Long. S. P.

4. In a *quare impedit*, plaintiff intitled himſelf to a manor to which an advowſon was appendant, that his father was ſeiſed and covenanted (without ſaying per indenturam hic in cur. prolat.) for natural affection to ſtand ſeiſed to himſelf for life, remainder to the plaintiff, and that his father died; the defendant demurred. Per Cur. it is good; for the plaintiff is *not party or privy to the deed*, nor has a remedy to come to it, and he has the eſtate by the 27 H. 8. of uſes, and now the *deed properly belongs to the covenantee*, and ſo was the better opinion in D. 277. and that differs from the 14 H. 8. 7. 8. and judgment was given accordingly. Noy. 145. Welby's caſe.

5. In *debt againſt executrix* for 10 l. the plaintiff declared *upon an obligation conditioned to pay 5 l. to A. to the uſe of M. his daughter at a time limited in a certain indenture*, the defendant *pleads that the indenture was made between her teſtator and one J. S. by which the plaintiff enfeoffed J. S. to the uſe of the teſtator and his heirs, and that the teſtator covenanted to pay 5 l. to the plaintiff within two months after the death of W. R. which W. R. is yet alive.* The plaintiff demurred, becauſe the defendant did not produce the indenture, but the court held that the plea was good without it, becauſe the defendant was a *ſtranger* to the deed, and it does not belong to him, but *belongs to the feoffees*, and ſhe has no means to enforce them to produce it, and the court will not impoſe an impoſſibility, eſpecially ſhe being an executrix; but the plaintiff had leave to diſcontinue. Lutw. 481. Trin. 3 Jac. 2. C. B. Crotch v. Crotch.

[See Ceſty que Truſt (F)]

(M. a. 19) By Corporations and their Grantees, &c.

1. IF a particular man claims an *exemption by a charter made to a corporation* he muſt ſhew it, per Haughton J. ſays it has been adjudged. Roll. Rep. 296. in the caſe of Buckham v. Dundridge.

2. Plaintiff in ejectment declared of a *leaſe made to him by a college by indenture*, without ſaying hic in curia prolat. it is not good. 1 Buls. 119. Paſch. 9 Jac. St. John's Coll. Oxon v. Ld. Norris, alias Clerk v. Hannes. S. P. Ow. 16. Trin. 36 Eliz. C. B. Thurſton's caſe.

3. *But* if a *leaſe for years* had been made *to a corporation*, who cannot take without deed, *and they granted it over*, the grantee might have intitled himſelf without ſhewing the deed; becauſe the leaſe of the thing in its nature might have paſſed without deed; although the perſons who took it could not take it without deed. Cro. J. 110. cites it as ſo ſaid in caſe of Predyman v. Wodry.

[See (M a 11)—Corporations]

(M. a. 20) By Perſons that are in by Deſcent.

1. HE, who is in poſſeſſion by deſcent, need not ſhew ſpecialty. Br. Monſtrans, pl. 65. cites 24 E. 3. 52. per Cur.

(M. a. 21) By Deviſee.

1. IN mortdanceſtor, the tenant intitled himſelf by deviſe, by *teſtament* of the anceſtor, of whoſe ſeiſin the defendant demanded, and this by cuſtom of deviſe, and Belk. challenged, becauſe he does not ſhew any thing of the deviſe, & non allocatur; becauſe the teſtament *does not belong to the tenant, but to the executors*, quod nota bene. Br. Monſtrans, pl. 102. cites 40 Aſſ. 2. Ibid. pl. 160. cites S. C—S. P. ibid. 49. cites 7 H. 6. 1. per Strange, quod non negatur.

(M. a. 22) By Diſſeiſee.

1. *DISSEISEE* cannot plead a *releaſe* made *to the diſſeiſor* without ſhewing it; nor e contra. Per Fitzherbert. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

(M. a. 23) By Grantee, Leſſee, &c.

1. IN *debt upon leaſe for years by indenture*, the plaintiff may count without the indenture; for the leaſe is the effect and not the indenture; for variance between the writ and the indenture for this cauſe was agreed not to be material. Br. Monſtrans, pl. 20. cites 44 E. 3. 42. —— Ibid. cites 4 H. 6. 7. contra per Babbington. But Brooke ſays, it ſeems the law is contra to Babbington.

[83]

2. In *waſt*, it was admitted that if a man *leaſes for life*, and after by * aſſent of the *leſſee makes livery to another in fee*, and the *leſſee does waſt*, the *feoffee ſhall have waſt as aſſignee*, without ſhewing the deed of grant of the reverſion. Br. Monſtrans, pl. 24. cites 46 E. 3. 25.

* Orig. Aſſignment.

3. It is ſaid for law that where an ejectment is brought againſt *alienee of him in reverſion*, he *may plead a condition* without ſhewing deed. Br. Monſtrans, pl. 31. cites 7 H. 4. 16.

4. *So* upon a *leaſe for years rendering rent* with condition of non-payment; the reaſon ſeems to be becauſe it is of a *chattle*. Br. Monſtrans, pl. 31. cites 7 H. 4. 16.

5. If *tenant for years* in whom there is privity *pleads a releaſe*, he ſhall ſhew the deed. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

6. A leaſe was made *by A. to J. S. and* afterwards *A. made another leaſe to W. R. to begin after the determination of the leaſe made to J. S.* In ſecond deliverance brought exception was taken, that the plaintiff had conveyed to himſelf an intereſt of a leaſe made by A. to W. R. which is made by name of the reverſion, and to commence after the firſt leaſe made to J. S. ended, which is *alledged to be made by deed indented*, and that therefore the plaintiff ought to ſhew the indenture, and the rather for that the validity of the 2d leaſe depends upon the validity of the firſt leaſe, ſo that to make the ſecond leaſe good, the plaintiff muſt ſhew the firſt to be good, and in order to that muſt ſhew ſuch deed, notwithſtanding it was made to J. S. and not to him. But the exception was diſallowed. Pl. C. 147. &c. 3 Ma. Throckmorton v. Tracy.

7. *Ejectment* was brought *by leſſee* for years, *defendant pleaded a bargain and ſale* made to him in fee by indenture inrolled within 6 months, *by which he was ſeiſed till leſſor diſſeiſed him, who leaſed* after to the plaintiff. The plaintiff *replied that* the bargain and ſale *was upon condition, which was broken*, abſque hoc that the leſſor diſſeiſed, &c. Defendant demurred and for cauſe ſhewed, according to the ſtatute, that the plaintiff in his replication did not ſet forth the ſaid *indenture comprehending the condition*, and after good debate and conſideration of the matter in law, it was adjudged for the plaintiff. Mich. 35 and 36 Eliz. B. R. 5 Rep. 74. Wymark's caſe. ——Alias Dun v. Low.

8. A.

8. A man claims from a *grantee of a patentee* of a hundred, in which was a leet; he muſt ſhew the deed, if he avows for an *amerciament* in the *leet*. Cro. El. 245. Porter v. Gray.

9. Plaintiff declared of a *leaſe by baron and feme*, and ſhewed it not to be by deed, yet it was held well enough; for it may be intended by deed, though no declaration thereupon; and though it be without deed yet it is well enough, at leaſt during the life of the baron; and it is a leaſe from them both during that time. Mich. 27 and 28 Eliz. B. R. Cro. E. 438. Bateman v. Allen.

10. In treſpaſs, defendant, who was *under leſſee* of the patentee of part of the term, juſtifies under the leaſe *by patent from the king*. Per tot. Cur. he ought to have pleaded hic in curia prolat. and for this omiſſion the juſtification is not good, and judgment pro quer. 1 Buls. 154. Trin. 9 Jac. * Layfield v. Hellicar.—So † of the *leſſee of patentee*, per Periam J. but Rhodes contra, Godb. 112. pl. 133. Mich. 28 and 29 Eliz. Anon.—Sty. 15. P. 23 Car. B. R. Jones v. Young; S. P.—But where the *king comes to the land* ‡ *en le poſt*, his grantee need not ſhew it; for by intendment the king had it not. Cro. J. 109. Hill. 3 Jac. B. R. Predyman v. Wodry.

Cro. J. 317. S. C. but there it is *ſervant of patentee*. Cro. E. 716. S. P. Brownlow's caſe. * Cro. J. 317. S. C. adjudged in the Exchequer upon error aſſigned, that he being *but a ſervant*, his plea was good. But it was held, that he *deriving his title* from the patentee, *not by act in law but by his command*, he muſt make profert as well as one that claims as aſſignee ——Cro. J. 360. Rolls v. Boulton, S. P.

† Jenk. 305. pl. 80.—316. pl. 4.

‡ Pl. C. 57. b. per 2 Juſtices contra, unleſs the king's grantee *grants over all his intereſt*, by which the patent belongs to the grantee; otherwiſe in grant of parcel only. D. 29. b. pl. 200. Hill. 28 H. 8. —‡ Every purchaſor of the king of abbey lands comes in en le poſt, and he that *comes in en le poſt* ſhall not be inforced to ſhew the deed or writing, by which he, after whom he comes in, was *diſcharged of titles*. Arg. 2 Roll. Rep. 253.

11. One poſſeſſed of a grand leaſe makes an under leaſe, *under leſſee* makes a leaſe, and his tenant covenants to repair; in an action of *covenant* on the breach, he need not ſet out the *original leaſe* or *mean aſſignments*. Cart. 31. Gold v. Barnſly. [84]

[See Prerog. (Y. c. 2) Que Eſtate (D)]

(M. a. 24) By Grantee of a Chattel.

1. WHERE the lord of B. and his anceſtors, &c. time out of mind, have had *foldage of ſheep* for their tenants in B. and he grants it to W. N. *for* 4 *years*, it is good, and W. N. may juſtify without ſhewing writing of the grant; for he need not [becauſe it is] but a chattel. Br. Monſtrans, pl. 166. cites 1 H. 7. 24.

Br. Preſcription, pl. 105. cites S. C.

2. A. who was the true and rightful *patron granted the next avoidance to B.* and after *B. made C. and D. his executors* and died. The *executors granted it to J. S.* and all their intereſt in it: the church voids and J. S. brings qua. imp. & avers this to be the next avoidance, but does not ſhew the *literas teſtamentarias of B.* and it ſeems he need not for though the executors never proved the teſtament,

yet the grant of the avoidance is good, and is an adminiſtration in law. D. 135. pl. 13. Mich. 3 and 4 P. and M. Smithley v. Chomeley.

(M. a. 25) By Lord by Eſcheat, &c.

1. LORD by eſcheat ſhall not plead a *releaſe* made to the diſſeiſor by the diſſeiſee without ſhewing it. 10 Rep. 93. in Dr. Leyfield's caſe.

2. *Grantee of a next preſentation was outlawed*, and the church became vacant. The lord of the manor, to whom the goods, chattels, &c. of outlawed, &c. perſons were granted by letters patents, brought qua. imp. and it was reſolved, that the plaintiff being *en le poſt*, and not privy to the grant in any wife, need not ſhew the deed of grant to the perſon outlawed. Hob. 302. Mich. 17 Jac. Holland v. Shelley.

[See (M. a.)]

(M. a. 26) By Lord, Meſne and Tenant.

1. WHERE there is lord, meſne and tenant, the *tenant may plead a releaſe*, made *by the lord to the meſne* without ſhewing it; for this amounts to hors de ſon fee. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

2. *So* where the lord or meſne has *granted his ſeigniory or meſnalty over*, &c. to which he attorns, and does not ſhew the deed; for this *goes in his diſcharge*, and it does not belong to him, and he has no means to come by it. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

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(M. a. 27) By Officers.

1. HE who *juſtifies the entry into a houſe as under eſcheator*, ſhall ſhew the commiſſion, by which the eſcheator commanded him to do ſo. Br. Monſtrans, pl. 92. cites 22 Aſſ. 57.

2. A *ſheriff* or bailiff ſworn and known*, who makes an *arreſt*, need not *ſhew the warrant*. Contra of a ſervant of the ſheriff, &c. who is not ſworn or known. Br. Monſtrans, pl. 117. cites 8 E. 4. 16. and 21 H. 7. 23. 37.

* S. P. ibid. pl. 77. cites 21 H. 7. 23. Per Rede Ch. J. And therefore he may do it by command of the ſheriff, without a precept in writing, and the party ought to obey. Ibid pl. 63. S. P. cites 14 H. 7. 8.

3. An under-collector need not ſhew records, per Choke. Br. Monſtrans, pl. 127. cites 21 E. 4. 50.

4. *Treſpaſs*

4. *Treſpaſs of impriſonment*; the defendant *juſtified as ſervant of a juſtice of peace*, to arreſt the plaintiff, who was making a *riot* in preſence of the juſtice, and good, without ſhewing precept in writing; for, *in preſentia juſticiar.* contra in *abſentia* juſticiar. Br. Monſtrans, pl. 63. cites 14 H. 7. 8.

5. *And* a *ſheriff*, who has a capias, need not *ſhew the capias* to the party when he arreſts him. Br. Monſtrans, pl. 63. cites 14 H. 7. 8.

6. For he is an officer known. Nota, Br. Monſtrans, pl. 77. cites 21 H. 7. 32.

(M. a. 28) By Privies.

1. TRESPASS of goods taken, &c. the *defendant juſtifid*, becauſe *he was mayor* of M. *and the vill has goods of outlaws* by grant of the king and he took them as goods of the outlaw, as mayor; and after was *removed*, *and another made mayor*, judgment; and the plaintiff demurred, becauſe he did not ſhew the patent; and per Danby and Moyle, he need not as here, for now this *intereſt is determined*, *and the patent belongs to the new mayor*. *But where the intereſt is determined*, *and the patent belongs to himſelf*; there he ſhall ſhew it. And per Danby, he ſhall ſhew the deed in the principal caſe: therefore quære, for *adjornat*. Br. Monſtrans, pl. 11. cites 35 H. 6. 8. S. P. cited in Pl. C. 81. b. in the caſe of Partridge v. Strange and Crocker. — S. C. cited ibid. 148. in the caſe of Throgmorton v. Tracy.

2. A man has a *rent for* term *of another's life*, *and ceſty que vie dies*, he ſhall ſhew patent; *contra*, *where the remainder of the ſame rent is over in fee*; for this belongs to him in remainder. Br. Monſtrans, pl. 11. cites 35 H. 6. 8.

3. *So* of a *parſon* who *has a rent in fee*, *and permutes or reſigns*; for the *deed belongs to the new parſon*. Br. Monſtrans, pl. 11. cites 35 H. 6. 8.

4. He who is privy as *leſſee for years*, *feoffee*, &c. cannot plead a deed without ſhewing it. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

5. A *remainder man* ſhall not plead a *releaſe made to the tenant for life*, without ſhewing it; and yet it *does not belong to him*; nor has he means to come at it. 10 Rep. 93. b. in Dr. Leyfield's caſe. Co. Litt. 267. b. becauſe they are privies in eſtate. —So of a *confirmation* to tenant for life, *remainder to another in fee*. Litt. S. 573. Becauſe he is privy in eſtate. Co. Litt. 317. b.

[See Reverſion (S)]

(M. a. 29) By Strangers.

1. A. *Gave land to B. in fee rendering rent, and to re-enter for non payment*; afterwards *B. leaſed to C.* for a term of years *rendering rent*; the *rent payable to A. was arrear, by which he entred and ouſted C.* Now C. ſhall be diſcharged of his rent againſt B. and ſhall *ſay that his eſtate is defeated by the condition* as above, and that by reaſon of the rent arrear he is ouſted, and ſo his eſtate defeated, &c. without ſhewing the deed of the condition. 45 E. 3. 8. b. pl. 10.

2. He who is a *ſtranger to the releaſe cannot plead it without ſhewing it*, as it ſeems. Br. Monſtrans, pl. 41. cites Littleton, tit. ſtates accordingly.

3. *As* in *debt* againſt N. who ſaid, that the obligation was made by him, and by a feme who took E. to baron, and the plaintiff by the deed which he ſhewed had releaſed to E. all actions, &c. Br. Monſtrans, pl. 41. cites 11 H. 4. 30.

4. *Formedon*, the tenant ſaid that *A. was ſeiſed and leaſed to him for life*, and after granted the *reverſion to ſeven*, and *four of them releaſed to the other three*, and after, one of the three releaſed to the other two, and ſhewed all the deeds; and ſo it ſeems that he ought to ſhew a deed to which he is a ſtranger, if he pleads it. Br. Monſtrans, pl. 42. cites 14 H. 4. 32.

5. In *præcipe quod reddat* the *tenant made default* after default, A. came and ſaid that T. was ſeiſed in fee, and leaſed to the tenant for life, the *remainder* to him *in fee*, and *prayed to be received*, and did not ſhew the deed of remainder. And the opinion of the court, except Priſot, was, that he ſhould be received without ſhewing the deed; for *he is to affirm the poſſeſſion of the tenant*, and this *by defence*. Br. Monſtrans, pl. 12. cites 35 H. 6. 31. 32.

6. *But* quære *in formedon*, in remainder *or waſt*, where he *is to recover the land*; there he ſhall ſhew the deed of remainder. Br. Monſtrans, pl. 12. cites 35 H. 6. 31. 32.

7. *And* the tenant ſhall have *aid of him in remainder*, without ſhewing the deed and a fortiori here; for the deed appertains to the tenant for life during his life, and not to him in remainder. Br. Monſtrans, pl. 12. cites 22 H. 6. 1.

8. *And* it ſeems, that he may *make title in aſſiſe* by ſuch remainder without ſhewing the deed; but there the *remainder was executed*. Br. Monſtrans, pl. 12. cites 22 H. 6. 1.

9. In debt upon an *obligation*, *that A. ſhall ſerve the plaintiff for ſeven years*, the defendant ſaid that A. ſerved from the day, &c. till ſuch a day in the ſeventh year, when the plaintiff diſcharged him out of his ſervice: and a good plea without ſhewing the *deed of diſcharge*; becauſe the condition is put in the deed, and alſo the *defendant is a ſtranger* to the ſervice, and was not ſervant, but A. was the ſervant. Br. Monſtrans, pl. 119. cites 10 E. 4. 15.

10. A

10. A feme ſhall have *dower of a rent-charge* without ſhewing the deed, becauſe the deed does *not belong* to her. Arg. Pl. C. 46. in the caſe of Wimbiſh v. Talboys.——55. S. P. Per Montague Ch. J.——Arg. 81. b. S. P. in the caſe of Partridge v. Strange. Cro. C. 209, in the caſe of Gray v. Fielder.

11. Where a deed is *pleaded in diſcharge*, and the party does *not make title under it*, there is no need of prolat. hic in Curia. Mo. 870. Brown v. Goldſmith. *Tenant in dower* may plead a *releaſe to her baron* without ſhewing it. Cro. E. 863. in the caſe of Brome v. Carr.——10. Rep. 93. in Leyfield's caſe.——For this is an eſtate gained *by act in law*. 94. b. ibid.——The *tenant by curteſy* muſt ſhew the releaſe made to his wife; for though his eſtate be created by the law, yet the deed belongs to him, and he had it in his power; for being made to his wife, he may detain it during his life. 10 Rep. 94. in Dr. Leyfield's caſe.——Co. Litt. 226. a.

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12. It is a maxim, that where a man is a *ſtranger* to the deed, and *doth not claim the thing* comprized in the grant, *or any thing out of it*; *nor* doth claim any thing *in right of the grantee, as bailiff or ſervant*; there he ſhall plead the patent or deed without ſhewing it. 10. Rep. 94. Dr. Leyfield's caſe. Br. Monſtrans, pl. 61. cites 14 H. 8. 4. Per Pollard J. that where a ſtranger, who has no privity, is to take advantage of a deed, and *has no means to come by it*; he ſhall plead it without ſhewing it.—He that is *party or privy* in eſtate or intereſt, or he that *juſtifies in the right of him* that is party or privy, ſhall plead a deed. Though he, that is privy, *claims only part of the original eſtate*; yet he ſhall ſhew the original deed to the court. 10. Rep. 92. Dr. Leyfield's caſe. ——94. ibid.——By juſtifying under the right or intereſt of his maſter, it ſeems he *meddles with the title*, and therefore muſt ſhew the deed, without which he cannot juſtify, and it was his folly to juſtify under one, who could not or would not ſhew the deed. 9 Jac. B. R. Cro. J. 291. Purfrey v. Grimes.——2 Mod. 64. S. C. cited in the caſe of Stubbings v. Bird.

13. *But* when he *claims the thing*, or any right or intereſt out of it, or juſtifies in right of the grantee, he muſt ſhew the firſt grant. Ibid.

14. *As ſecond grantee of a rent-charge* muſt ſhew the firſt grant, and ſo muſt his baily. Ibid.

15. *And* the grantee of the rent-charge ſhall not plead the *releaſe of the diſſeiſee to the diſſeiſor* without ſhewing it; for though he claims not the land of which the releaſe is made; yet he, that hath rent out of the land, *hath right in the land*, which by releaſe of all his right ſhall be extinct, and therefore muſt ſhew the deed. Ibid.

16. If land be *mortgaged* upon condition, and the *mortgagee* (in poſſeſſion ſuppoſe) *leaſes the land for years, reſerving a rent*, and afterwards the *condition is performed*, and the *mortgagor re-enters*; the leſſee, in an action of *debt for the rent*, ſhall plead the condition, and re-entry without ſhewing the deed. Co. Litt. 226.

17. One need not produce a deed of *releaſe* in pleading, where it *was to a* * *third perſon*, and he † *claims not under him, nor has any means to come by it*. Per Levinz. J. 2 Show. 418. in the caſe of Howard v. Denham. * Pl. C. 148. b. 149. a. b. Throgmorton v. Tracy. † Pl. C. 231. b. D. 174. 18. 3 Le. 83. Carver v. Pinkney.

18. *But*, where a * ſervant juſtifies by *leaſe of tythes made to his maſter*, he ought to make profert. Cro. J. 360. Rolls v. Bolton. * Br. Monſtrans, pl. 11 cites 35 H. 6. 8. Per Moyle and Danby

(M. a. 30.) By Tortfeiſor.

1. A Tortfeiſor, who *cannot make title*, may plead a deed without ſhewing it, per Fitzherbert and Brook. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

(M. a. 31) Monſtrans. To whom.

1. IN *præcipe* quod reddat againſt S. he *pleaded that R.* was ſeiſed, and *infeoffed him in mortgage, upon condition of payment* of certain money at a day; *and that R. paid the money at the day and entered*, judgment of the writ. Exception was taken, becauſe he ſhewed no deed of the condition. But ruled that he need not ſhew the deed for two reaſons. 1. That he ought not to ſhew any deed to the *demandant*, becauſe he *is a ſtranger*. 2. It might be when R. paid the money, and the condition performed, that the deed was *rebailed to R.* and ſo the plea was adjudged good, and the writ abated. Co. Litt. 226. a.

[88] (M. a. 32) Profert or Monſtrans, Aided or Cured by what.

Defendant in debt on bond *confeſſed the action*, and ſo plaintiff had judgment; yet upon error brought for want of a profert the judgment was reverſed. Trin. 2 Jac. B. R. Cro. J. 32. Dawbeny v. Baniſter.

1. THE want of profert may be made good by the *plea of the other party*. Pl. C. 230. b. 4 Eliz. in the caſe of Williams v. Barkley.—*As* in the grant of an advowſon, where the *iſſue* was taken *on a collateral matter*. Hutt. 54. Lightfoot v. Brightman.

2. In *replevin*, the defendant juſtified as ſervant to J. S. as in his freehold, and the *plaintiff conveyed as patentee for years* from the queen, without making profert, *and traverſed the freehold of J. S.* It was held by all the juſtices except Walmſley upon a *general demurrer* for the not making profert, that it was but matter of form, and not much material. For it was an *inducement only to the traverſe* and not traverſable, and may be amended: and they ſaid, that *if the defendant makes no defence, and there wants an averment*, the words (Hic in curia prolat.) may be *amended and inſerted*; for the truth of the matter appears, and in this caſe the *letters patent are not iſſuable*. But, Periam ſaid, that if ſuch plea had been in an avowry when it was *iſſuable*, it ſhould be otherwiſe, and it was adjudged accordingly for the plaintiff. Cro. E. 217. Hill. 33 Eliz. B. R. Vautry. v. Aplen.

3. In replevin, the defendant *avowed for rent* granted 12 E. 2. but did not ſhew the deed. The plaintiff *demurred generally*, and the court held, that the want of hic in curia profert is matter of ſubſtance, and *not aided by the ſtatute* 27 *Eliz.* 3. 5. *upon a general demurrer*. Mo. 885. Trin. 13 Jac. Heard v. Baſkervill.

S. C. cited per Hobert Ch. J. Hob. 301. Sid. 308. Mich. 18 Car. 2. B.R. Jevons v. Harridge.

4. In treſpaſs of breaking his cloſe, the defendant juſtified, becauſe it was the freehold of J. S. and that he entered by his command. The plaintiff ſaid that the place where is cuſtomary lands, parcel of the manor of D. &c. and demiſable by copy at will in fee; that W. R. was ſeiſed in fee according to the cuſtom, and died ſeiſed; and that the *land deſcended to A. and B. two daughters as heirs* of the ſaid W. R. *and that*, at ſuch a court, *dominus conceſſit eis*, &c. habend', &c. to them *and their heirs*, whereby they are ſeiſed in fee, and demiſed to the plaintiff. *Iſſue was joined upon a collateral matter*, and verdict for the plaintiff. It was moved in arreſt of judgment, becauſe the plaintiff *did not ſhew the grant*, and that he ſhewing that A. and B. were ſeiſed in fee, without ſhewing the grant, was not good; and of that opinion was all the Court, that the pleading was not good; but Hide, Jones and Whitlock J. conceived, that it was *but a default in the form*; *and* the *iſſue being* taken *upon a collateral matter*, it *was helped by the ſtatute of jeofails*; whereupon it was adjudged for the plaintiff. Cro. C. 190. Paſch. 6 Car. B. R. Shepherd's caſe.

5. 16 *and* 17 *Car.* 2. 8. After verdict, *judgment ſhall not be ſtaid or reverſed for default of alledging the bringing into court any bond, bill, or other deed mentioned in the pleadings, or of any letters teſtamentary, or of adminiſtration.*

6. The plaintiff *declared of taking, chaſing, and detaining a cow* for the ſpace of 8 hours, the defendant *pleaded that I. S. was patentee of all the eſtrays within the manor of H. by which he was poſſeſſed of all eſtrays, &c. and ſo being poſſeſſed, the heifer* [juvenca] *aforeſaid, being an eſtray, came into the manor*, by which, he, as *ſervant* of the ſaid I. S. took and chaſed the heifer [juvencam] aforeſaid; which is the ſame taking, &c. and detained her till replevied by the plaintiff. Exception was taken to the bar, for not producing the patent, ſed non allocatur; becauſe no advantage can be taken of it but upon *ſpecial demurrer*. But the plaintiff had judgment for the variance between the declaration, which was [vaccam] and the plea which was (juvencam), Lutw. 1353. Hill. 2 and 3 Jac. 2. C. B. Mellor v. Bocking.

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7. In *debt on bond* in the grand ſeſſions of Wales, the plaintiff in his declaration omitted the making of a profert, &c. and judgment was for the plaintiff. This was aſſigned in error; but the court held it only matter of form, of which no advantage could be taken * *after verdict*, *or on a* ‡ *general demurrer*, and therefore affirmed the judgment. 2 Salk. 497. Mich. 4 and 5 W. & M. B. R. Saltſbury v. Williams.

Nels. Abr. 1263. Pleas (R) pl. 14. Marg. ſays that in the MS. of this caſe it is [after judgment by default]

* S. P. Cro. E. 153. Trin. 31 Eliz. 3. Lee v. Curveton. ——‡ S. P. Sid. 249. Paſch. 17 Car. 2. Whiteman v. Miles.

8. *Adminiſtrator brought debt* upon a bond made to the inteſtate ſetting forth that he was adminiſtrator to J. S. and that the defendant did not pay to the teſtator in his life, or to him [the adminiſtrator] ſince J. S's death. [The defendant pleaded] *non eſt factum* and verdict for the plaintiff; [exception was taken] that it *did not appear that adminiſtration was committed to the plaintiff.* And per Cur. that would be a fatal exception upon demurrer; but is helped *by your pleading over, whereby you admit him capable* to ſue. 6 Mod. 135. Paſch. 3 Annæ, B. R. in the caſe of Adams v. the tertenants of Savage.

9. 4 *and* 5 *Annæ*, 16. *helps ſuch omiſſions* unleſs ſpecially demurred to: *and that all ſtatutes of jeofails ſhall extend to judgments by confeſſion, &c.*

See more matter of Monſtrans or Profert of Deeds, *under the Head of Pleadings at the ſeveral titles* throughout the work.

(N. a) Pleading *Non eſt Factum.* By what Perſons.

Br. Compriſe, pl. 3. cites S. C.

1. A *ſtranger* ſhall not ſay non eſt factum; but a *privy* may. Br. Non eſt factum, pl. 18. cites 28 H. 6. 6.

So, a ſtranger may ſay *riens paſſa* by the deed. Br. Eſtranger al. Fait. pl. 1. cites 3 H. 6. 18. 26.

2. A *ſtranger* to a deed may plead *ne releſſa pas*; but a party to the deed muſt plead non eſt factum, if he has nothing to plead to avoid his deed; but where he has matter ſufficient to avoid his deed, he may plead ne releſſa pas ſpecially. 2 Buls. 55. Mich. 10 Jac. B. R. Richardſon v. Piſtell.

——Ibid pl. 6.——But contra per Strange. pl. 22. cites 10 H. 6. 7.

A ſtranger ſhall not ſay *nient compriſe*, but *ne enfeoffa pas* by the deed. Br. Eſtranger al. Fait. pl. 2. cites 28 H. 6. 6.——So he may ſay * *ne granta pas*, or † *ne charga pas* by the deed, and ſuch like. Ibid. pl. 4. cites 43 E. 3. 1.——So *ne dona pas*. Ibid. pl. 6. cites 2 H. 4. 20. 21.——So *ne leſſa pas* in caſe of a leaſe for life to defendant, remainder in tail to the plaintiff. But in the ſame caſe *riens paſſa* by the deed was held no good plea as that caſe was. Ibid. pl. 7. cites 2 H. 4. 22.——S. P. For though the leaſe was without deed, yet it was good. Ibid. pl. 9. cites 9 H. 4. 3.

* Ibid pl. 13. cites 24 E. 3. 37. per Thorpe.——† Ibid. pl. 14. cites 37 Aſſ. 16.

Br. Eſtr. al. Faits, pl. 4. cites 43 E. 3. 1.—— pl. 27. cites 20 E. 4. 1.

3. None but the *party himſelf, his heirs, executors*, or adminiſtrators may plead non eſt factum. Per the Ch. J. and Powell J. Lutw. 662. Trin. 11 W. 3. C. B. Robinſon v. Corbet.

6 Mod. 311. S. C.

4. A *feme covert* may plead non eſt factum to a *bail bond* given *by her* to the ſheriff who arreſted her, and it ſhall not eſtop her. 1 Salk. 7 Mich. 3 Annæ, B. R. Linch v. Hooke.

[See Stranger. (F)]

(N. a. 2) Pleading non eſt Factum. In what Caſes.

1. *RAVISHMENT of ward* brought *by executors* inaſmuch as the anceſtor of the infant held of the teſtator in chivalry, &c. the *defendant ſaid, that the teſtator by deed infeoffed the anceſtor of the infant in fee, to hold of the chief lord*; and no plea per Cur. without giving *colour* to the plaintiff; and ſo he did after; and then they were at iſſue upon Not the deed of the teſtator; quod nota, iſſue upon a deed, which touches frank-tenement, taken *in action perſonal, which demands only a chattle.* Br. Raviſhment de Gard, pl. 8. cites 2 H. 4. 23.

2. *Debt* was brought *againſt an abbot upon an obligation of his predeceſſor*, where it was *doubtful if he was abbot or not, becauſe he* was *elected by* 10 *monks and put in by the viſitor*, and *another was elected by* 14 *monks*, and the abby paſſed by election; and the perſon that was elected by 10 made the obligation; and it is not there agreed if he ſhall plead *the ſpecial matter* and conclude judgment ſi actio, or if he ſhall ſay not the deed of the abbot and covent generally, and give the matter in evidence or plead the matter and conclude, and ſo not his deed; for no judgment. Br. Non eſt Factum, pl. 3. cites 9 H. 6. 32.

3. *But* it was held there, that where an *abbot or parſon* is *inducted erroneouſly*, and makes a grant or obligation, and after is *deprived or dereigned for pre-contract*, or ſuch like, it ſhall bind; becauſe *he was an abbot* or parſon *in poſſeſſion*; but an *uſurper* who uſurps before inſtallation, or inſtitution, or preſentation, where another abbot or parſon is rightfully in poſſeſſion; or if one enters and occupies in the time of vacation *without any election*; the deeds of ſuch are void. Br. Non eſt Factum, pl. 3. cites 9 H. 6. 32.

4. A. is *bound to J. S.* where there *are two J. S.'s* and *the* contrary *J. S. gets the bond* and ſues it; the defendant may *ſay that he* ſealed and *delivered the deed to the other J. S.* and not to the plaintiff; judgment if action; and ſhall not be compelled to ſay, non eſt factum. Br. Noſme, pl. 65. cites 12 H. 6. 7.

5. In debt upon obligation under the covent ſeal, *not the deed of the abbot* is a good plea; and *ſo* of *not the deed of the covent*; but *not the deed of the abbot and covent* is double. Br. Negativa, &c. pl. 31. cites 14 H. 6. 16, 17.

6. In treſpaſs, the defendant *pleaded a releaſe bearing date after the treſpaſs, and* pleaded *the primo deliberatum ſuch a day after, abſque hoc that he is guilty after the ſaid day*; and a good plea; and the *plaintiff may well ſay, non eſt factum, if all be in one and the ſame county.* Br. Treſpaſs, pl. 33. cites 34 H. 6. 5.

7. In recordare, the *defendant pleaded* againſt the plaintiff, *not the deed of S. after time of memory*; and it was held negative pregnant. Br. Negativa, &c. pl. 35. cites 39 H. 6. 7, 8.

8. *In*

In debt on bond, defendant pleaded that *factum predict.* was made and delivered without date, and that afterwards plaintiff put a date, and so not his deed; but held ill on demurrer; for first he confesses the deed, by saying *factum predict.* and afterwards denies it: whereas he might have said, non est factum, generally. Adjudged for the plaintiff. Cro. E. 800. Mich. 42 and 43 Eliz. C. B. Copsy v. Turner.

8. *In all cases where* the defendant *confesses once the deed, and after would avoid it by a matter, which makes the deed defeasable and not void*, he shall never say, not his deed. Mo. 43. pl. 132.

So where 2 *were bound jointly in a single bill*, and one died, and *debt was brought against the survivor*, who pleaded that he ought not to be charged, because as to part the obligor had paid it to the plaintiff at such a ward in L. and the residue he had himself paid at the same place, at * another time, and which the plaintiff accepted in full satisfaction, and delivered the bill obligatory in the name of an acquittance of that debt to the defendant, *prout ita cepit*, *the said bill had wholly lost its force and effect*, and that after the plaintiff took it from him by force, &c. *and so the defendant says that that bill, non est factum suum*, & de hoc ponit se, &c. upon this the plaintiff demurred. It was argued by 2 serjeants, Stamford and Bromley, that it was no plea; because, when a man pleads payment in the same county, he ought to rely upon the debet, &c. and also because no acquittance was shewn of the payment, it being a maxim, that a single obligation cannot be avoided by naked matter, but by something as high in its nature as the obligation is, viz. by matter in writing; and also, from the inconvenience of putting matters in writing and matters in fact upon a level. And further that this bill cannot be an acquittance, because not made in the name of the obligee, nor any words of account. D. 51. pl. 12. &c. Mich. 38 H. 8. Cockerell's case.——Hughes's Abr. 593. pl. 5. cites S. C. by the name of Cotterel's Case and says, it was held that the re-delivery of the deed to the defendant could not be an acquittance; because it wanted words of acquittance to that purpose.——And Nels. Abr. Bonds (H) pl. 3. fo. 588. cites S. C. by the name of Cotterel's Case and says, the plea was adjudged an ill plea.——But Quære, if any thing is said by the court in the whole case.

9. *As* in debt upon *an obligation*, the *defendant cannot plead that he has paid the sum, and that the obligation was delivered to him in lieu of an acquittance*, and that the plaintiff re-took it with force from the defendant, and *so not his deed*; for he has *confessed it* before to be his deed. Br. Non est Factum, pl. 9. cites 1 H. 7. 14. and 22 H. 6. 52.

So in *covenant against an apprentice upon an indenture*, discharge by parol is no plea; and it is a good conclusion to say judgment si actio; but not so not his deed. Br. Bar. pl. 68. cites 1 H. 7. 14. per Vavasor and Keble.——*So* if one *pleads acquittance against an obligation*. Per Keble. Ibid.——*So* if in debt upon an obligation, the defendant pleads that at the time of the making he was *within age*, he shall not say, not his deed; for the deed is voidable for this matter. Mo. 43. pl. 132.

And *so* where *any matter* is *to come after the delivery*. Mo. 43. pl. 132.

Br. Barre, pl. 68. S. P. cites 1 H. 7. 14.

10. In case of *duress* the party must demand judgment si actio, and cannot plead non est factum; because the delivery of the deed was not void. Per Montague Ch. J. Pl. C. 66. b. in case of Dive v. Manningham.

* Br. Barre, pl. 68. S. P. cites 1 H. 7. 14.

11. *So* in case * of *infancy*. Ibid.—5 Rep. 119. S. P. in Whelpdale's case.——A bond by infant, or *non compos* is void; because the law has appointed no act to be done to avoid it; and the only reason, why the party cannot plead non est factum, is, because the cause of nullity is extrinsick and appears not on the face of the record. 2 Salk. 675. Hill. 9 W. 3. B. R. Thompson v. Leach.

12. In debt upon an *obligation* the defendant said that there was a *schedule annexed* to the obligation concerning certain covenants, the which schedule is now disannexed from the said obligation, and so not his deed. And it was held by all the justices, that this conclusion was not good; but he ought to say *judgment si actio*. Mo. 43. pl. 132.

13. *Where the deed never was his deed*, as where it is *falsely read*, and such like, *he shall conclude not his deed*. Br. Non est Factum, pl. 11. cites 14 H. 8. 25. per Pollard.

14. *But*

14. *But* where a deed is *made in a defeaſible manner, or* where it is *avoidable by an act ex poſt facto*, he ſhall conclude *judgment ſi actio*; as in caſe upon a bond made *by dureſs*, or by an *infant*, or is *raſed* after, there he ſhall ſhew the matter and ſhall conclude, judgment ſi actio; and the ſame upon *interlining* after, per Pollard. Br. Ibid.

15. Sir Edward Aſhfield was bound in an *obligation* by the name of Sir *Edmund*, and ſubſcribed it with the name of *Edward*; and in debt brought upon it, he pleads it is not his deed; and all the juſtices inclined, that he might well plead it; for it appears to them, that he is not named Edmund; and the *original* againſt him *was*, *Command Edward, otherwiſe Edmund*, and this was not good; for a man cannot have two chriſtian names; and if judgment were given againſt him by the name of Edmund, and the ſheriff ſhould arreſt him by a capias, falſe impriſonment would lie againſt him. 2 Brownl. 48. Hill. 8 Jac. C. B. Sir Edward Aſhfield's caſe.

16. *In all caſes*, where a bond *was* once *his deed, but before action brought becomes no deed*, either by * *raſure, or* † *addition*, or other *alteration* of the deed, or by ‡ *breaking the ſeal*, the defendant may ſafely plead, non eſt factum; for at the time of the plea, which is in the preſent time, it was not his deed. 5 Rep. 119. b. the laſt reſolution in Whelpdale's caſe. Br. Barre, pl. 68. cites 1 H. 7. 14. * 11 Rep. 27. Trin. 12 Jac. Pigot's caſe. —Savil 71.

Manwood v. Harris, contra adjudged.—† Cro. E. 627. Mich. 40 and 41 Eliz. Markham v. Gonaſton.——Dal. 33. 21. Contra, 3 Eliz. Anon.————‡ Dal. 105. pl. 50. S. P. per Southcote and Wray, 15 Eliz. Anon.

17. *Obligation* was made *by two*, and after the *ſeal of the one was torn* off the deed; there, per Brian, in an action brought againſt the other he may ſay non eſt factum, as if it had been raſed, or interlined; for a diſcharge to the one ſhall ſerve both; and alſo, when it was his deed 2 were obliged, and now only one is, and therefore not his deed. Quære. Br. Non eſt Factum, pl. 21. cites 3 H. 7. 15. [92] Br. Obligation, pl. 43. cites 3 H. 7. 5. that it was argued, that he whoſe ſeal was torn off

might plead non eſt factum; and that Brian agreed that he might: but ſays nothing of its being held, whether he whoſe ſeal remained might plead that plea, but only that it was argued, whether he might or not.——But in the year book the argument was only, whether he, whoſe ſeal remained, might plead non eſt factum; and Brian held that he might plead it well enough, and that for the reaſon mentioned of 2 being obliged before, and now only one; ſo that the year book is according to Br. Non eſt Factum, pl. 21.————* It ſhould be 3 H. 7. 5.

18. In debt upon bond, defendant pleaded non eſt factum, and *before the day of appearance of the inqueſt, rats eat the label*, by which the ſeal was fixed, through the negligence of the clerk in whoſe cuſtody it was. The judges directed, that if the jury find it was the defendant's deed at the time of the plea pleaded, they give a *ſpecial verdict*; and ſo they did. 5 Rep. 119. b. in Whelpdale's caſe, cites D. 59. D. 59. pl. 12. Paſch. 36 and 37 H. 8. C. B. Nichols v. Halwood. *So* where after the iſſue joined the *ſeal was pulled off*, the plaintiff had judgment; for the trial ſhall relate to the time of the iſſue joined. Cro. E. 120. Mich. 30 and 31 Eliz. B. R. Michael v. Stockwith.

19. If a deed *was once the party's deed, and after the duty is extinct*, then he ought to demand judgment *ſi actio*; as if a *releaſe* of the

the duty be pleaded, he ought to demand judgment ſi actio; for it was once his deed, and therefore he cannot ſay non eſt factum. Per Montague Ch. J. Pl. C. 66. b. in caſe of Dive v. Manningham.

20. *W. S.* was bound in an *obligation to A. in which he was named J. S.* and J. S. perceiving the miſnoſmer ſealed and delivered the obligation as his deed. Afterwards, *debt was brought* upon this obligation againſt him *by the name of W. S. otherwiſe called J. S.* and he pleaded non eſt factum, and this ſpecial matter was found by verdict; and by the opinion of the juſtices of C. B. the plaintiff ſhall not recover upon this verdict. But the better way had been to have brought the action by the name of J. S. as named in the obligation: and then if he appeared and pleaded non eſt factum, he ſhould be concluded by the obligation. Mich. 10 and 11 Eliz. C. B. D. 279. b. pl. 9. Shotbolt's caſe.

3 Rep. 26. b. it is ſaid by the reporter, that peradventure the obligor cannot plead non eſt factum, becauſe it was *once his deed*.——Holt. Ch. J. cited 5 Rep. 119. b. and ſaid the ſubſequent refuſal made the deed *void ab initio*. 1 Salk. 307.

21. A bond was *delivered to A. to the uſe of B.* the obligee; *B. refuſes* to take it; now the delivery has loſt its force; and the obligor, if ſued upon it, may plead, non eſt factum; contrary to the opinion in * D. 167. 5 Rep. 119. b. in Whelpdale's caſe.

* D. 167. pl. 14. Trin. 1 Eliz. Taw's caſe.——And. 4. pl. 8. S. C.——Bendl. 75. S. C.

22. A *ſtatute ſtaple* being *ſued as a bond*, the defendant may plead, non eſt factum, and give in evidence, that there was no delivery. But if by his bar he admits a delivery, judgment will be againſt him. Per Popham. Cro. E. 495. in caſe of Aſcue v. Hollingworth.

S. P. adjudged accordingly; but defendant might have pleaded *in abatement* of the writ, but could not plead non eſt factum. 5 Rep. 119. firſt reſolution in Whelpdale's caſe.——Upon non eſt factum, he ſhall not have the advantage; becauſe it is his deed, and a ſeveral deed: but becauſe the *ben is joint*; therefore if it be pleaded in abatement, that another ſealed the deed, who is *not named and is yet living*, judgment ſhall be againſt the plaintiff. Per Holt Ch. J. Skin. 280. Hill. 2 W. and M. in caſe of Boulſton alias Boſon v. Sandford.

23. Upon non eſt factum, by ſpecial verdict the bill was found in hæc verba, whereby it appeared, that the *defendant and another* ſealed and delivered that bond, and *were jointly bound*, and that the other is yet alive; and if, &c. It was adjudged without argument for the plaintiff. Cro. J. 152 Hill. 4 Jac. B. R. Stead v. Moon.

[93]

A *bond inrolled* eſtops the party to plead non eſt factum. Per Holt Ch. J. Comb. 248. Paſch 6. W. and M. B. R. in caſe of Smart v. Williams.——2 Le. 65. in Sir William Pelham's caſe.

24. A *feoffment inrolled without livery* is of no force to make the land paſs, but the inrollment may *eſtop* the feoffor to ſay, not his deed. Agreed per omnes. Poph. 8. Gibbons v. Maltyard and Martin. Per Manwood B. Obiter.

[See Eſtoppel (F). Inrollment (B)]

(N. a. 3) Pleadings. Non eſt Factum, Specially or Generally, and at what Time.

1. DEBT upon an *obligation*, the *defendant ſaid, that he delivered it to J. S. as an eſcrow upon certain conditions* to be performed, *to deliver to the plaintiff as his deed*; and ſaid *that the conditions are not performed, and ſo not his deed*; this is no plea, becauſe he does not confeſs any delivery to the plaintiff, by which *he ſhall ſay that the ſaid J. S. delivered the obligation to the plaintiff, the conditions not performed, and ſo* non eſt factum, and then well, becauſe otherwiſe nothing ſhall be entered but non eſt factum generally. Br. Non eſt Factum, pl. 16. cites 18 E. 3. 29.

2. The defendant ſaid that he was lay, and *not lettered*; and that the obligation was *read to him by name of* 8 *marks where it is* 8 *l.* and ſo not his deed, &c. and 3 H. 6. 37. is to the ſame intent, and the plaintiff ſaid, that his deed; Priſt, &c. ad patriam. Br. Non eſt Factum, pl. 2. cites 3 H. 6. 52.

3. If a man *ſeals a deed, and delivers it to a third perſon to keep till a certain condition be performed*, and then to deliver it to the obligee, &c. there if he *delivers it contrary to the condition*, and an action is brought; the defendant may plead this matter and conclude, and ſo not his deed, becauſe it was never delivered as a deed, &c. Br. Non eſt Factum, pl. 4. cites 9 H. 6. 37. Br. Relation, pl. 1. cites 27 H. 6. 7.

4. *But* contrary where it is *delivered as a deed to the third perſon, to keep till* the condition be performed, &c. there he ſhall not conclude, non eſt factum; and in this caſe a deed was delivered as a deed, and the defendant pleaded the truth of the matter, how he delivered it to the third perſon as a deed, and he delivered over the condition not being performed, and ſo not his deed; and the other e contra, and found by verdict not his deed, yet the plaintiff ſhall recover; becauſe *in pleading he has confeſſed a delivery*; and therefore it is his deed, and therefore when a *verdict is found contrary to an acknowledgment by matter of record*; there the judgment ſhall be given upon the acknowledgment, and not upon the verdict; per Cur. And there it is ſaid, that where the matter precedent as above, is *doubtful to the lay gents*, there the *concluſion does not wave the precedent matter*, and the jury ſhall not be charged with it if it be not entered in the roll. Br. Non eſt Factum, pl. 4. cites 9 H. 6. 37.

5. When the defendant *comes in by garniſhment*, he cannot plead non eſt factum, generally, but ſpecially. Hill. 9 H. 6. b. per Cott.

6. A man is *bound in* 40 *l. to J. S.* where there *are two J. S.'s* and the *contrary J. S. gets the bond and ſues it*, the *defendant may ſay, that he ſealed and delivered* the deed *to the other J. S. and not to the plaintiff*, and a good plea. Br. Miſnomer, pl. 82. cites 11 H. 6. 12, 13.

7. If a man makes an *obligation in my name*, I may ſay non eſt factum. Contra, upon matter of record. Br. Diſceit, pl. 17. cites 19 H. 6. 44.

8. If

8. If a man delivers *an obligation to J. S. upon* certain *conditions* to be *performed to deliver to the obligee as a deed*, and if *not to keep it as an eſcrow*. If the *obligee gets it contrary to the condition, and brings debt*, the other cannot ſhew this matter and conclude judgment ſi actio, but ſhall conclude, and ſo non eſt factum; for it was an eſcrow, and *never a deed*, by reaſon that it was delivered to the obligee, the condition not performed. Br. Non eſt Factum, pl. 19. cites 19 H. 6. 1. 38. and 10 H. 6. 25. 26.

9. *Confirmation* was *pleaded* of the demandant, *after the laſt continuance* in præcipe quod reddat, the *demandant ſhall not ſay not his deed after the laſt continuance*, for it is *negativa pregnans*, nor ſhall he ſay that he made it before, &c. and not after; for then he confeſſes the deed, and ſhall be barred; but he *may ſay that he made it ſuch a day by dureſs before the laſt continuance, abſque hoc*, that he made it after, &c. and *the other ſhall ſay that he delivered it after the laſt continuance*, and ſo the *time is only in iſſue*. Br. Non eſt Factum, pl. 20. cites 21 H. 6. 9.

Where a man pleads not his deed, *the reaſon is that ſcriptum prædictum non eſt factum ſuum.* Br. Eſtoppel, pl. 6. cites 9 H. 6. 59.

10. Debt upon an obligation, the defendant *ſaid, that he delivered the ſame obligation* to W. N. *as an eſcrow*, upon certain act to be done, to deliver it as his deed, and he did deliver it, the act not being done, and ſo not his deed. Per Paſton, by *this word (obligation)* you have *acknowledged that it was a deed*, by which Newton ſaid, that he ſaid to W. N. that, if the plaintiff did ſuch an act, that then, he in his name ſhould make an obligation and deliver it to the plaintiff, &c. and he has delivered it, the condition not performed, &c. and ſo not his deed, and others e contra. Nevertheleſs if he had ſaid that he had delivered *the writing* as an eſcrow then it had been good. Br. Non eſt Factum, pl. 12. cites 24 H. 6. 1.

11. *Where the deed is void*, and *not voidable only*; *defendant ſhall ſay, and ſo not his deed.*

12. *As feme covert* ſhall conclude, and ſo not her deed. Br. Barre, pl. 68. cites 1 H. 7. 14. per Keble.

Br. Barr. pl. 78. cites 1 H. 7. 14.

13. *So* where the *obligor* is *not lettered*, and the obligation being with condition, is *read otherwiſe than it is written*, he ſhall plead non eſt factum and give the matter in evidence. And he pleaded accordingly. Br. Non eſt Factum, pl. 10. cites 15 E. 4. 17. per Brian and another.

S. C. cited per Coke, 11 Rep. 27. b. in his notes on Pigot's caſe.

14. *As* in debt upon an *obligation of* 20*l.* the defendant ſaid that he is lay, and not lettered, and that it was *read* to him, *as an obligation of* 20*s. which he had paid*, and ſhewed an acquittance thereof, *and as to the reſidue not his deed*; and held a good plea. Br. Non eſt Factum, pl. 8. cites 9 H. 5. 15.

S. C. cited per Coke, 11 Rep. 27. b. in his obſervations on Pigot's caſe.

15. Debt upon an *obligation*, the defendant ſaid that it is indorſed upon condition, that if he *perform* all the *covenants compriſed in the indenture* made, &c. that the obligation ſhall be void, and ſhewed the indenture which contained 4 covenants, and that he was a layman, and *not lettered, and that the indenture was read to him upon the firſt 2 covenants only, and alledged the performance of them*, & hoc, &c. judgment ſi actio, &c. and per Fitzherbert and Brudnell juſtices the deed is *good in part, and in part not*, ſcilicet the indenture; and therefore the concluſion, judgment ſi actio, is well; contra per Brook juſtice, and that the indenture is *void in all*, and therefore ſhould conclude,

conclude, and ſo not his deed; and per Pollard Juſtice, becauſe the indenture is void, therefore the obligation is ſingle, and therefore he ſhould have concluded and ſo not his deed. Br. Non eſt Factum, pl. 11. cites 14 H. 8. 25.

16. In *debt* upon an obligation the defendant ſaid, that the deed was for payment of 20l. at a certain day, but at the time of the delivery the day was not writ in the deed, but a ſpace was left for inſerting it; and after the delivery the plaintiff *inſerted the day*, and ſo not his deed. Per Dyer, the better pleading had been to ſet forth the ſpecial matter, per quod ſcriptum predict. *perdidit* effectum. Judgment ſi actio. Quod nota. Mo. 28. pl. 89.

17. *Where a man confeſſes* a deed *to have been once his deed, and after ſhews matter, by which it is become void*, he ſhall plead the ſpecial matter and conclude to the action. Mo. 30. pl. 98. Anon. Trin. 3. Eliz. [95] Dal. 23. pl. 21. S.P. per Plowden 5 E. 6. Anon. Mo. 42. pl. 132. Anon. —66. pl. 179. Anon.

18. *But where it appears that it was not his deed at the beginning*, he ſhall plead generally non eſt factum, per Plowden. Ibid.

19. A bond was made by A. to *two obligees, B. and C.—B. died*, C. brought action and *declared of a bond made by A. to C.* It was adjudged the deed of A. for though it had been better pleading to have ſhewn that the bond was made to the ſaid C. and B. now deceaſed, yet upon this general iſſue of non eſt factum, it ſhall be reputed the deed of A. though it was made to B. and C. Sav. 92. Mich. 30 and 31 Eliz. Paunce v. Read.

20. *In all caſes where the deed is voidable, and ſo remains at the time of pleading*; the obligor cannot plead non eſt factum; for it is his deed at the time of the action brought, and ought to be avoided by ſpecial pleading with concluſion of *judgment ſi actio*. 5 Rep. 119. Trin. 2. Jac. C. B. the ſecond reſolution in Whelpdale's caſe.

21. *As* if *infant* ſeals and delivers a deed, or a man of full age by *dureſs*. Ibid. cites 1 H. 7. 15. a. b.

22. When an obligation or other writing is *by act of parliament, enacted to be void*, the party who is bound cannot plead non eſt factum, but in conſtruction of law, the deed is to be voided by the party who is bound by it by ſpecial pleading of the matter, taking advantage of the act of parliament; for though the act makes the obligation, &c. void, yet to this the *law requires order and manner, which the perſon obliged muſt purſue*. 5 Rep. 119. Trin. 2. Jac. C. B. the third reſolution in Whelpdale's caſe. Upon the *ſtatute of uſury* [13 *Eliz.* 8.] defendant cannot plead non eſt factum; nor upon the ſtatute of 23 *H.* 6. *of* * *ſheriff's bonds*, being according to the form preſcribed; for they are deeds, ſuch as they are. Jenk. 295. pl. 45.——But where the bond is not according to the ſtatute, the defendant ſhall plead this matter, and *conclude, and ſo the obligation is void, judgment ſi actio*, and ſhall not conclude non eſt factum. And the ſame concluſion ſhall be made upon the ſtatute of uſury. Br. Non eſt Factum, pl. 14. cites 7 E. 4. 5. and Trin. 7 E. 6.—S. P. and ſame caſes cited and held againſt the opinion of Montague in Pl. C. in Manningham's caſe. 5 Rep. 119. b. in Whelpdale's caſe.

* 7 Mod. 151. in caſe of the Queen v. King.

23. In *debt* upon an obligation for *letting one go at large upon mainprize*, if it is *not ſaid, the plaintiff is ſheriff*, the defendant may plead ſpecially, and ſo conclude his plea by way of non eſt factum; but

but he cannot plead non eſt factum generally, becauſe that is contrariant. Brown's Analyſis 17.

24. In debt on *bond for* 300*l.* defendant, after a general imparlance demands oyer of the bond and pleads ſpecially, that it was *but for* 30*l.* but it was not allowed *after a general imparlance*; and defendant pleaded that it was not his deed, which was the proper plea in that caſe. Brownl. 70. Hill. 9 Jac. Anon.

25. All ſpecial pleas of non eſt factum in caſe of an *eſcrow* or *raſure*, &c. are impertinent; for thereby the defendant brings all the proof upon himſelf; whereas if he had pleaded non eſt factum generally, he would turn the proof of whatſoever is neceſſary to make it his deed, upon the plaintiff. Per Holt Ch. J. 6 Mod. 217. Trin. 3 Annæ. Buſhel v. Paſmore.

[See (N. a. 2)]

[96] (N. a. 4) Pleadings in General.

But where the count was that A. per ſcriptum ſuum conceſſit,

1. A bare writing is not a deed without ſealing it; and therefore the pleading ought to be *per ſcriptum ſuum ſigillat.* or *per factum ſuum*; for factum ſuum implies the ſealing and delivery. Arg. 1. Le. 310. Paſch. 33 Eliz. Maidwell v. Andrews.

&c. without ſaying ſub ſigillo, &c. and this was aſſigned in error to reverſe the judgment; it was diſallowed, becauſe it cannot be ſcriptum abſque ſigillo. Palm 173. Paſch. 19 Jac. B. R. Vulgar v. Higgins.

2. A deed of leaſe for 99 years by him in reverſion expectant on an eſtate for life, was made in the words *demiſe ſet, and to farm let*, and was pleaded in the ſame words; yet upon the whole pleading, it was adjudged to be a *bargain and ſale*. 8 Rep. 93. b. 94. a. Hill. 7. Jac. Fox's caſe——But ſee the next caſes in the reports of which this caſe was cited.

S. P. per Holt Ch. J. for he ſaid that pleading in the words of the deed

3. *So*, if tenant for life by the word *dedi* grants his eſtate to him in reverſion, this ought to be pleaded as a *ſurrender*, as it is by operation of law, and not in the words of the deed. Per Holt Ch. J. Skin. 570. Mich. 6 W. and M. B. R. in the caſe of Netherton v. Jeſſop.

would be uncertain and barbarous pleading. Skin. 375. in caſe of Baker v. Lane.——12 Mod. 401. Paſch. 12 W. 3. per Holt. Ch. J. Steer v. Shalecroft.

4. In error to reverſe a judgment in replevin, it was aſſigned that the count was *that A. per quandam indenturam granted to the defendant*, and does *not ſhew between what parties* the indenture was made. But it was over-ruled; for the defendant muſt neceſſarily be a party, or otherwiſe he cannot take by it. Palm. 173. Paſch. 19 Jac. B. R. Vulgar v. Higgins.

4 Mod. 149. S. C. Barker v. Lade.—2 Vent. 267.

5. Every deed muſt be pleaded *expreſsly according to its operation*, and not according to the words at large. Carth. 254. Tr. 3 W. and M. Br. Baker v. Lade.

S. C.—Skin. 315. S. C. by name of Baker v. Lane.—3 Lev. 291. S. C.—Per Holt. Ch. J. 12 Mod. 533.

6. *As* where the words *give and grant* operate as a covenant to ſtand ſeiſed, and will not take effect otherwiſe; there it *muſt be pleaded as a covenant to ſtand ſeiſed*, and ſo judgment in C. B. was reverſed. Carth. 254.* Baker v. Lade.—308. S. P. Ofmer v. Sheaf. Vent. 266. S. C.——3 Lev. 291.

* Adjudged contra in C. B. by 3 J. againſt Pollexfen Ch. J. 2.

(O. a) Pleadings. What Deeds are pleadable.

1. A deed made *before time of memory* is not pleadable; contra of record. Br. Avowry, pl. 45. cites 12 H. 4. 23. Br. Faits, pl. 21. cites S.C.

2. *Therefore* in *avowry*, where the *tenant had a deed* bearing date before time of memory, *to hold by leſs ſervices*, he cannot plead it; but *is put to a ne injuſte vexes*, or other like remedy; notwithſtanding that he has *confirmation of a king*, which is matter of record, *reciting the firſt grant*. Br. Avowry, pl. 45. cites 12 H. 4. 23. Br. Faits, pl. 21. cites S.C.

(O a. 2) Pleadings. Where Deeds refer one to another. [97]

1. I. S. was bound in an *obligation* of 20l. *to J. Bozam*, with a (Z) to pay 10l. at two ſeveral days; and after, upon payment of one of the ſums, the obligee *made an acquittance in the name of J. Boſam*, with an (S). In debt brought upon this bond, the defendant was compelled to *ſay that J. Bozam by the name of J. Boſam acquitted him, &c.* Br. Pleadings, pl. 21. cites 14 H. 4. 31. Br. Faits, pl. 22. cites 14 H. 4. 30.

2. In debt upon obligation the defendant *pleaded defeaſance, that if the plaintiff may peaceably enjoy the office* of parker of B. *taking 3d. per day according to the deed of grant of the defendant, that then*, &c. *and ſaid that he had enjoyed it according to the ſaid grant*. And per Cur. this is no plea without *ſhewing what was the effect of the grant in certain*. Quod nota. Br. Pleadings, pl. 105. (bis.) cites 16 E. 4. 9.

3. Debt. The *condition of a bond* was *to pay* 1400 *l. with intereſt* on ſuch a day, *according to the intent of a certain proviſo or covenant mentioned in an indenture bearing even date*, &c. *and made between the ſame parties*. The *defendant recites a deed* of the ſame date made between the plaintiff and defendant, *whereby, in conſideration of* 1400 *l. ſecured to be paid by an obligation of the ſame date, and in conſideration of five ſhillings paid to the plaintiff, the plaintiff aſſigned to the defendant a 20th ſhare of lead works, &c. and* ſaith *that he paid the money ſecundum formam proviſion. in indentura præd. mentionat.* The plaintiff *replied*, that the *defendant did not pay* the money, &c. Verdict for the plaintiff.——It was moved in arreſt of judgment, that *defendant had miſtaken the deed*; *for* there is *no ſuch covenant in the deed ſet forth*, and therefore it is a *void iſſue and ought to be a repleader*; and to that opinion the Court inclined. Holt ſaid, that the defendant

is *eſtopped to ſay that there is no ſuch deed*; therefore he *ſhould ſet forth ſuch a deed*, or elſe he is gone, and muſt pay the money; and that he might have pleaded *payment, ſecundum formam conditionis*, and well; for the *indenture is but a further deſcription of the agreement*. The counſel for the defendant aſked, what if they ſhould ſet out the whole indenture, and there is no ſuch covenant? to which Holt anſwered, that it was your fault to ſay ſo in the condition; and judgment for the plaintiff. (Cæteris tacentibus.) Comb. 377, 378. Trin. 8 W. 3. B. R. Evans v. Powell.

4. If a *bond* be to *perform articles in one deed, and that deed refers* the party *to another* deed: in order to diſcharge himſelf, he muſt *ſhew the matter in the ſecond deed that is referred to from the firſt*. Mich. 3 Annæ, B. R. 6. Mod. 237. in caſe of Lady Cook v. Remington.

(O. a. 3) Indenture. What muſt be by Indenture and not by Deed-Poll, &c.

1. *By* 27 *H.* 8. 16. BARGAINS and ſales *to an uſe of inheritance of freehold ſhall be by deed indented and inrolled within ſix months.*

2. *By* 32 *H.* 8. 28. *All* leaſes *made* by huſband and wife *of lands, &c. of the wife ſhall be by indenture.*

3. *By* 7 *Eliz. c.* 13. Sale of bankrupt's eſtate *by commiſſioners of the bankruptcy, muſt be by deed indented and inrolled.*

[98] 4. *By* 43 *Eliz. c.* 11. *Contracts relating to draining waſts, &c. where the queen, her heirs and ſucceſſors, hath an intereſt in ſuch waſtes, &c. ſuch contracts or bargains ſhall not bind them, unleſs they be written in parchment, indented and certified in chancery, and the royal aſſent thereunto firſt obtained and ſignified under the privy or great ſeal, when the waſtes or ſoils are of the poſſeſſions of the crown, but under the ſeal of the dutchy of Lancaſter, and inrolled in that court when they are of that kind.*

5. *Leaſes by eccleſiaſtical perſons* muſt be by deed indented; for though the ſtatutes of 1 and 13 Eliz. do not appoint the leaſe to be made by writing, yet it muſt therein and in the other following properties and qualities required by ſtat. 32 *H.* 8. follow the pattern thereof (*concurrent leaſes* only excepted). Watſ. Comp. Inc. fol. 429. cites Co. Lit. 44.

(P. a) *Conſtruction* of Deeds in Equity.

1. IF it be lawful for a court of equity in ſome caſes, and upon ſome *ſpecial circumſtances*, to expound a deed *otherwiſe than the letter* ſeems to import; yet this ought never to be done, ſo as to

to make a deed, but only *to avoid ſome extremity.* Hill. 25 Car. 2. Fin. R. 101. Cheek v. Lord Liſle and Harvey.

[See Grants.]

(Q. a) *Averments* as to Deeds in Equity.

1. AVERMENT by A. againſt a *general warranty* in a deed, and ſome proof being that it was declared on the ſealing, that the plaintiff ſhould undertake for his own act only; he was relieved. Mich. 14 Car. 2. Chan. Caſes. 15. Caldcot v. Hill.

2. Averments are not to be admitted in *chancery contrary to the purport* of the deed. Tr. 32 Car. 2. 2 Vent. 345. in Sir William Beverſham's caſe. cites 1. Roll. 379. See Vendor and Vendee (E).

3. In caſe of a *ſurrender made by a ſteward of a copyhold*, if there be any *miſtake*, that is only matter of fact, and the courts at law will in that caſe admit an averment, that there was a miſtake, &c. *either as to land or uſes.* P. 1689. per Commiſſioners. 2 Vern. 98. in caſe of Towers v. Moor.

4. The *father purchaſed land in name of a younger ſon*, and another, who after the father's death diſclaimed; and in the conveyance the whole purchaſe money was mentioned to be paid by the father. It was ruled by the Lord Chancellor, that parol evidence ſhould be admitted *to ſhew the intention of the father*, that this conveyance was for the benefit and advancement of the younger ſon; becauſe it *concurred with the conveyance, and was only to rebut a pretended reſulting truſt:* and though the father took the profits till his death, at which time the ſon was eight years old, it can be no evidence of a truſt for him; for it muſt be intended to have been done by him as guardian to the ſon. Wms's Rep. 111. to 113. Mich. 1709. Lamplugh v. Lamplugh.

5. A. a baronet conveyed *to the uſe of himſelf in tail*, remainder *to B.* his ſecond couſin the defendant (who was *preſumptive heir to the honour in caſe of failure of iſſue male of A. for life*, remainder *to the firſt, &c. ſon of B. in tail male*, remainder over, *with power of revocation* to A. who ſometime after *revoked the old uſes, and limited new ones* upon D. his youngeſt ſiſter for life, remainder to her firſt, &c. ſon in tale male, they taking the name of A. &c. A. died, and D. brought a bill to eſtabliſh the revocation; and B. brought his bill to ſet aſide this latter deed, and to recover ſome legacies given him and his children by A.'s will; B. died, and upon a revivor of the ſuit by the two infant ſons of B. the deed of revocation, &c. was fully proved; and on the other ſide was only circumſtantial proof; as that A. had expreſſed his intentions, that his eſtate ſhould go with his honour, &c. But Ld. Parker ſaid, that words can have no weight againſt a deed ſo ſolemnly executed, and it muſt therefore ſtand. Wms's Rep. 481. Mich. 1718. Shales v. Sir John Barrington. [99]

[See Averment.]

(R. a) Suppreſſed Deeds. Relief in Equity.

Wms's Rep. 732. Mich. 1721. S. C. cited by Jekyl Ma. of the Rolls; and ſaid that upon ſearch he found it under the name of Hobert, Attor. General v. L. . . . .

1. A. was *attainted*, and it was ſuppoſed that he was *ſeized of an eſtate tail.* A. bill was exhibited in chancery, becauſe the deeds, by which the eſtate was to come to A. were not extant, but were ſtrongly ſuſpected to be ſuppreſſed by ſome, under whom the defendants claimed. And it was decreed by Ld. Chancellor, Ld. Coke, and Hobert, and Maſter of the Rolls, that the king and his heirs, and his farmer of the ſaid lands ſhould hold and enjoy the lands, till the defendants ſhould produce the deeds, and the Court thereupon take further conſideration, and order. Hob. 109. Trin. 14 Jac. The King and Ld. Hunſdon v. Counteſs of Arundell and Ld. William Howard.

———2. Wms's Rep. 680. Mich. 1734. S. C. cited in the caſe of Cowper v. E. Cowper. Per Jekyl. Ma. of the Rolls, who ſaid that the decree was drawn up thus. "That the king, "his heirs, and his farmer ſhould hold and enjoy, till the defendants produced the deeds, therein "particularly mentioned, and *proved once to have been extant, and duly executed.*" And makes this remark, (viz.) that here we ſee, that the *exiſtence of the deeds was fundamental to the decree, and the proof of them fully and expreſſly aſſerted by the court in framing* the decree.———and pag. 682. he ſays, that he does not remember or believe, that any caſe had been cited, where there was not ſome proof made of the exiſtence of the deed or writing ſuppoſed to be ſuppreſſed or deſtroyed.

2. The defendant entered into a *bond to leave his fellowſhip*, and after took away his bond, and the Court decreed him to leave it. Toth. 128. 129. cites P. 15 Car. Holme v. Wild.

3. *Termor for years* dies *inteſtate*; adminiſtration is granted to B. who dies and makes J. S. executor. *C. is adminiſtrator de bonis non*, and brings a bill againſt J. S. for the original leaſe; and it was decreed accordingly. Hill. 25 Car. 2. Fin. R. 59. Preſtidge v. Preſtidge.

4. Upon a bill for diſcovery and delivery of old deeds, defendant inſiſted, that the plaintiff's claim was under one *executed for felony*, whereby his lands were forfeited to the king, and that defendant was in poſſeſſion ſeveral years under that *forfeiture*. But it appearing that the anceſtors of defendant had the deeds concerning theſe lands, the court ordered the bill to be retained to enable the plaintiff and his heirs to make uſe of the depoſitions therein at any trial at law, and defendant to do the ſame, and the plaintiff to have *recourſe to the records, rolls, and evidences of the manor*, in which the lands lie, to view, *peruſe and take copies*, (paying for the ſame) and ordered that defendant and his heirs, lords of the manor, ſhould *produce at any trial* at law ſo many thereof as the plaintiff or his heirs ſhall at any time require, but at the charge of the plaintiff, his heirs or aſſigns. P. 28 Car. 2. Fin. R. 249. Draper and Zouch.

Where the evidence is ſuppreſſed by either

5. Lands were *decreed*, where a marriage deed of ſettlement was got back by the father by a trick ſet forth in the bill and proved, and by him burnt or cancelled; and the decree confirmed on a re-hearing;

re-hearing; and where deeds are ſuppreſſed omnia præſumuntur. *And* the Chancellor *would not allow a tryal at law*, whether the father ſurrendered his eſtate for * life to enable a recovery produced for making good the ſettlement by barring a prior entail. See 2. Ch. Caſes 292, 293. Mich. 28. Car. 2. Gartſide v. Ratcliffe.

party, a court of of equity will always *preſume a title* againſt perſons

ſuppreſſing it until the *evidence* be produced. Mich. 32 Car. 2. Fin. R. 471. Lewis. Lewis v.

6. A. gave B. a ſtatute for 5000 l. and B. gave A. a *defeaſance of the ſtatute*, which was to perform a *truſt* of a term; B. died. The heir of B. by bill, claimed the term, as being declared by the defeaſance to be in truſt to attend the inheritance; but A. ſuppreſſed or concealed the defeaſance; Finch C. decreed the truſt for the plaintiff. P. 30 Car. 2. Fin. R. 357. Goodwin v. Cutler.

7. Where a *conveyance* by fine was *voluntary*, and without conſideration, no money being paid, and the defendant, who was heir to her mother, and whoſe eſtate it was, inſiſted, that the fine was gained unduly, and denied the having the deed, by which the complainant claimed, and of which he prayed diſcovery, the Court would give no relief, but left the plaintiff wholly at law to help himſelf there as he could. Hill. 34 and 35 Car. 2. 2 Chan. Caſes 133. 134. Anon.

8. *Detinue of charters* (during the detainer) is a good plea at law in bar of an account; and ſo it is in equity. Hill. 1688. per Cur. 2 Vern. 33. in the caſe of Lady Plymouth v. Bladen.

See Account (L a.) S. C. more full.

9. The plaintiff was a *remainder man in tail* in a voluntary ſettlement, and the bill was for the diſcovery of the deed; but it appearing to the Court that the entail was *diſcontinued*, the Court would not relieve the plaintiff. Hill. 1688. 2 Vern. 35. Kelley v. Berry. —— 50. Paſch. 1688. Bunce v. Philips. S. P.

10. A. preſented a parſon to a living, and took *a bond to reſign on requeſt* at any time within ſeven years; A.'s houſe-keeper being the parſon's ſiſter, *got away the bond*, and delivered it over to the parſon. A. brought bill to diſcover, and to be relieved. The defendants demurred, and the demurrer allowed. 2. Vern. 242. in the caſe of Bainham v. Manning, cited by commiſſioner Hutchins. Mich. 1691. as the caſe of Mr. Forteſcue.

11. The defendant ſuppreſſed a marriage ſettlement, whereby a *remainder in tail* was limited to the plaintiff's father, and all the prior eſtates were ſpent; on proof that the *ſettlement* came to defendant's hands, and that he confeſſed it in an anſwer to a former bill, the Maſter of the Rolls decreed the plaintiff to hold and enjoy. Affirmed by Ld. Keeper Wright. Trin. 1700. 2 Vern. 380. Eyton v. Eyton.

12. A. *tenant for life* without impeachment of waſte, *with power to make a jointure* on any wife, *not exceeding* 100 l. a year for each 1000 l. brought by her, and ſo ratably for any leſs ſum, *remainder to truſtees to preſerve contingent remainders*, remainder *to the firſt, &c. ſon in tail male*; *remainder over*. Afterwards *A. married M. but whether ſhe had any or no fortune does not appear*. They

part by conſent, and a deed is drawn between A. and M. and the remainder man and truſtees with covenant *to ſettle* 30 *l. a year for the proviſion of M. during the ſeparation, in conſideration of which ſhe is to claim no thirds or any thing out of the huſband's eſtate under the ſtatute of diſtributions. A. executes this deed, and ſends it to the remainder man in the country to be executed by him, who did ſo, and returned it to A. who kept it*, and did not deliver it to the truſtees; M. applied for it, but could not get it; however, *money was paid her in purſuance of the deed.* Afterwards *A. cancels the deed in preſence of the remainder man.* A. dies. M. brings a bill againſt the remainder man to have the benefit of this covenant from the death of A. and ſo decreed by the Maſter of the Rolls, and on appeal affirmed by the Ld. Chancellor. Sel. Ch. Caſes in Ld. King's time. 75. Trin. 2 Geo. 2. Sepalino v. Twitty.

[101] 13. Defendant had *articled to give a portion* in marriage with his daughter to S. and had the deed in his cuſtody. S. ſued for the portion, and ſet forth the purport of the articles by his bill. The *defendant*, in his anſwer, *pretended that the articles varied from what the bill ſet forth, and afterwards burnt* the articles. All which being made to appear, he was committed and continued *confined, till he admitted the articles* to be as the bill had ſet them forth. Mich. 1731. 1 Wms's Rep. 733. where Jekyl, Maſter of the Rolls, cites it as the caſe of SANSON v. RUMSEY; and ſays that the commitment was only by an interlocutory order, and the cauſe never heard.

2 Vern. 561. S. C. as to commitment. See (X. 3.) pl. 4.

14. A. by deed *ſettled a term, ſo as that after his and M. his wife's (the defendant's) death without iſſue*, the ſame was to come *to the plaintiff for the reſidue of the term.* A. died without iſſue, and M. had burnt the deed; and by her anſwer did but faintly deny it, viz. That ſhe did not remember ſhe ever burnt or deſtroyed the deed. Two witneſſes ſwore to the limitations of the ſettlement; both agreed that it was in truſt to A. for life, remainder to M. for life; but differed as to the words of the remainder; one ſaying that it was to the *heirs of their bodies*, and the other that it was to the *iſſue of their bodies, and for want of iſſue by A. and M. remainder to the plaintiff.* It was inſiſted for the defendant, that the remainder over upon either of thoſe limitations of the truſt of a term was void in law, and therefore the admitting the deed to be ſuppreſſed could not advantage the plaintiff. But the Maſter of the Rolls ſaid, that though ſuch limitations as before mentioned were void, yet a limitation in truſt for A. and M. for their lives, and afterwards for their children, or for their iſſue, *and for want of ſuch children or iſſue living at the death of the ſaid A. and M.* then to go over to the plaintiff, is good; and that ſince a term might be limited in ſuch manner, he would *intend it ſo limited in the preſent caſe*; for every thing ſhall be preſumed *in odium ſpoliatoris.* But he ſaid there could be no decree for the poſſeſſion, nor any preſent conveyance to the plaintiff, it being only a remainder of a term after the defendant's death; but directed that the *defendant aſſign over the term* to truſtees, *in truſt for herſelf for life, and after for the plaintiff, and bring the*

the deeds relating to the title *into court, and pay costs.* 1 Wms's Rep. 731. to 734. Mich. 1731. Dalston v. Coatsworth.

15. What a court of equity will look upon as *evidence to presume a suppression* of deeds, see 2. Wms's Rep. 678. &c. Mich. 1734. Cowper v. Earl Cowper.

[See (B. a) (X. 3) — Discovery (M.) — Fraud. Hunt v. Matthews.]

(S. a) Deeds directed by Chancery to be delivered up, or Cancelled.

1. IN debt upon an *obligation*, the defendant said he had *made* it to the plaintiff *for certain debts which he had bought of the plaintiff*, which were *due to him by diverse persons*; and because it is only a *chose in action*, of which no property is altered to the defendant, nor can he sue for them, but the plaintiff may sue for them, or release them, and so he *has not quid pro quo*, by which he sued by *subpœna* against the plaintiff upon this matter in chancery *to have the obligation discharged*; to which the plaintiff there came and answered; and the Chancellor for doubt adjourned them into the Exchequer-Chamber; and there it was debated by him and all the justices of both benches; and held that the plaintiff in conscience ought to discharge the obligation, in as much as the defendant has not, nor cannot, have any thing by this obligation; by which the Chancellor awarded in the chancery, that the plaintiff bring in the obligation to be cancelled, or make an acquittance or release it. And because the now plaintiff refused to do it, he was awarded to the Fleet, there to remain until, &c. and there he yet remains which is the same obligation, judgment, &c. and held that the obligation remains in force, and therefore no bar. Br. Barre, pl. 45. cites 37 H. 6. 13. [102]

2. *Ancient bonds* being put in suit were ordered to be cancelled. Toth. 88. cites Mich. 16 Jac. Garford v. Humble.

3. Bonds entered into by *menaces*, threats and imprisonments, were ordered to be cancelled. Toth. 88. cites 4 Car. Watts v. Lock.

4. Bonds concerning wares were cancelled because of *cosenage*. Toth. 88. cites 5 Car. Otby v. Daniel.

5. Bonds entered into *for fees and lord's favours* were cancelled. Toth. 89. Lever v. Arsents.

6. *Marriage brocage bonds* were ordered to be cancelled. Toth. 89. cites Feb. 17 Jac. Arleston v. Kent.

7. A *voluntary bond* of 1000 *l.* entered into for no consideration was cancelled in the presence of the judges. Toth. 89. cites 7 Car. Wright v. Moor.

8. Bond entered into in 22 Eliz. (being a very *long time since*) was decreed to be delivered up; it being conceived that the money was all paid, because it was *not inventoried, nor any money proved to have*

been paid to the teſtator. Toth. 90. cites Lord Cavendiſh v. Forth.

9. A. made a *feoffment* to the mayor and burgeſſes of Glouceſter *to the uſe of a free ſchool* and other purpoſes; and a bill being exhibited againſt them, and the plaintiff not proving his title, it was decreed for the defendants and their ſucceſſors, and that the plaintiff ſhould by Chriſtmas then next deliver them all the evidences concerning the ſame. Toth. 120. cites Meſſenger v. the Mayor and Burgeſſes of Glouceſter.

10. A. as principal, and B. as ſurety, were bound in a bond to C. The *obligee's name was uſed only in truſt for A. one of the obligors*, and if any money was paid, it was A's. money; but it did *not appear if any money was lent.* B. being ſued brought his bill, and the Court decreed the bond to be delivered up and cancelled, and ſatisfaction acknowledged with coſts to the plaintiff. See Mich. 26 Car. 2. Fin. R. 127. Launce v. Marden and al.

11. If a *deed with power of revocation is revoked*, he, to whom the inheritance belongs, may, by a bill in chancery, compel a delivery thereof to him in order to be cancelled; becauſe the deed of revocation may be loſt, and then it is unreaſonable, that the other ſhould be ſtanding out. Paſch. 4 Annæ. G. Eq. R. 1. ſays it was ſo held in chancery.

12. A. *lent money on a bad ſecurity*, which his lawyer adviſed him was a good one; he having *notice of the other title*, how it ſtood, (though not knowing the goodneſs of it,) or at leaſt knowing, that another claimed title to it, he muſt deliver up all the writings, except the mortgage deed; but that he may keep, becauſe of the covenant therein for payment of the money. At the Rolls. Mich. 1720. Ch. Prec. 548. Opie v. Godolphin.

[103] (T. a) *Defects* in Deeds ſupplied in Equity.

1. A LEASE was made to two during their lives, and after *to the uſe of ſuch of the children begotten by P. R.* without any expreſs concluſion, what child or children. In this caſe the conſtruction touching the uſes muſt be made, as near as may be to the *meaning of the parties, who conveyed* the ſame to uſes. Toth. 191. cites 16 June, 36 Eliz. Rumney v. Garnon.

2. The word *(heir)* was left out *in a clauſe of reſervation*, but ſupplied in equity. Toth. 229. cites July 1606. Baildon v. Church.

It was made a queſtion whether chancery might help a *purchaſer* of lands for a valuable conſideration, the word (heirs) being omitted in the purchaſe deed; but the point was not reſolved. 4 Le. 8. 184. M. 30 Eliz. C. B. in Halton's caſe.

3. A. was poſſeſſed of a defective *leaſe from the king*, which the defendant would have avoided by a compoſition made by him with the commiſſioners for defective titles; but he was relieved here.

here. Toth. 192. cites Hill. 5 Jac. Gage v. Scory.——and ſays, that any other eſtate whatſoever would be relieved in like caſes.

4. A *bond for* 500*l. by a miſtake of the writer*, was not good; but the Court ordered the obligor to give a new bond of like penalty. Toth. 237. cites 10 Jac. Haddon's caſe.

5. A *conveyance* was defective, yet becauſe there was a full *intention to make better aſſurance*, it was decreed. Toth. 106. cites 2 Car. Cooke v. Cleere.

6. A bill being brought to be relieved, as to a *covenant ill penned*, was demurred to; but in regard of ſome *precedent agreement*, the demurrer was over-ruled. Toth. 110. cites Mich. 3 Car. Vanlore v. Bartlett.

7. Chancery will help a defect in a *ſurrender*. 12 Car. 1. 1 Chan. Rep. 108. Smith v. Smith.

8. The aſſignment of a term for years had *not words ſufficient to convey all*, which was conveyed by the grant of the inheritance; but the defect was made good. Paſch. 30 Car. 2. Fin. R. 347. E. of Pembroke v. E. of Middleſex and Hawles, and al.

9. A *bill* was brought to ſupply a *defect in a ſettlement* of lands on the plaintiff, the better to enable him to pay his debts; but the cauſe coming on upon bill and anſwer, the court would make *no order without a replication and proofs*. Hill. 13 Car. 2. Fin. R. 415. Sir John Tufton v. Hawtry.

10. A defect in a voluntary conveyance, made as a *proviſion for children* and for their maintenance, ſhall be ſupplied in equity. Paſch. 1682. Vern. 40. Thompſon v. Atfield.

11. The *not delivery of a deed*, though it was ſigned and ſealed, is not relievable in equity; by Wright Keeper. Hill. 1704. 2 Vern. 475. in caſe of Clavering v. Clavering.

12. A bond being *interlined after execution*, and ſo void at law, was endeavoured to be made good or relieved in equity for ſo much money, as it was really given to ſecure; and that it might be conſidered there as a bond. But Lord Chancellor was of opinion, that at moſt, it can be a charge by ſimple contract only; it being deſtroyed as ſuch by themſelves, and ſo is, as if it had never been, and conſequently can be no bar to the payment of a debt of a ſuperior nature. Sel. Ch. Caſes. in Lord K.'s time. 24. Trin. 11 Geo. 1. Anon.

13. A. made a *voluntary conveyance to B. his half brother*, which proved defective. A. died without iſſue. B. brought a bill to compel the heir to make good the conveyance. And Lord K. [104] Wright was of opinion that as the conſideration of blood, would at common law raiſe an uſe, and as before the ſtat. 27 H. 8. ſuch ceſty que uſe ſhould have compelled an execution of the uſe in a court of equity; ſo would this imperfect conveyance *raiſe an uſe in reſpect of the conſideration of blood, and* conſequently *ought to be made good in equity*. Wms's Rep. 60. Mich. 1702. Watts v. Bullas.

[See **Copyhold.—Powers.**]

(U. a) Aided, or relieved at Law, or in Equity.

1. IF a man *pleads by force of an indenture*, which is loſt, on *affidavit* made thereof, the party ſhall be compelled by the Court to *ſhew his counterpart*, and he to plead thereto; or otherwiſe the Court may grant an *imparlance*. So it is, if he will depoſe that he never had any counterpart. Trin. 15 Jac. B. R. Cro. J. 429. Anon.

2. A *fine* ſhewn in evidence, there being *proof of the purchaſe money paid*, was held *to be good evidence*, that the eſtate was paſſed accordingly though the *deed of uſes* is loſt. Clayt. 121. Grice v. Beaumont.

3. The plaintiff having only a copy of a deed of feoffment, under which ſhe claimed the land, (the original being loſt) and the defendant having a counterpart, the plaintiff prayed by her bill, that the *copy* might be *compared to the counterpart*, and if it agreed, that the ſame might be *allowed in pleading as a good deed ſealed and delivered*; which was granted, and it was referred to a maſter to ſettle the ſame. Paſch. 13 Car. 2. N. Ch. R. 82. Griffin v. Boynton.—So of a *probate* of *a* will whereof the original will was loſt. Ibid. cited as decreed 13 Car. 2. in the caſe of Gorges v. Foſter.

Poph. 205, 206.—Contra Noy. 82. Vincent v. Beverly. Contra.

4. It was ſaid, that if a grantee in a *voluntary deed*, or an obligee in a voluntary bond, loſe the deed or bond, they ſhould have *remedy* againſt the grantor or obligor *in equity*. Mich. 18 Car. 2. 1 Chan. Caſes. 78. Underwood v. Stany.

5. A *docket* or inrollment *of a decree* was loſt, and ordered to be new inrolled. 19 Car. 2. 3 Ch. R. 20. Deta & al. v. Dickenſon.

6. Proof being made of the conſtant payment of a *rent* till 12 years paſt, the deeds being loſt, the rent and arrears were *decreed* to be paid, becauſe it did *not appear what kind of rent* it was, and ſo no remedy at law. Hill. 20 and 21 Car. 2. 1 Chan. Caſes. 120. Collet v. Jacques.

7. A *ſtatute* being loſt, it was moved *to have it certified*, and two precedents were ſhewn. But per Finch K. they are precedents not to be followed, and I will never do it; exhibit your bill againſt all that are concerned in the land, and juſtice ſhall be done you. Mich. 27 Car. 2. 1 Chan. Caſes. 270. Anon.

8. A *debtor conveyed his eſtate to truſtees for payment of debts*, but the *title deeds were burnt* caſually, and the perſon, from whom the eſtate was originally purchaſed, knowing this refuſed to *execute a releaſe* for the ſatisfaction of a purchaſor; but he was decreed to join. Trin. 28 Car. 2. Fin. R. 262. Bennet v. Ingoldſby and Hampton.

9. An *annuity* was granted, but afterwards the deed *came into the hands of the heir of the grantor*; yet it was decreed it ſhould be paid with intereſt. Paſch. 29 Car. 2. Fin. R. 293. Stokes v. Verrier.

10. A

10. A *bill of exchange* being loſt *after acceptance*, the drawee was decreed to pay the money to the plaintiff, on giving ſecurity to indemnify the defendant as the maſter ſhall think reaſonable, againſt any perſon that may hereafter demand the ſame. Paſch. 29 Car. 2. Fin. R. 301. Tereeſe v. Geray.

11. A mortgagor, having confeſſed that he had *burnt the original mortgage deed*, was ordered to deliver to the plaintiff's clerk in court the copy of it upon oath, with the names of the witneſſes. Paſch. 30 Car. 2. Fin. R. 352. Corſellis v. Corſellis. [105]

12. Where equity relieves in caſe of deeds charged to be ſuppreſſed, or burnt, or cancelled, it is *neceſſary to prove that there were ſuch deeds*. Per the Maſter of the Rolls. 2 Wms's Rep. 681. cites it as ſo done in caſe of the KING v. THE COUNTESS OF ARUNDEL. Hob. 109.——and 1 Ch. Caſes 292. in caſe of Gartſide v. Ratcliffe—and 1 Vern. 408. Hunt v. Matthews.

[See Account.]

(W. a) Loſt Deeds ſupplied by after-Deeds.

1. THE defendant acknowledged a *recognizance*, which was taken away privately; the Court ordered that either the plaintiff ſhould be paid his money, or that the recognizance ſhould be inrolled. Toth. 267. cites 22 Eliz. Charnock v. Charnock.

2. Obligee in a *bond loſt*, hath remedy againſt a ſurety in equity. Mich. 18 Car. 2. 1 Ch. Caſes 77. Underwood v. Stany.—Arg. Hill. 31 and 32 Car. 2. 2 Ch. Caſes 23. S. P.

3. If an *annuity* is *granted* by one *to his houſekeeper with a bond for payment* of it, and the *bond is loſt* equity will decree payment of the annuity; for *ſervice is a good conſideration*, and *no turpis contractus* ſhall be *preſumed*, unleſs proved. Abr. Equ. Caſes 24. pl. 7. Hill. 1700. Lightbone v. Weedon.

Though it appeared that no wages were due to her. Abr. Equ. Caſes 93. S. C.

4. If a *fine* is levied by huſband and wife of lands, which he has in right of the wife, and there is a *deed* made at the ſame time *to declare the uſes* thereof, and afterwards this deed *is loſt*, and then *another is* made to the ſame effect, and *dated as the firſt*; that deed is ſufficient to declare the uſes of the fine. Per Holt Ch. J. Mich. 7 Annæ. Holt's Rep. 735. in caſe of Buſhell v. Burland.

(X. a) Of inſpecting Deeds by Order of Court, and at what Time.

1. *AN earl* having a notion that his next eldeſt brother was extravagant, and having no iſſue of his own, *cut off the entail of his eſtate* by a recovery, *and by deed and will ſettled it on his younger brother* for life, remainder to his firſt ſon (then in being) for life,

Lord Macclesfield ſaid that more ought to be done in this caſe,

than in a common case, ibid. 178.—Yet afterwards in a case where peerage was not concerned, where the plaintiff claimed by virtue of a remainder in tail expectant on

life, with remainder to trustees to preserve contingent remainders; remainder to the first son of that son in tail male; &c. *charging the estate with* 100 l. *a year only to his next brother the present earl*, and died without issue. Lord C. Macclesfield taking notice of the ingratitude to the crown, to give away the estate from the honour, and that here being *no purchasor*, there was no occasion to bring the cause to a hearing; his lordship, on bill and answer, ordered all the deeds and writings to be brought by the defendant, the devisee, before the master; and that the plaintiff, the present earl might, either by himself or agents, have the inspection of them; so that if any thing has slipped the conveyance, or if the entail be not well docked, the plaintiff may have the benefit thereof. 2 Wms's Rep. 177. Trin. 1723. Earl of Suffolk v. Howard.

an estate tail, and was *heir male of the family*, and the *defendants were heirs general*, and sisters of the tenant in tail, * and by their answer shewed, that their brother the tenant in tail had suffered a recovery, and declared the use to himself in fee, referring to the deed in their custody, Lord C. Talbot before the hearing, ordered the defendants to leave with their clerk in court, the *deeds making the tenant to the præcipe, and declaring the uses of the recovery*. 2 Wms's Rep. 178. in an addition at the end of the page, cites about Hill. 1735. Sir Edward Bettison v. Farrington and al.

*[106]

2. In the proofs of a cause, *plaintiff proved a deed*, and the *defendant, on petition* to the Master of the Rolls, *got an order of leave to inspect*; *because the deposition* of the witness *referring to the deed, made the same to be part of the deposition*, But to discharge the order, it was moved that defendant can have no right to see the strength of plaintiff's cause, or the evidence of his title before the hearing; and that if this were to be granted, such motions would be made every day; since it would be every one's curiosity to try to pick holes in the deed or settlement, by which he is disinherited; and no such order was ever made in the like case; and Lord Chancellor discharged the order. 2 Wms's Rep. 410. Pasch. 1727. Davers v. Davers.

False Judgment.

(A.) Who shall hold Plea of False Judgment.

Before the making of *this statute*, if a false judgment

1. 52 *H.* 3. 20. *Stat. Marlb.* ENACTS that *none from henceforth (except our lord the king,) shall hold in his court, any plea of false judgment given in the court of his*

his tenants; for such plea specially belongeth to the crown and dignity of our lord the king. had been given in a court baron,

this should have been *redressed in the court baron of the lord next above him*, and so upwards of the lords paramount; which both was an occasion of long delays, and the king had also many times prejudice thereby; for that those base courts could assess no fine or amerciament to the king; which is to be understood, that if the next immediate mesne had no court baron, the false judgment could not be redressed in the court of the lord next above, for default of privity; but then the false judgment was to be redressed in the court of Common Pleas, or before the justices in eyre; and now the justices in eyre being worn out, the *original writ* of false judgment is *returnable coram justitiariis* nostris apud Westm. which are the justices of the court of Common Pleas. 2. Inst. 138, 139.

(B.) Lies in what Cases; and where False Judgment, and where a Writ of Error, or other Action; and the Difference. [107]

1. WRIT of false judgment lies * *not before execution sued*, and till the demandant has entred. Br. Faux Judgment, pl. 6. cites M. 18 E. 3. and F. N. B.——And in false judgment it was held a good plea, that the plaintiff himself is yet seised of the franktenement, and was so the day of the writ purchased. But *writ of error* lies against him who was party to the judgment, whether he was tenant of the franktenement or not. Br. Faux Judgment, pl. 8. cites 38 E. 3. 34.

* *But* it was admitted by Catesby and Jenney, that it lies † without any execution *in plea of land*. Br. Faux Judgment, pl. 19. cites 8 E. 4. 19.——But ibid. cites‡ F. N. B. contra. Brook makes a quære *in plea personal*, but says, it seems all one; otherwise it is *in attaint*, by reason that the petit jurors may die, but it seems that the suitors may live. Quære.——‡ F. N. B. 19 (A) cites M. 38 E. 3. 15. and 8 E. 4. 19. accordingly. That where the tenant loses his land by false judgment in a writ of right in a court baron, he shall *not* have a writ of false judgment *before* the *demandant has entred* upon him, &c.——† Orig. in (Sur) but in the other editions of Brook, it is (Sans) which is according to the year book, per Jenney.

2. *Land* is *recovered* in court baron *by plaint*, where it is *franktenement*, and ought to have been by writ. False judgment lies, but not *assise*, *nor trespass*; for it is not void, nor coram non judice, but error. Br. Faux Judgment, pl. 11. cites 22 Ass. 64. So defendant might bring *error*. Br. Trespass, pl. 238. S. C.

3. A *sheriff* in the county *quashed the essoin without the consent of the suitors*, and the party brought *a bill against him in the Exchequer*, and it well lies. For *false judgment does not lie*; *because it was not the act of the suitors*, who are judges there; and the essoin was cast in writ of taking of beasts: and so note that suitors are in the county. Br. Faux Judgment, pl. 18. cites 26 Ass. 45. S. P. Br. Action Sur le case, pl. 79. cites S. C.

4. Note, that of a *judgment* given *in ancient demesne of lands at common law* a writ of false judgment does not lie, because it is coram non judice. F. N. B. 19 (D) in the notes there (C) cites 7 H. 4. 28. b. For *error or erroneous process in ancient demesne*, the parol shall not be removed; for the party may have writ of false judgment. Br. Cause a Remover, &c. pl. 4. cites 9 H. 6. 34.

5. It is said that *in false judgment the parties have day in court*, and *in a writ of error not*. And in debt before the sheriff in the county

county the plaintiff recovered his debt and damages, and the defendant brought a writ of falſe judgment, by which the record was removed by recordare out of the county into bank; and in the ſame court the plaintiff in the firſt action may pray execution, if the *defendant will not aſſign his errors*; and after the plaintiff in the writ of falſe judgment, was *nonſuited*. Br. Faux Judgment, pl. 15. cites 20 H. 6. 18.

6. Of *error in court of piepowders* writ of error lies, and not writ of falſe judgment; which proves that it is a court of record; and this per Littleton, quod non negatur. Br. Error, pl. 162. cites 6 E. 4. 3. and 7 E. 4. 23.

7. Falſe judgment lies upon a *juſticies*, and *admeaſurement of paſture*, and *all other vicontiel writs*. Br. Faux Judgment, pl. 14. cites 7 E. 4. 23.

F. N. B. 19. (I). 8. A writ of falſe judgment does not lie *of error in aſſiſe of freſh-force*, but a writ of error; for aſſiſe of freſh-force is always in court of record. Br. Faux Judgment, pl. 22. cites the regiſter.

9. If falſe judgment be given in a *writ of right cloſe*, the party tenant or demandant may ſue a writ of falſe judgment thereupon. F. N. B. 12. (A).

[108] 10. But *copyholders* of land in ancient demeſne at the will of the lord muſt ſue by bill in the lord's court; and ſhall make proteſtation to ſue there in the nature of what writ he will. But though falſe judgment he given, he *ſhall not have* writ *of falſe judgment at common law*. F. N. B. 12. (B). Ibid. 18 (H).

Br. Faux. Judgment, pl. 7. cites 14 H. 4. 39. —For if a copyholder ſhould have ſuch writ, he ſhould be reſtored to a freehold which he never loſt, but always continued in the lord. But it ſeems the recovery is void, and may be avoided by plea. F. N. B. 12. (B) in the notes there (b).

11. Upon falſe judgment given in *courts, holding plea by preſcription* in every ſum in debt by bills before them, falſe judgment will not lie, but a writ of error thereupon. F. N. B. 18 (H).

But it is ſaid there in marg. that it is contrary if the juſtices be *removed* into B. R. *by a pone*. 12. Where falſe judgment is given upon a writ of *juſticies* directed unto the ſheriff, the party grieved ſhall have falſe judgment, and not a writ of error; although the judgment be of debt, or treſpaſs over the ſum of 20 s. F. N. B. 18 (H). —Br. Error, pl. 20. S. P. cites 34 H. 6. 48. and 63.

But county court, hundred court and court baron, &c. are no courts of record, and ſo a writ of error lies not, but a writ of falſe judgment. 13. A writ of *error properly lies*, where falſe judgment is given in any court, which is a court of record; as in the Common Pleas, or in London, or other city, or place where they have power to hold plea by the kings charter, or by preſcription, in any ſum in debt or treſpaſs over the ſum of 40 s. F. N. B. 20. (D). Co. Litt. 117. b.—and though the plea is held with or without writ, it is all one. 6. Rep. 11. b. Jentleman's caſe.

See Court baron [ ] Jentleman's caſe. 14. If the *ſteward is named* in the judgment, it makes it a falſe judgment. Noy. 74. in caſe of VAUGHAN v. PARAMORE cites 1 E. 5. 36. and the reaſon is becauſe he is not judge there. Ibid. cites 6 Rep. 11. Jentleman's caſe.

[See (D.) pl. 1.]

(C.) False

(C.) False Judgment tried by whom, and how; and of the returning the Writ, and removing the Record.

1. 1 *E.* 3, 4. *Stat.* 1. ENACTS that *when a record cometh into the king's court by writ of false judgment, in case where the party alledgeth, that the record is* * *otherwise than the court doth record the same, the* † *averment shall be received of the good country, and of them which were present in the court when the record was made, if they do* ‡ *come with others of the country by the sheriffs return. And if they come not, the inquest shall be taken by the good country.*

* Upon error assigned in a writ of false judgment given in the county of York, in an indebit. assumpsit, & a quantum meruit, the defendant in the false judgment, after pleading to the other errors, founds a further plea upon this statute thus, (viz.) *Et quod in præmiss. ill. manifeste est variatio inter loquelam prædict. superius retornat. & loquel. in Cur' Com' præd' super quo* judicium prædict' realiter reddit' fuit *absque hoc* quod defect. præd' superius pro erroribus assign' fuerunt vel eorum aliquis fuit content' in loquela præd. super quo judicium præd. in Cur' Com' prædict' reddit. fuit, prout in Cur' hic pretextu brevis de falso judicio præd' superius retorn' recordatur, et hoc paratus est verificare unde petit judicium, si curia hic ad examinationem defect' prædict' procedere velit seu debeat, &c. Lutw. 957, 958. Hill. 13 W. 3. Butterfield v. Sarton.——And refers to a like precedent in Hearne (495) 399.

* In a writ of false judgment on a judgment in ancient demesne it was said to be *in curia regis* where it should be *regine*; now by this there is no record made or removed but only an *oyer*, and is as if the suitors had brought in the record *without a writ to warrant it*. F. N. B. 18. (G) in the notes there (d). *But in writ of error* which removes a record if it be *abated*, a *special writ* may be awarded upon the record *quod residet in curia*, &c. For this was a record before the removal, and the justices of C. B. may carry it into B. R. in their hands; though otherwise of a roll of a base court which is ‖ not a record.——Br. Faux Judgment, pl. 1. cites 4 H. 6. Fitzh. Faux Judgment, pl. 1.——Br. Faux Judgment, pl. 1. cites 3 H. 6. 26.

† That is, it shall be tried by those who were then present. For the word averment, in this place, *signifies an act or trial*; and not an offer to justify the thing. N. Lutw. 303. in his additions to the report of Butterfield v. Sarton.

‡ If they come, and by other of the country, &c. Cay's Abr. Stat. tit. False Judgment.

‖ [109]

2. If the *sheriff returns that the suitors will not record le parol* (or plea), a *sicut alias distringas* shall issue against all the suitors. And if at the day *some* of the suitors do *appear, and others do not*, the court here shall accept the record by the hands of those that appear; for perhaps, at the distringas sicut alias, the others will disavow the record; but their issues shall be saved, and the distringas sicut alias shall issue as well against those that appear as against the others. And by Hill, if on the first writ the record had been delivered to 4 suitors, and 2 of them had appeared, and the other 2 made default, the record had been (well) accepted. See 1 E. 3. 9. 26 E. 3. 61. * 12 H. 4. 23. And an *idem dies* shall be given to those that appear, according to 29 E. 3. 26. For it may be that at the other day, those who now appear may make default. But if the sheriff returns the names of those who refuse, the distringas shall issue only against them: and if any of them make default, the record shall not be received by the hands of those that appear, but their issues shall be saved, and a new distringas shall go both against them and those who made

All that are returned by the sheriff to be suitors at the court baron, and *present* when the judgment was given, *ought to return the writ*, and not all those that ought to make suit at court. by that means the party shall never have it certified as it may happen.

Noy. 74. Vaughan v. Paramore.

made default. F. N. B. 18. (E) in the notes there (b) cites 9 Eliz. D. 262.

——cites F. N. B. 18 (D) and D. 262.——* Br. Faux Judgment, pl. 5. cites S. C.——See (E) pl. 1.

3. Note, that records of a court baron ſhall be certified *by all the ſuitors* upon a writ of falſe judgment, and not by ſome of them; quære, how this ſhall be taken. Brook ſays it ſeems, by all thoſe *who ſhall be in court upon the ſame plea*, and not by thoſe ſuitors who never were preſent in this ſuit. Br. Faux Judgment, pl. 16. cites 12 H. 4. 22. and 31 E. 3. Fitz. Faux Judgment 8.

4. Writs of falſe judgment *iſſue out of Chancery*, and are directed to county and hundred courts, &c. and are *returnable only in C. B.* L. P. R. 529.

(C. 2) The Effect thereof, and how it muſt be obeyed.

1. IF a writ of falſe judgment be directed to the court of a lord, they *cannot proceed after*; and if the *lord will not hold court to allow it diſtringas ſhall iſſue* to diſtrain him to hold his court; for the writ muſt be ſerved at a court. Br. Faux Judgment, pl. 12. cites 6 H. 7. 15.

(D) In what Court, and at what Time, and to whom Directed.

Writ of falſe judgment *lies not but againſt the ſuitors*, per Litt. J. and *diſtringas ſectatores ad hundum record* lies againſt the ſuitors. Br. Faux Judgment, pl. 14. cites 7 E. 4. 23.

1. FALSE judgment ſhall iſſue *to the ſuitors in a baſe court*, and *not to the bailiffs*; for where bailiffs have conuſance of pleas, or authority to *hold plea by præſcription*, it is a court of record, and therefore a writ of error lies there, and not of falſe judgment; quod nota diverſit. & dubitat. there what writ ſhall lie of falſe judgment in a court of *piepowders*. Br. Faux Judgment, pl. 3. cites 45 E. 3. 1.

[110] 2. If a writ of falſe judgment be brought againſt the ſteward and the ſuitors, the writ ſhall abate becauſe the ſteward is named. Per Vaviſor Arg. it ſeems it is intended, where the writ is directed *to the ſteward and ſuitors*. Br. Faux Judgment, pl. 20. cites 1 E. 5. 3.

3. A man ſhall not have a writ of falſe judgment, but in the court *where there are ſuitors*; for if there be no ſuitors, the record cannot be certified by them. F. N. B. 18. (H).

[See (B.)]

(E) Pleading.

(E) Pleading, and Errors in False Judgment.

1. IN false judgment it was assigned for error, because in *the precept of summons*, &c. these words, *coram tali*, &c. *were wanting*; and because it appeared by the record that he had *appeared before judgment*, therefore he has affirmed the summons; and where a man is *essoigned*, he shall not say after, that he was not summoned, per Wyche. and after the judgment was affirmed. Br. Faux Judgment, pl. 4. cites 46 E. 3. 30.

2. Error *upon false judgment* given *in D. upon a writ of right*; it is said that the *heir shall be warned as well as the tertenant*; and it is said there, that the *plea of the tenant shall be taken*, and not of the heir: but this seems to be in false judgment, and not in error. Br. Error, pl. 42. cites 8 H. 4. 18.

3. False judgment *upon a justicies directed to the sheriff* of D. viz. J. B. and the *under sheriff*, viz. N. T. *held the county, and gave the judgment* of the sum of 1000*l.* contained in the justicies; and the defendant brought writ of false judgment, and assigned it for error; and that they *made the record that the plea was held before J. B.* named in the justicies, *where in fact he was absent*; quod nota. but the plaintiff was nonsuited, and so no determination; but it seems to be error: for by the writ of false judgment the sheriff is commissioner; and commissioner, nor judge cannot make a deputy; and see here, that he shall falsify the roll; but it seems that he shall not say so, if it was in a court of record. Br. Error, pl. 78. cites 21 H. 6. 43. Br. Faux Judgment, pl. 9. S. C.

4. False judgment upon a recovery in a writ of right in a court-baron, the false judgment was assigned, for that the roll was, *placita coram seneschallo & sectatoribus*, &c. where the steward is no judge, but the suitors; and therefore error, per Chock and Littleton. Br. Faux Judgment, pl. 13. cites 6 E. 4. 3.

5. Note by Fitzh. for clear law, that in a writ of false judgment, *in nullo est erratum*, is no plea; for they shall join issue upon some *matter in fact certainly alledged by the party*, and shall be tried per pais; for it is not a * record, contra in error. Br. Faux Judgment, pl. 17. cites M. 23 H. 8. *Orig. (Accord.) but in the other editions it is (Record).

6. In false judgment, if the plaintiff assign the errors, he shall not say *in hoc erratum est*, but he shall say *unde queritur diversimodo sibi falsum judicium factum fuisse, judicium, viz. in hoc*, &c. Note the diversity between error and false judgment in this point. And note, that upon the writ of false judgment, the sheriff returned, *quod acceptis secum 4. legalibus militibus de com' suo accessit*, &c. *& recordum illud habeo coram*, &c. *sub sigillo meo & sigillis prædictorum * militum*, and held the return not good; and that the record was not removed by it. For the return should be *sub sigillis † ex his qui recordo illo interfuerunt*, and not of 4 knights. And for this cause the Court could not proceed. Trin. 6 Eliz. Mo. 73. pl. 198. D. 73. pl. 56. S. C. with the after additions, viz. * quatuor. † quatuor.

7. A writ of false judgment was brought in the Common Pleas of a false judgment given in the court of ancient demesne, in a writ of right-

right-close prosecuted there in the nature of a writ of *aiel*; one of the plaintiffs, who had before appeared, was nonsuit and severed, and the other suitors would not send the record to the sheriff; whereupon a distringas issued against them; upon which they brought the record into court, and there assigned many errors in the record of the judgment. 1. Because in the stile of the court no mention is made *before what judges*. 2. There is *no officer named in the award or return of the summons*. 3. *No day prefixed* to the tenant in the summons, *but ad proxim. curiam*. 4. Tenant *made attorney within age*. 5. *No warrant* of attorney *entered for the plaintiff*. 6. *No names of the summoners returned*. 7. Tenant within age, and in by discent *ousted of age*. 8. *Refusal to receive demurrer*. And upon non sum inform' the court proceeded to the examination of errors, and reversed the judgment; and awarded that he should be restored to all which he had lost by reason of the judgment aforesaid; but no costs or damages; and the suitors were amerced to 7*l*. Trin. 9 Eliz. D. 262. b. pl. 32, 33. Anon.

8. The writ was defective as it seems, because it was recordari facias loquel. *quæ est in eadem curia*; whereas it should be *fuit*. Mich. 9 and 10 Eliz. D. 268. pl. 17. Herford v. Winde.

A writ was *sub sigillo tuo & sigillis 4 legalium hominum ejusdem curiæ*; where it

9. *Exceptions* were taken *to a writ* of false judgment in a court of ancient demesne, because the writ was *assumptis tecum quatuor militibus de comitatu tuo, &c.* and in the end, *per 4 legales homines ejusdem curiæ*. But disallowed, for it is the form of the register. Mich. 22 & 23 Eliz. D. 373. pl. 13.

should be *sub sigillo tuo, & per 4 legales homines ejusdem curiæ*, &c. and also in the end of the writ, before the teste, it wanted the words * *& aliud breve*; and the defendant refusing to consent to the amending the writ, the court doubted what to do. Trin. 4 and 5 P. and M. D. 164. pl. 58. and cites 4 H. 6. 4 that where the writ wants substance, the plaintiff may have another writ out of chancery, to the justices of C. B. reciting the matter and commanding them to proceed to discuss the errors contained in the record, *quod penes eos residet*. Nota bene.

* D. 268. in case of Herford v. Winde.

10. If a judgment in an inferior court is erroneous, *no advantage shall be taken* of it upon pleading, *but by writ of false judgment*; and the judgment shall be intended good till it be avoided. Hill. 24 and 25 Car. 2. B. R. 2 Lev. 81, 82. Doe v. Parmiter.

11. An action was brought in the court of Leicester, for an inartificial cutting of the plaintiff's sow. The defendant demurred. Plaintiff joined. And *upon the demurrer* day was given *ad proximam curiam* without mention of any day certain; and this was held to be incurable. But then it was moved that it *appears to be a court of record*, and then a writ of *error lies*, and not a writ of false judgment, if there had been a *compleat judgment* which there was not, there being only a writ of inquiry of damages awarded, and so nothing further was done. Mich 3. Jac. 2. C. B. Lutw. 951 to 954. Buffard v. Bull.

12. An *infant* brought trespass in an inferior court for taking of a cow, and after a verdict and judgment for the plaintiff, it was assigned for error. 1. That *in the venire facias* the word *scire*, &c. was inserted *instead of sciri*, &c. 2. That the plaintiff in the inferior court, did *not declare by his prochein amy*. 3. Because it is said

ſaid in the record, that the *jury elect. triat. & jurat. fuerunt per Cur'* where the jury is to be tried by triors, and for theſe reaſons judgment was reverſed. Lutw. 954. to 957. 3 & 4 Jac. 2. Wilſon v. Leathat.

[See (B).—Error. [(J. c)—K. c) &c.]——See more in Townſend's Tables 153. and Cornwall's Tables 173, 175.]

(F) How the Judgment ſhall be. [112]

1. IN a writ of falſe judgment, if the judgment be reverſed, the ſuitors are amerced; and the court ſhall *give* the former *judgment which the ſuitors ought to have given.* F. N. B. 18. (A.) a note there.

2. In a writ of *right-cloſe*, if the *writ of* the *demandant* be *abated*, whereupon he brings falſe judgment *in C. B.* and there the judgment is *reverſed*, and the writ awarded good; then he ſhall hold plea in C. B. and a *judicial writ ſhall iſſue from* the *Common Pleas*, in nature of *proteſtation* made in the firſt writ; and if the proteſtation were in nature of aſſiſe of *mortdanceſtor*, the juſtices ſhall direct a *writ unto the ſheriff to ſummon the jurors* to come *out of ancient demeſne thither*, and all the matter ſhall be tried and determined in C. B. And although the judgment be given of the land in C. B. yet the land ſhall be ancient demeſne. Quod vide M. 3 E. 3. in tit. Faux Judgment, F. N. B. 19. (D.) cites 4 Inſt. 270.

F. N. B. 19. (D.) Marg. laſt edition ſays, that it was held accordingly, in caſe of PHILIPS v. BURY. in Hill. 6 W. 3. B. R. by Holt, and the opinion of Dyer 373. denied, becauſe not warranted by 34 Aſſ. 40.

3. *Tenant in tail levied a fine of* land, which was *ancient demeſne*, with proclamations; a *formedon* was brought of the land within the court of ancient demeſne, and the defendant pleaded the fine in bar of the eſtate tail by the cuſtom, and judgment was given there accordingly. Whereupon a writ of falſe judgment was brought in the Common Pleas, and it was a queſtion in that caſe, if the averring of the cuſtom for barring of the eſtate tail there was good againſt the ſtatute *de donis conditionalibus*, which was made within time of memory. Ld. Dyer makes a nota, that if the judgment ſhould be reverſed for that error yet the judgment given here can be no other, but that the party ſhall not have judgment to recover ſeiſin of the land which is ancient demeſne, but *only that he ſhall be* * *reſtored to his action*, &c. which will be adjudged there according to their cuſtom. Mich. 22 and 23 Eliz. D. 373. a. b. pl. 13. —— cites 37. Aſſ. 4.

*See (E). pl. 1.

(G) Execution awarded where, and how. And of Scire Facias.

1. IT was shewn to Thirning, that a man had *recovered land in ancient demesne*, and before that execution sued, he, who lost, brought a writ of false judgment, so that the *record is in C. B.* and the *plaintiff does not pursue it*, and the *demandant cannot now have execution in ancient demesne*. And Thirning said, he *may sue execution as well by scire facias* as upon a writ of error in B. R. For when the record is there, they will award execution. Br. Faux Judgment, pl. 6. cites 12 H. 4. 23.

2. It was agreed that *if the plaintiff upon scire facias ad assignand.* [*audiend'*] *errores appears*, the *court shall proceed to the examination of errors*; but *if he makes default*, the *defendant shall have execution*; for the *court is not bound to examine the errors, though* they are *apparent*, unless at the assignment of the party; and that a man cannot be nonsuited in a writ of error; for he has not *day in court*; contrary in a writ of false judgment; but in the sci. fa. upon writ of error, he may be nonsuited; quod non negatur. Nevertheless it is not expressly ruled. Br. Error, pl. 11. cites 20 H. 6. 18.

3. The *original is determined by the nonsuit* of the plaintiff in false judgment, per Ascough; and therefore, per Paston, execution shall be awarded in bank presently; and so see that the record shall
[113] not be remanded into the country, but execution shall be made in bank. Br. Faux Judgment, pl. 15. cites 20 H. 6. 18.

4. In false judgment J. T. recovered against R. S. in a justicies directed to the sheriff of D. 1000*l.* which *recovery was removed into C. B.* at the suit of the defendant, by writ of false judgment returnable 15 Hill. 21 H. 6. at which day *J. T. appeared, and R. S. was nonsuited*; by which *J. T. brought scire facias to have execution*, returnable 15 Pasch. and the *parties appeared*, and the plaintiff [in the court below] prayed execution. Yelverton objected to it, and said he could not have execution; *and shewed a writ of false judgment, quod coram vobis residet* returnable 15 Johis. *and prayed process* against J. T. and tendered surety to sue with effect, *and assigned error* that the justicies was directed to the high sheriff, and the under sheriff held the county and the plea between the parties, and the record was entered as before the high sheriff, where in fact it was before the under sheriff, and so the judgment coram non judice; and because both parties appeared it was held in vain to award any process against the said J. T. upon which *J. T. said that the said J. S. was otherwise nonsuited in another writ of false judgment*, therefore judgment si actio. Per Paston J. if a *record* be *removed out of* this court of *C. B. into B. R. by writ of error, and scire facias is brought against the party, and after the plaintiff in the scire facias is nonsuited, and the other brings scire facias to have execution; and the other shews writ of error, quod penes illos residet, and assigns errors*; yet the other ought to

to have execution without anſwering to the errors. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34.

5. *But* if he will *firſt ſue a writ of error*, and pray ſcire facias againſt the party, and after is nonſuited; there, if the other ſues ſcire facias to execute, the party, who was nonſuited ſhall have a writ of error, quod coram vobis reſidet, and aſſign his error, *contra in the ſcire facias*; per Paſton. J. Ibid.

6. *And* ſo there ſeems a *diverſity where he ſues ſcire facias and is nonſuited*, and where he *prays ſcire facias and does not ſue it out*; and therefore, if in the firſt writ of falſe judgment no proceſs was ſued, then it is ut ſupra. Ibid.

7. *And* ſo it ſeems that *nonſuit after appearance and proceſs ſued is peremptory, and e contra before appearance*; for if he does not ſue out proceſs upon it, then it cannot be * after appearance. ibid. Br. Nonſuit. pl. 26. cites S. C. and P. per Paſton;

but Br. makes a quære as to this in falſe judgment.—* Orig. [Priſe] but it ſeems it ſhould be [Puis.]

8. *And* ſo it appears by this caſe, that *if the record comes into a more high court, and execution is awarded there, the record ſhall not be remanded.* Ibid.

9. If a writ of falſe judgment be brought in C. B. of a judgment given in an inferior court, by which the record came into the bank; yet this is not of record to have execution, nor otherwiſe; but *whether the judges affirm or diſaffirm the record*, ſo that they meddle therewith, *then it is of record*; *and then execution lies*, or *a writ of error*, and not before, per Priſot. Br. Faux Judgment, pl. 10. cites 39 H. 6. 5.

10. When the *firſt judgment* is *reverſed* by writ of falſe judgment, the plaintiff in the writ of falſe judgment may have a writ of *ſcire facias in bank* againſt the party to have execution in the writ of falſe judgment. Br. Faux Judgment, pl. 19. cites 8 E. 4. 19. Br. Executions, pl. 124. cites S. C.

11. Writ of falſe judgment was brought of a judgment given in the county court upon a plaint there affirmed in an action upon the caſe for an aſſumpſit to the damage of 39*s.* and coſts to 10*s.* And *to delay execution of the coſts* and damages the writ was brought. And the record was removed, and the writ ſerved, and the plaintiff was nonſuited; upon which the defendant prayed a *ſcire facias* againſt the *plaintiff to have execution.* And by good adviſement the writ *was granted*; for otherwiſe he ſhall not have any judicial writ to have execution. *For the record ſhall not be remanded* into another county, &c. Mich. 15 & 16 Eliz. D. 329. a. b. pl. 14. [114]

12. See the like point, 20 and 21 H. 6. But there was a *new writ* of falſe judgment directed to the juſtices of C. B. *quod coram vobis reſidet*; and error thereupon aſſigned, in order to prevent execution in the ſcire facias; et curia adviſare vult, &c. D. 329. b. pl. 44.

(A) False Latin.

1. FALSE Latin does not overthrow *indictments*, if by any intendment the indictment can be made good. Cro. E. 108. Mich. 30 and 31 Eliz. B. R. Bricket and al.—Mich. 2. Jac. B. R. 5 Rep. 121. b. Long's case, S. P.

2. False Latin shall not destroy * *deeds* nor *pleadings*, though it will abate ‡ *writs*. Sti. 302. Arg. in case of Tailor v. Webb.

* 11 Rep. 3. b. Hill. 7 Jac. in Auditor Curle's case.——S. P. by Coke, Trin. 12 Jac. 2 Buls. 241. in case of Marsham v. Jolly.——‡ And that is only *original* writs; but *judicial* writs, or *fines*, shall not be impeached for false Latin, 5 Rep. 121. Long's case.——4 Mod. 160. 4 and 5 W. and M. B. R. in case of Bennet v. Preston.——10 Rep. 133. a. Mich. 11 Jac. B. R. Osborn's case.

3. In debt on a bond, if the *obligation* be false Latin, the *declaration ought to be good Latin*; as if the obligation be wiginti, the declaration ought to be viginti; and then the court is to construe if it be a variance. 2 Show. 155. Hill. 32 and 33 Car. 2. B. R. Anon.

4. False Latin does not *abate an appeal*. 4 and 5 W. and M. B. R. 1 Salk. 328. Bennet v. Preston.——4 Mod. 159. S. C.

5. False Latin was held to be *cured by a verdict*. 8 Mod. 380. Trin. 11 Geo. Cambridge v. Lea.

[See 4 Geo. 4. 26. at tit. Latin. Inf.]

(A) False Oath.

1. TILL the statute 3 *and* 11 H. 7. which gives power to examine and punish perjuries in the Star Chamber, there was *not any punishment* for any false oath of any witness *at common law*; and now there is a form of punishment provided for perjuries by the 5 Eliz. yet before the statute 3 H. 7. the king's counsel used to assemble and punish such perjuries at their discretion; and there was no punishment for perjury at common law but in case of *attaint*; as appears D. 272. But in the *spiritual court*, pro læsione fidei, they use to punish them. Cro. E. 520. Mich. 38 and 39 Eliz. C. B. Damport v. Simpson.

2. If one makes a false oath, the party is punishable for it by an *action on the case*, if it be not perjury for which he may be indicted; there is a *difference* between a *false oath* and *perjury*; for one is judicial the other is extrajudicial. And the law inflicts greater punishment for a false oath made in a court of justice than elsewhere, because of the preservation of justice. Per Roll. Ch. J. Trin. 1652. Sti. 337. in case of Howell v. Gwinn.

3. At

3. At the *common law* one may be indicted for a falſe oath in an *affidavit*. Per Roll. Ch. J. Trin. 1652. Sti. 374. King v. Troes.

[See Perjury.]

False Plea.

[115]

(A) The Effect thereof, and how Diſcountenanced and Puniſhed in Law and Equity.

1. IN *precipe* quod reddat *againſt two*, if the *one comes and takes the entire tenancy upon him*, upon which they are at iſſue, and it is *found againſt the* tenant, by this he ſhall loſe his moiety; for it is found againſt the tenant for his part, becauſe it is tried per pais upon iſſue; contrary of plea to the writ by demurrer. Note the Difference. Br. Peremptory, pl. 73. cites 8 E. 3. 17.

2. Plaintiff, in a ſuit in *chancery* againſt an *executor*, ſhall have the ſame advantage thereof, as if the ſame plea were found falſe by verdict at law; and ſhall have all the *ſame conſequences here as* follow on a falſe plea *at law* to all intents. Mich. 26 Car. 2. 2 Chan. Caſes. 201. Parker v. Dee.

Falſifying Recoveries.

(A) At Common Law.

1. AT common law, if one had ſuffered a recovery in any real action againſt him *by default*, (if he was *lawfully ſummoned and no error* was *in the proceeding*,) he had not (the caſe of an *infant only excepted*, for the tenderneſs of his age and defect of intelligence,) any remedy but by writ of right. And this was the reaſon that tenant in tail, tenant by the curteſy, tenant in dower, or for life, after a recovery by default, had no remedy till the ſtatute of *W.* 2. *cap.* 4. gave them a writ of *quod ei deforceat*. Nota per Coke. 6 Rep. 8. b. in Ferrer's caſe.

2. Where *leſſee for life* was *remainder in fee*, if a *ſtranger had recovered againſt the tenant for life* before the ſtatute of Weſt. 2.

he was barred; and if it were by *feint action*, and after the *tenant for life died*, he in remainder was barred; becauſe he never had poſſeſſion of the land to maintain an action. *But if* he in *reverſion had entered upon tenant for life, and diſſeiſed* him, and after the tenant for life had *re-entered* upon him and died, he in remainder might have had a writ of right againſt him who recovered; becauſe the *miſe* was *joined upon the meer right* of the thing which was in demand, which of them had meer right, viz. the demandant, or the tenant, and not whether he has right to the poſſeſſion upon that which was defeated by the entry of the tenant for life; for if he could have gotten poſſeſſion to convey an action unto him, although the poſſeſſion afterwards did fail him, yet in trial his right did not fail him; but it ſhall be found that his right is *eigne*, but a *right without a poſſeſſion* gives no action. But yet at common law, it was ſaid, he was not without a remedy before the ſtatute; becauſe he might have had a *formedon in remainder*, though he never had any poſſeſſion by a recovery in a mortdanceſtor; and, it was ſaid, that if tenant for life upon a recovery had againſt him, had died before execution, he in remainder might falſify the recovery in a ſcire facias. Hughes's Abr. 916. pl. 11. cites 12 E. 4. 21.—[But I do not find it there.]

[116] 3. If *tenant for life*, where the *remainder* was over *in fee*, had ſuffered a recovery, he in remainder was without remedy at common law. And the *reaſon of the ſtrictneſs of the common law*, was to prevent multiplicity of ſuits, trials, recoveries and judgments, in one and the ſame caſe. 6 Rep. 8. b. in a nota of the reporter's.

(B) Falſifying. What Things may be Falſifyed; in what Caſes, and how.

1. *PRÆCIPE quod reddat againſt two, who made default*, and *at the grand cape they appeared and waged their law of non ſummons*, and at the day *one came and the other not*; there if the *demandant recovers the moiety where the other is tenant of the whole and is ouſted*, he ſhall have aſſiſe; per Stone. Quære; for he might have taken the whole tenancy abſque hoc that the other had any thing, and have waged his law, &c. Br. Aſſiſe, pl. 470. cites 6 E. 3. and Fitzh. Saver Defalt, 67.

2. In formedon the *tenant vouched one, who came*, and joined iſſue with the demandant, and a *venire facias iſſued*; and *before the day of return the vouchee died*, and [ſo] did not come at the day; by which *petite cape iſſued*, and ſo the *demandant recovered by default*; this judgment may be reverſed by action of *diſceit*; per Cur. but *not by aſſiſe*; and therefore ſee that the judgment is voidable, but not void. Br. Aſſiſe, pl. 139. cites 8 Aſſ. 32.

So if the *demandant in præcipe quod reddat releaſes his right meſne between the niſi prius and the day in bank*, and recovers, and enters: the tenant who loſt ſhall have aſſiſe

3. In aſſiſe if a *man recovers by verdict*, and *before judgment the tenant gets a releaſe of the plaintiff*, he cannot plead it; but *if he be ouſted*, he ſhall have aſſiſe, per Tanks, to which there was no anſwer. Br. Aſſiſe, pl. 366. cites 43 Aſſ. 19.

aſſiſe by the releaſe, per Townſend. Br. Aſſiſe, pl. 378. cites 5 H. 7. 40.——S. P. ibid. pl. 404. cites M. 6 R. 2. and Fitzh. Aſſ. 70.——S. P. ibid. pl. 492.

4. If I grant to you *proximam advocationem*, and after I *ſuffer the advowſon to be recovered* againſt me *by writ of right of advowſon*; you may in Qua. Imp. falſify this recovery. And this was *at common law*, per Fitzh. 26 H. 8. pl. 8.

5. *Ceſty que uſe in tail, before the ſtatute of uſes*, ſuffered a recovery againſt him upon a feint title and died, the feoffees could not falſify it *in aſſiſe by way of entry*; but they ſhall have writ of *entry ad terminum qui præteriit*, or *writ of right*, and ſhall falſify it by this action. Br. N. C. pl. 153. cites 30 H. 8. 147.

6. In all caſes where a man ſhall *not have error or attaint*, he may falſify. Godb. 271. Hill. 15 Jac. B. R. adjudged, Plott's caſe. S. P. per Doderidge J. Cro. J. 466. S. C. Holford v. Platt.

7. *Chirograph of a fine* ſhall not be falſifyed by any parol evidence. Admitted. Arg. 10 Mod. 42. Mich. 10 Annæ, B. R. in caſe of Ld. Say and Seal.

8. *Nor* by the date of the concord; though that be matter of record. 10 Mod. 43. 44. ut ſup.

9. Whenever a recovery is falſified, it is by *writ of error*, or by *pleading*; and in ſome ſpecial caſes by *motion*. Pig. of Recov. 166.

(B. 2) By Entry, &c. [117]

1. *CESSAVIT* is brought *againſt J. who aliened to S. pending the writ*, and the *demandant took the rent and homage of S. pending the writ, and after had judgment to recover*; the beſt opinion was, that the ſaid S. ſhall avoid the recovery by this acceptance; quære, inaſmuch as it was not pleaded before judgment, ſo that it is matter in fact; but per Stone by this acceptance the writ was abated, and the action extinct. Br. Acceptance, pl. 3. cites 21 E. 3. 18, 19.

2. Where the *demandant* in præcipe quod reddat *enters upon the tenant pending the writ*, and the *tenant loſes* the land *by default after appearance* by petite cape, upon which he cannot aver this entry by way of plea before his default ſaved; by which ſeiſin of the land is adjudged, and a *proteſtation is entered of this entry made by the demandant to ſave the aſſiſe* of the plaintiff; and ſo ſee that of this entry he ſhall have aſſiſe againſt him, who hath recovered the land againſt him by judgment after the entry, per Cur. Br. Aſſiſe, pl. 17. cites 40 E. 3. 42.

3. In ſcire facias. A. brought *præcipe quod reddat againſt B.* and *pending the writ J. N. entered*, and *A. recovered and brought ſcire facias againſt him, who entered to execute the recovery*, and the *tenant pleaded that he was ſeiſed till by the ſaid B. diſſeiſed, againſt whom the ſaid A. brought the præcipe, pending which writ the now tenant entered*; and by the opinion of the Court it is no plea; for he *ought to allege* Br. Brief, pl. 9. cites S. C.

allege elder title, or that there is covin between the demandant in the præcipe and the tenant, quod nota. Br. Fauxif. de Recov. pl. 2. cites 3 H. 6. 34.

Fr. Brief, pl. 9. cites S. C.

4. *Wherefore* the tenant alleged, that before B. had any thing J. S. was seised in fee, and enfeoffed him, by which he was seised, till by the said B. disseised by covin, against whom the said A. brought the præcipe, and pending the writ he entered, and after he omitted the covin and pleaded ut supra; and so it is admitted there, that *elder title of entry, than the tenant has upon whom he enters, suffices, though it be not elder than the title of the demandant in the præcipe quod reddat*; for there it is agreed that such entry *shall abate the writ*. Ibid

5. *So* if the *lord enters upon his villain, or* the *mortgagee upon the mortgagor pending the writ*. Ibid.

6. *Contra, if a man disseises the tenant pending the writ*, this shall not abate the writ, and therefore this is no cause to falsify; and per Marten there the matter supra is good, but yet this *is no plea in scire facias*, which is founded upon a recovery; *but* the demandant shall have execution, and the other *shall be put to an assise, and falsify there, viz. by way of action, and* by an original, and *not in writ judicial* by way of defeating. Quære inde; for concord. 7 H. 4. Ibid.

Br. Brief, pl. 182. cites S. C.—Br. Judgm. pl. 31. cites S. C.

7. In *præcipe quod reddat*; *where formedon* is brought *against C.* and *I enter pending the writ*, and the *demandant recovers after*; there the recovery shall bind us both; contrary if I had title before the writ of formedon; and therefore it is usual to bring the writ against the mortgagor and the mortgagee, the lord and the villein; for a *lawful entry, pending the writ, shall abate the writ*. In these cases, and several others, the lawful entry *of a stranger* shall abate the writ, quod nota, and by such entries the party, who entered lawfully, shall falsify the recovery, per Markeham. Br. Entre congeable, pl. 34. cites 21 H. 6. 17.

8. If *tenant for life* be *impleaded, and prays in aid of a stranger*, he in reversion may enter; *but if he does not enter, till the other has recovered*, then he cannot enter, but is put to his writ of entry *ad terminum qui præterit*, or entry at common law, and shall falsify the recovery there. Br. Forfeiture de Terres, pl. 87. cites 24 H. 8.

[See Error (B)—Remitter (G. 2)]

[118] (B. 3) In what Cases. In respect of the Place where.

1. IN scire facias *against the heir upon a recovery in assise by default* against his father, he *said his father had nothing the day of the writ* of assise, *nor at any time pending the assise, but J. N. who was seised in fee, whose estate he has, judgment*, &c. and by all the justices he shall have the plea, because he claims by a stranger and not by his father; and per Choke the father himself shall have this plea

plea in ſcire facias upon a recovery by default, quod quære. Br. Confeſs and Avoid, pl. 6. cites 33 H. 6. 21.——And ſee 33 H. 6. Fitzh. 20. it is agreed there alſo, that recovery by default may be avoided as above. Ibid.

2. Aſſiſe was brought in Suſſex by B. and E. his wife againſt J. F. and it was adjourned into the exchequer chamber, and the plaint was of 8 acres of land, the *tenant pleaded* in bar *that a ſtranger was ſeiſed and infeoffed him* and gave *colour*, &c. the *plaintiff ſaid that, at another time the feme brought* writ of *dower againſt a ſtranger*, and demanded her reaſonable dower of the frank-tenement which was J. F.'s late her huſband in 3 vills, *and the writ was ſerved, and the tenant made default, and the demandant made her demand of the third part of the manor of D. and S. of which manor of S. this land in the plaint is parcel*, upon which grand cape iſſued returnable, &c. *and the plaintiff recovered by default and had execution and this land* (inter alia) *put in execution, by which he was ſeiſed till by the tenant diſſeiſed*; to which the *tenant ſaid that* 4 *acres* of the land parcel of the ſaid manor of S. *are in* W. which is one of the *cinque ports* where the king's writ runs not, and ſo the recovery falſe and faint in law, and demanded judgment, and the plaintiff demurred. per Forteſcue Ch. J. if the recovery was void of the land in the cinque ports, yet it is good as to this, which is now put in view; by which he awarded the aſſiſe, quod nota; and quere, if this was becauſe the *plaintiff did not make title*, or becauſe the recovery is good of land in the cinque ports, if *exception be not taken*; it ſeems to be for both points, and ſo it ſeems the recovery good; but ſee * that (it may be conſiſtent or) ſtand together, becauſe all was not in the cinque ports, nor does it appear what part was in the cinque ports. Br. Fauxiſ. de Recov. pl. 15. cites 36 H. 6. 32.

* Orig. Que poit eſtoier ove.

3. A recovery *of land in the county of E. which lies in the county of H.* is void. Ibid.

4. *So* of a recovery *of land in ancient demeſne which lies not in the manor* of ancient demeſne; for this is *coram non judice*. Ibid.

5. *But* a recovery *in formedon in B. R.* or a *fine* levied there, is good enough, per Forteſcue Ch. J. Ibid.

But ſee Fines (C. 2)

(B. 4) How. By Plea.

1. A Man ſhall not avoid a *judgment given againſt his anceſtor in an action real paſſed by trial in jury*, by ſaying that his anceſtor had nothing in the land at the time, &c. *contra of a recovery by default*, there he may ſay, that his anceſtor had nothing at the time, &c. but J. D. whoſe eſtate he has; by all in the exchequer chamber. Br. Judgment, pl. 95. 5. cites 33 H. 6. 17.

2. *And* it was ſaid there that he, who *pleads a recovery by default ought to aver the tenant to be tenant of the land at the time*, &c. *contra*, where he pleads recovery *in action tried*, by all in the exchequer chamber. Br. Judgment, pl. 95. cites 33 H. 6. 19.——*So* of a *recovery in aſſiſe againſt my anceſtor*. The ſame year, fo. 19. in ſcire facias, per judicium Cur. ibid.

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3. In

3. In *ſcire facias upon recovery* of *land againſt A.* the *tenant ſaid, that A. was not tenant of the franktenement the day of the writ purchaſed, nor ever after, but B. was tenant whoſe eſtate he has*, and a good avoidance of the recovery. Br. Confeſs and Avoid, pl. 49. cites 14 E. 4. 2.

4. If judgment be given *in the marſhalſea between two, who are not of the king's houſehold*, it is void and coram non judice, and the defendant may avoid it by plea, or have writ of error. Br. Judgment, pl. 123. cites 20 E. 4. 15.

See (G. 2)—Error (A)

(C) Falſifying Recovery. In what Caſes. In the Point tryed.

He who cannot attaint, may falſify in the point tried. Br. Faux. Recov. pl. 29. cites 10 E. 4. 16.—Ibid. pl. 50. S. P. cites 12 E. 4. 14 & 19.

1. IN annuity. per Forteſcue where a man hath *iſſue a ſon by one venter, and a daughter by another*, and the land is *entailed to him and his ſecond iſſue*, and he loſes by falſe verdict, and dies; *the attaint is given to the ſon*; and therefore the *daughter may falſify the recovery in* the ſame point, that was tried. Br. Faux. Recov. pl. 12. cites 22 H. 6. 28. —— Quære; for tempore H. 8. it was held, that the attaint goes with the land, as a writ of error ſhall go, and that the daughter ſhall have attaint, and ſhall not falſify. Ibid. pl. 50.

2. *So* where a man *ſeiſed in bourough-Engliſh hath two ſons*, and loſes by falſe oath, and dies; the attaint is given to the eldeſt ſon, and therefore the youngeſt ſhall falſify in the point tried, quod Yelverton omnino negavit. Br. Faux. Recov. pl. 12. cites 22 H. 6. 28.

3. If a recovery be had againſt tenant in tail, and the title is *tried* againſt him (ſcilicet) quod *non dedit*, &c. the iſſue has no remedy but by attaint; for he ſhall not falſify in this point; but if the *verdict be upon other ſpecial matter*, and *not upon the title*, or if it was a recovery *by default*; in theſe caſes, the *heir in tail* may falſify the recovery. Br. Faux. Recov. pl. 4. cites 34 H. 6. 2.

4. *So* the *ſucceſſor of a parſon* ſhall falſify upon a recovery *by default*, in like caſes, where the title was not tried. Ibid.

5. *So* upon a recovery by default *againſt tenant for life* who dies, *he in reverſion* may falſify; and ſo it ſeems here, that a man ſhall not falſify in a point once tried. Per Priſot and Moyle. Ibid.

6. A *feme* may falſify *in dower*, where a recovery is pleaded againſt her baron by action tried, viz. *in another point* which was not tried; but not in the ſame point which was tried. Br. Faux. Recov. pl. 7. cites Trin. 36 H. 6. in Fitzh. Tit. Faux. &c. 27. per Forteſcue.

Br. Eſſoppel. pl. 168. cites S. C.

7. If tenant in tail makes *manumiſſion to his villein whom he has in tail*, and after the *villein brings action* againſt him, and the *tenant in tail pleads villeinage* againſt him, and *he ſays that frank*, &c. and ſo to *iſſue*, which *is found againſt the tenant in tail*, who has iſſue and

and dies; if the *villein brings action againſt the iſſue*, and *he pleads villeinage* in the ſaid villein, and *the other eſtops him by the trial againſt his father*, there, per Littleton juſtice, the iſſue in tail ought to plead the matter, and confeſs and avoid the trial and record; becauſe his anceſtor had made to him manumiſſion. Br. Confeſs and Avoid, pl. 49. cites 13 E. 4. 2.

8. Where trial of frank paſſes againſt the *anceſtor* in tail, who *alledges the villein to be regardant*, the heir in tail ſhall not by this be eſtopped to alledge that he is, and *was villein in groſs* to him and to his father, &c. by the beſt opinion. Ibid. Ibid. [120]

9. A *termor*, who is received upon a recovery given againſt his leſſor, may falſify in the point of the writ and traverſe it; for otherwiſe the *covin* will not aid the termor, if it be *upon a true title*; quod nota bene, per Pollard and Fitzherbert. Br. Faux. Recov. pl. 48. cites 14 H. 8. 4.

10. Where it is ſaid in the books, that *privies* ſhall not falſify *in the ſame point tried*; the meaning is, that they ſhall not falſify in *ſcire facias upon the ſame judgment*, or in any other *writ of the ſame nature*; but he may bring action of a higher nature, and ſo try the matter again. 6 Rep. 8. 40 and 41 Eliz. in * Ferrer's caſe. A recovery is not ſo ſacred but that it may be falſifyed as well *in point of recovery, for the thing*, as alſo betwixt the ſame parties, per Doderidge J. Cro. J. 466. —— * Pig. of Recov. 160. cites S. C.

11. There is a *difference* where the *parties* have *not the abſolute fee* in them, as *parſons*, *prebendaries*, &c. there the ſucceſſor is not bound, but in action of the ſame nature he may falſify, or have juris utrum; but where, by the common law, they have the mere right, as biſhop, &c. there they cannot falſify. Pig. of Recov. 160. cites 6 Rep. 8. a.

[See (G. 2) (H)]

(D) Falſifying Recoveries by Termors.

1. 6 *E.* 1. 11. *WHEN a man leaſes his tenement in* London, *and he in reverſion or remainder cauſes himſelf to be impleaded by colluſion, and to make the termor loſe his term, loſes by default, or gives it up; in this caſe the mayor and bailiffs may inquire by inqueſt, whether ſuch plea was moved upon good right, or by covin; and if it be found that it was upon good right. Judgment ſhall be forthwith given; but if it be found by fraud, to cauſe the termor to loſe his term, the termor ſhall enjoy his term, and the execution of the judgment for the demandant ſhall be ſuſpended until the term be expired: in like manner ſhall it be of inquiry before the juſtices, if the termor challenge it before the judgment.* In the eye of the law *any eſtate for life*, being an eſtate of freehold, againſt whom a precipe quod reddat doth lie, is an higher and *greater* eſtate *than a leaſe for years*, though it be *for a thouſand or more, which* never are without ſuſpicion of fraud, and they were the leſs valuable, for that at the common law they *were* ſubject unto, and * *under the power of the tenant of the freehold*; the learning whereof ſtandeth thus, and it is worthy to be known. When Littleton wrote, if a man had made a leaſe for years by writing, and he that had the freehold had ſuffered himſelf to be *impleaded in a real action by colluſion, to bar the leſſee* of his term, and made default, &c. the ſtatute of Glouc. gave the leſſee for years ſome remedy by way of receipt, and a trial, whether the demandant did move the plea by good right or colluſion; and if it were found

found by colluſion, then the termor ſhould enjoy his term, and the execution of the judgment ſhould ſtay till after the term ended. But this ſtatute *extendeth not* to five caſes. 1ſt. If the leaſe was * *without writing*, for the words of this act are, (ſo that the termor may have recovery by writ of covenant) 2d. It extendeth only to a recovery *by default*. 3d. The termor could not be relieved by this ſtatute, unleſs he *knew of the recovery, and was received*. 4th. By the better opinion of books, it extendeth not to † *tenants by ſtatute* merchant, ſtatute ſtaple or elegit. 5th. Not to *guardian*. But now the ſtatute of 21 *H.* 8. *doth give remedy in all the ſaid caſes, ſaving in the caſe of the guardian*, and giveth them power to falſify all manner of recoveries had againſt the tenants of the freehold upon feigned and untrue titles, &c. Co. Litt. 46. a.

* 6 Rep. 57. Brediman's caſe.——9 Rep. 135. in Aſcough's caſe.——Per Doderidge J. 2 Rolls. R. 222.——Per Holt Ch. J. 7. Mod. 42.——* Pig. of Recov. 51.——† Pig. of Recov. 51. Br. Aſſiſe, pl. 367.

This *ſtatute* which enacts that a termor may be received to falſify, ‡ *requires a deed, and that* the *termor ſhould ſhew it before judgment*, &c. as above; and *extends only* to the *confeſſion* of the tenant, *and to* his *default after default*: It does *not* extend *to feint pleadings*; *nor* where judgment is given upon the *default of the vouchee*; for the ſtat. goes only to the default of the tenant. It *aids* the *tenant by ſtatute and* tenant by *elegit*. The termor and tenant by ſtatute and elegit after judgment againſt the tenant may falſify a recovery had againſt any of them, by the ſtat. of 21 H. 8. c. 15. The ſtat. of Glouceſter is uſed at this day for a termor: If he has a deed, and comes before judgment, he may ‖ be received to maintain his leaſe upon averment of colluſion, and offering to maintain the leaſe of the leſſor. Jenk. 200. pl. 19.

By this ſtatute leſſee for years in London, may falſify a common recovery; whereby the judgment is not to be ſtaid, but the execution ſuſpended during the term: and this is done by a *writ de inquirendo ſuper ſtat. Glouc.* and *tried in the he ſtings*. Pig. of Recov. 51.

‖[121]

But per Fitzherbert. If one grants *proximam præſentationem*, and after ſuffers the advowſon to be recovered againſt him by writ of right of advowſon; there the grantee ſhall have quare impedit, and falſify the recovery at common law, who is not in effect but termor. Br. Fauxif. de Recov. pl. 1. cites 26 H. 8. 2. —— * It ſhould be 2. pl. 3.

2. A *quare impedit* is brought againſt the patron and incumbent to preſent to a rectory, of which the *incumbent has made a leaſe for years* to B. by deed. The *patron* of the incumbent *confeſſes the action*: the leſſee for years is not reliveable, although he come before judgment, and ſhews his leaſe, and ſhews title of his leſſor, and the fraud and colluſion; for a parſon incumbent may, when he will, reſign his rectory, and avoid his leaſe; and the abſence of a parſon for the ſpace of 80 days in a year ſhall avoid the ſaid leaſe; alſo, if he would ſuffer a judgment and recovery of it againſt him, ſuch recovery ſhall avoid the ſaid leaſe. The *ſtatute of Glouceſter* is to be underſtood of leaſes made by ſuch leſſors, as could not defeat ſuch leaſes by their own acts. Jenk. 200. pl. 19. cites 26 H. 8. * 23.

3. A woman brought *dower againſt her two daughters and* another, and in truth the third was but *a termor*, and the wife had *no cauſe of dower*; but this was only to make the termor to loſe his term; for they *all made default at the grand cape*, and now *the termor prayed to be received*, and ſhewed cauſe that the huſband made a leaſe for years, and after the *leſſee levied a fine to the leſſor, and they* granted *and rendered back again to the leſſee for the ſame years, rendering the ſame rent*; it was argued that the ſtatute of Glouceſter is, that if the farmer *have, &c.* that is, if *he may have covenant* as in the 19 E. 3. and here he may have covenant, and prayed to be received, and ſhewed his plea. Anderſon Ch. J. held that a tenant may falſify by the common law. And it being inſiſted, that the leaſe is after the title of the dower, Peryam J. ſaid, that although it be after, yet if he have *matter which goeth in the deſtruction of the dower*, he ſhall falſify well enough, as if ſhe have title of dower and

five

five years paſs after the fine levied. And Anderſon and Peryam ſaid that the ſtatute of Glouceſter was made, that a termor ſhould not be put out of poſſeſſion, but here the termor is named; ideo quære; and after, at another day, Shuttleworth moved it again, and ſaid the termor ſhall *not be received, becauſe he is named in the writ*, and the court was of the ſame opinion then; but they ſaid that he might *plead ſpecial non tenure*. Goldſ. 87. pl. 12. Paſch. 13 Eliz.

4. M. and his wife brought *dower* againſt E. *to parcel*, he *pleads non tenure, and* to the other parcel, *ne unque ſeiſie que dower*, which goes to the *trial*; and there the *tenant makes default*, and upon that a *petit cape* is awarded, and now, *at a day in bank, one Lumbard prays to be received* upon the ſtatute of Glouceſter, to ſave his term, &c. but Hendon alledged to the contrary. 1. That ſtatute is not to this purpoſe in force. By the common law tenant for years cannot falſify. 6 Rep. PERIAM'S CASE. Then, becauſe it was hard, that a recovery ſhould be had by covin, and the leſſee for years without remedy for his term the *ſtatute of Glouceſter* was made, which *gives a reſceipt for the leſſee for years*; after the ſtatute 21 *H.* 8. was made, which *gives the leſſee power to falſify*. The common experience of the court is, that if an *habere facias ſeiſinam* iſſue, there is not any ſaving of the term of leſſee for years. Hill. 39. Eliz. in BEST'S CASE, a reſceipt was moved and denied. For if the leſſee had a good term, he might have treſpaſs for entry upon him; though Littleton ſays in his chapter of tenant for years, that he ſhall be received. Hutton ſaid, the ſtatute of *Glouceſter aids them only, who knew and had notice of the recovery*; *but* 21 *H.* 8. *aids them who had not notice of it*. And it is better to prevent [122] miſchief, than to remedy it after, and as to that a final bar; that he was of counſel in ſome caſes, where the leſſee was received. And if the leaſe be not good, the leſſor may avoid it by plea ſcil. traverſe, or demurrer: and he remembered the iſſue taken upon the term, and found againſt the termor, in the caſe of FULHAM v. SERJEANT HARRIS. Sed adjournatur. Hetl. 144. Trin. 5 Car. C. B. Moor v. Everay.

5. *Aſſiſe* is brought *againſt the tenant of the franktenement and the termor*, who pleads and loſes; but the termor is acquitted of the diſſeiſin. The termor is without remedy to have *attaint*; for he loſt nothing, neither the franktenement nor damages; nevertheleſs ſome hold contrary, and adjournatur, quære if he ſhall not falſify. Br. Faux. Recov. pl. 41. cites 43 Aſſ. p. 41.

6. Note by all the juſtices that, of error in a recovery, *none* ſhall have advantage *but the party or his heirs*; for a *ſtranger ſhall not falſify for error, nor by dilatories*, but by that which diſproves the cauſe of action. Br. Error, pl. 89. cites 9 E. 4. 13.

7. *Tenant by elegit* or termor ſhall not falſify a recovery of the *franktenement* by the common law; for they *cannot have the thing that is recovered*; for the recovery is of the franktenement and the term is only a chattle, per Danby contra Litt. Br. Faux. Recov. pl. 14. cites 9 E. 4. 38.

8. Where termor, recognizor, &c. are *received in default of the tenant of the franktenement*, there the *demandant ſhall have judgment*

againſt the tenant of the franktenement, *with a ceſſit executio during the leaſe or extent.* Br. Faux. Recov. pl. 25. cites 7 H. 7. 10. per Mordant.

The *reaſon why a term for years* was *eſteemed* in law to be *a leſs eſtate than a freehold for life* is this.

9. 21 *H.* 8. 15. *Enacts that a termor for years may falſify a feigned recovery had againſt them in reverſion, and ſhall retain and enjoy his term againſt his recoverer, his heirs, and aſſigns according to his leaſe.*

In former days all actions were real, and lands being leaſed for long terms, and fines taken for ſuch leaſes; it was uſual for the leſſors, or their heirs to ſuffer common recoveries, and by that means the leſſees were evicted; becauſe they could not *falſify* thoſe *recoveries, till* enabled by *this act.* But in thoſe days the terms for years were uſually granted for a ſhort time; for nobody would take long terms, becauſe the tenant of the freehold could deſtroy them, ad libitum, by ſuffering a common recovery, as aforeſaid: therefore thoſe eſtates for years were accounted the leaſt, and next to eſtates at will. per Cur. Mich. 11 Geo. 9 Mod. 102. in caſe of Theobald v. Duffoy.

The former act of 6 E. 1. 11. extended only to London; but this act extends to all leaſes out of London; and by this ſtatute the leſſee ſhall be received to falſify the recovery before judgment, and it ſhall ſuſpend the execution; but then he muſt not only aver the colluſion, but plead ſome bar to the plaintiff's title; and this ſtatute extends to all thoſe caſes where the vouchee or tenant lets judgment go by default. Pig. of Recov. 51.

13 Rep. 6. per Cur. Mich. 6 Jac. C. B. in Porter and Rothefters caſe. S. P.

10. Where the 21 *H.* 8. 15. *in the preamble, ſpeaks of leaſes made for great fines for the incomes,* and the proviſo is, that all *ſuch termors* ſhall or may falſify: it has always been taken that the ſtatute extends to leaſes either for a ſmall fine or for no fine. 11 Rep. 33. b. Trin. 12 Jac. B. R. in Poulter's caſe.

Roll. R. 443. S. C. gives the reaſons of the judgment. 1. Becauſe the ſtat. 21 *H.* 8. 15. extends to recoveries by covin; for the preamble is of *recoveries by conſent,* which this is not. 2. Becauſe the ſtat. is *that he ſhall avoid it in the ſame manner as the tenant of the freehold ſhould avoid it.* For this was made for the debility of his eſtate; but in the principal caſe, the leſſee pendente lite could not avoid it nor the leſſor himſelf, and ſo the tenant of the franktenement could not avoid it, and therefore neither could the leſſee.——Bridgm. 64. S. C.

11. *Tenant in tail* acknowledged a *recognizance* of 100l. and dies. A *ſcire facias was* brought *againſt the iſſue* in tail, *who hanging this ſcire facias made a leaſe for years* of the land in queſtion to the defendant, and pleads to the ſcire facias, that he had *riens per diſcent* of fee ſimple from his father, and that he was not the tenant of the land, all which was *found againſt him,* that he was tenant of the freehold, and that he had land by diſcent from him in fee ſimple, all which was put in iſſue, and hanging this, he made the leaſe to the defendant. Judgment was given againſt the iſſue in tail, that the land ſhould be liable to this recognizance; the *leaſe was made before judgment* to the defendant; the defendant being the leſſee, pleads all this matter, and in the ſpecial verdict this is all found: the plaintiff's * title was under this recognizance, and the judgment given againſt the iſſue in tail: the defendant's title under this leaſe for years made unto him by the iſſue in tail. The whole court was clear of opinion, becauſe this was *after verdict,* the leſſee here ſhall not be received to falſify for his term. Afterwards, at another time, it was clearly agreed by the whole court, that the leſſee for years ſhall not falſify, and ſo the ſame was pronounced by Montague Ch. J. and accordingly by the rule of the court judgment was given for the plaintiff. 3 Buls. 245. Mich. 14 Jac. Crawly v. Marrow.

*[123]

12. Though

12. Though by the ſtatute H. 8. a termor may falſify, yet *it muſt be the termor himſelf, and not another for him.* 1 Salk. 291. Mich. 8 Annæ, in the caſe of Lady Lindſey v. Ld. Lindſey.

13. 34 *and* 35 *H.* 8. 20. *Is that it ſhall not extend to prejudice the leſſee or leſſees, of any tenant in tail of any lands, &c. whereof the* reverſion or remainder *at the time of a feigned recovery had, ſhall be* in the King, *made in writing indented of any manors, lands, &c. for* 21 *years, or three lives, or under, whereupon the accuſtomed rent or rents is, or ſhall be yearly reſerved during the ſame term or terms; but the ſame leſſee or leſſees ſhall enjoy his or their term or terms, according to the ſtat. of* 32 *H.* 8. 28. *this act notwithſtanding.*

14. In replevin, the caſe was, a *diſſeiſor infeoffed a ſtranger*, and after the *diſſeiſee brought an aſſiſe againſt the diſſeiſor only*; and the *feoffee, pending the aſſiſe, let the land to the plaintiff.* The diſſeiſor pleads to the aſſiſe nul tort, nul diſſeiſin, &c. and found againſt him; whereupon the diſſeiſee recovered. The queſtion was, if the termor for years ſhould falſify this recovery; that is to ſay, that the defendant in the aſſiſe ne diſſeiſe pas. And it was agreed by the court that he might; for the termor here did *not claim by him againſt whom the recovery was had*, and there is no doubt that the freehold, out of which the term is derived, is not recovered, and the freehold is not bound by it. And the doubt at *common law* was, if the termor might falſify, where the recovery was againſt the leſſor; but it was never doubted, but that, where a recovery is *not againſt the reverſioner but* againſt a *ſtranger, who had nothing in* the land, the leſſee might falſify *in the point tried.* And ſo is 1 H. 7. 19. Cro. E. 284. Trin. 34. Eliz. B. R. Flower v. Rigden.

15. *And* it is a *rule*, that *every ſtranger* to a recovery may falſify; for he *cannot have error or attaint*, if he *came not in pending the writ by him againſt whom the recovery was*, for then he is bound; and afterwards it was ſo adjudged, that he might falſify in the point tried. Cro. E. 284. Flower v. Rigden.

16. *Tenant in tail made a feoffment* in fee *to his own ſon*, who was then of full age, *and afterwards* he *diſſeiſed* him, and then levied a fine; but *before the laſt proclamation, the ſon entered and made a feoffment*; then all the proclamations were made, and afterwards both the father and the ſon died; then the *feoffee* of the ſon *made a leaſe to W. R.* and died ſeiſed, and the *iſſue* of the tenant in tail *brought a formedon* againſt the heir of the ſaid feoffee, who was in by deſcent, and recovered againſt him by a *feint defence of his title*; and then he turned the leſſee for years out of poſſeſſion, who thereupon brought an ejectment: the court thought that he might falſify the recovery had by the iſſue in tail; becauſe the court alſo thought, that the eſtate tail was bound by this fine; but becauſe it appeared by the pleading that the *fine was levied* by the father *to that very perſon to whom the feoffee* of the ſon *had granted this leaſe* for years, and who was now plaintiff, and it *not being averred to* be levied to *any other uſe*; therefore *his leaſe was extinguiſhed*, and he was incapable to falſify the recovery obtained by the tenant in tail. Mo. 391. Hill. 37 Eliz. B. R. King v. Hunt.

Cro. E. 610. S. C. and P. as to the fine, but reports nothing as to the leaſe. Nels. A. 831. pl. 7. cites S. C. and ſays it was adjudged, but that does not appear in the book out of which he takes it.

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But by Bridgman ſerjeant a tenant of a future leaſe muſt wait, till his intereſt is turned into poſſeſſion; for he cannot falſify without action, and he cannot have action till then.

17. A. *tenant for life, remainder in tail* to B. remainder-man leaſes for years, to begin after the deceaſe of the tenant for life. A. ſuffers a recovery with *voucher of B.* and dies. The leaſe is not deſtroyed, but leſſee may falſify by common law, and alſo by the ſtatutes. But if B. who had the inheritance, had ſuffered a common recovery that ſhould have deſtroyed all the remainders and reverſions thereupon depending, and all the eſtates derived out of ſuch remainder; but tenant for life has no ſuch power. And the *recovery is had againſt tenant for life with voucher of tenant in tail.* Mich. 41 and 42 Eliz. C. B. Cro. E. 718. Pledgard v. Lake.

Arg. 2 Roll. R. 406. in the caſe of Aſcue v. Butts.

[See **Recovery** (C. a. 3)]

(D. 2) By Heir, Reverſioner, or Remainder-man; and How.

1. A Recovery had againſt tenant for life was falſified by the reverſioner, becauſe the *anceſtor of the recoveror in the ſcire facias had releaſed* his right before the execution of the fine, which was pleaded in bar *to J. S. then tertenant*; and ſo the execution falſe and feint in law. Br. Faux. Recov. pl. 21. cites 29 Aſſ. 1.

Fr. N. C. pl. 56. S. P. and that in caſe of tenant for life praying aid of a ſtranger, the reverſioner may enter; becauſe *it is a forfeiture*, cites 1 H. 7. 22. 10 H. 7. 20. per Keble. 25 H. 8. 70. ——Br. Entre Cong. pl. 115. cites 24 H. 8.

2. If a man recovers againſt tenant for life, he in reverſion ſhall not falſify *by entry*; but *ſhall have action of ad terminum qui præteriit, or writ of right*, and ſhall falſify therein; *but* if tenant for life *praies aid of a ſtranger*, he in reverſion *may enter before judgment*, but after judgment he is put to falſify. Br. Faux. Recov. pl. 44. cites 24 H. 8.

32 H. 8. 31. extended not to recoveries, where tenant for life came in as vouchee, &c. and therefore that act is repealed by this act of 14 Eliz. 8. and full remedy provided for preſervation of the entry of them in reverſion or remainder. But this ſtatute *extends not* to any recovery, unleſs it be by agreement or covin. Co. Litt. 362. a. ——* Bendl. 131, 132.

3. 14 *Eliz.* 8. *Enacts that all recoveries had or proſecuted (by agreement of the parties, or by covin) againſt tenants by the curteſy, tenants in tail, after poſſibility of iſſue extinct, for term of life or lives, or of eſtates determinable upon life or lives, or any lands, tenements, or hereditaments, whereof ſuch particular tenant is ſo ſeiſed, or againſt any other, with voucher over of any ſuch particular tenant, or of any having right or title to any ſuch particular eſtate, ſhall from henceforth (as againſt the reverſioners, or them in remainder, and againſt their heirs and ſucceſſors) be clearly void.*

32 H. 8. 31. *Provided only for* the preſervation of *reverſion, or remainder upon eſtate for life, &c. and not upon eſtate tail*; and ſo that by this ſtatute, no proviſion was made for the preſervation of the reverſion, *or remainder expectant upon eſtate tail.* 10 Rep. 44. b. 45. a. Trin. 38. Eliz. B. R. in Jenning's caſe.

Where the proviſo of this act ſpeaks of an

4. *This act ſhall not prejudice any perſon, that ſhall by good title recover any lands, &c. without fraud, by reaſon of any former right or title; alſo, every ſuch recovery had by the aſſent and agreement of the perſon*

perſon in reverſion or remainder appearing of record in any of the queen's courts ſhall be good againſt the party ſo aſſenting. *aſſent of record* by him in reverſion or remainder, it *is to be underſtood*, that ſuch an aſſent muſt appear upon the ſame record, either upon a *voucher, aid prayer, receit*, or the like; for it cannot appear of record, unleſs it be done in courſe of law, and *not by any extrajudicial entry* or by memorandum. Co. Litt. 362.

[See Error (B)]

(E) Falſifying Recoveries. By other Perſons than Termors. By Privies, or Strangers. [125]

1. *REVERSIONER* falſified a recovery had againſt tenant for life. Br. Faux. Recov. pl. 21. cites 29 Aſſ. 1.——Even though the tenant prayed in aid of him and made default. Br. Faux. Recov. pl. 24. cites 4 H. 7. 2.

2. If *præcipe quod reddat* be brought *againſt four*, and *three confeſs the action or make default*, and the *fourth demands the* * *view*, and the *demandant recovers 3 parts*; there if the fourth be tenant of the whole, and be ouſted by judgment againſt the three he ſhall have aſſiſe; for *he ſhall not be bound by judgment againſt ſtrangers, where he himſelf is ſole tenant*, per Skrene. Br. Aſſiſe, pl. 58. cites 12 H. 4. 19. and T. 4 H. 6. 26. accordingly. *Orig. Lieu.

3. A *ſtranger* may falſify a recovery *in the ſame point tried*, per optimam opinionem; and per Babington, he may do ſo *upon plea in bar*, but *not* upon plea *to the writ*. Br. Faux. Recov. pl. 3. cites 9 H. 6. 41.

4. If a man *purchaſes pending writ*, and the demandant proceeds, and recovers, the purchaſor ſhall be bound as well as his feoffor, and ſhall not falſify, though he be a *ſtranger*. For he comes in by him, who is bound and under his title. Br. Faux. Recov. pl. 15. cites 36 H. 6. 32. per Wangford. He, that *comes in by him againſt whom* the recovery is, ſhall not falſify. See Br. Faux. Recov. pl. 42. As if *A. infeoff B. to re-infeoff* A. and *B. ſuffers a falſe recovery*; now if *B. infeoffs A.* A. is bound; *but if A. enters upon B.* before execution without taking eſtate, he ſhall falſify.—Br. Eſtoppel, pl. 90. cites 23 H. 6. as held ſo by all the juſtices and ſerjeants.

5. *In aſſiſe*, a recovery is pleaded againſt a ſtranger, and the poſſeſſion of the plaintiff meſne between the title and the writ brought, there the plaintiff may falſify the recovery, as to *ſhew that the tenant might have pleaded a releaſe*, or that the tenant *died pending the writ*, or that the tenant *had not any thing in the land pending the writ*; for theſe prove the recovery void, or without title; and therefore a ſtranger may falſify, per Wangford and Forteſcue Ch. J. Br. Faux. de Recov. pl. 15. cites 36 H. 6. 32.

6. *So* where he *proves the recovery void, or the title nul*, per Wangford and Forteſcue Ch. J. Ibid.

7. *But* where a recovery is pleaded *againſt a ſtranger, and the title of the plaintiff meſne, &c.* he cannot falſify it *in title*; for he is as well *eſtopped* as the tenant himſelf. Ibid.

8. *But* every ſtranger may have allegation to *prove the title nul, or the recovery void*. Ibid.

9. *And* if *præcipe quod reddat* be brought *againſt him, who has nothing, and he appears, and pleads, and loſes*, he ſhall be eſtopped for ever; becauſe he was privy. Ibid.

10. *But his heir* may have thereof writ of error, or ſhall ſave it by way of anſwer; quære inde. Ibid.

11. He who *hath a rent* out of land may falſify a *recovery of the land*, as it is ſaid. Br. Faux. Recov. pl. 14. cites 9 E. 4. 38.

12. If two *coparceners make partition*, and *one is impleaded and prays aid* of the other, who is *ſummoned but does not come in*, and the other *dereigns the firſt warranty paramount* as if they had joined, and ſo the other ſhall have pro rata, and [yet] the other ſhall never falſify the recovery, per Keble. Br. Faux. Recov. pl. 24. cites 4 H. 7. 2.

Br. Faux. Recov. pl. 25. S. C.

13. A. had lands deſcended to him in *ancient demeſne* extended by *ſtatute merchant*; B. purchaſed the lands, and had a recovery by ſufferance in the court of ancient demeſne upon a voucher, and ouſted A. then A. brought a ſubpœna; and it was holden that A. [126] could not falſify the recovery, and therefore ſhould be *reſtored* to the poſſeſſion *by the chancery*; *for he had no remedy by law.* Where, notwithſtanding a double judgment, yet the judges directed them to the chancery. Toth. 185. cites 7 H. 7. 10.

14. If a man gives land in tail, remainder over in fee, and the *tenant in tail dies without iſſue*, and a *ſtranger intrudes*, and *remainder-man in fee brings formedon* in remainder, and *recovers by default*, and after *makes feoffment in fee*; and afterwards the *intruder brings action of diſceit and reverſes the recovery*; in this caſe he in remainder ſhall never have any remedy nor action, but it ſhall go in advantage of him who intruded. Br. Barre, pl. 76. cites 9 H. 7. 24.

15. 21 *H.* 8. 15. *Enacts, that no ſtatute of the ſtaple, ſtatute-merchant, or execution by* elegit *ſhall be avoided by ſuch feigned recovery, but ſuch tenants ſhall alſo have like remedy to falſify ſuch recoveries as is here provided for the leſſee for years.*

16. Quære, if a man *impleads the feoffee upon condition*, and the *feoffor enters for the condition broken*; it ſeems there that the writ ſhall abate, therefore it is uſual to implead the mortgagee and mortgagor, and the lord and the villein; and ſo ſee that the entry of a ſtranger ſhall abate a writ and avoid a recovery. Br. Judgment, pl. 31.

17. *Debt* was brought *againſt J. S. as executor, and* pending this action, J. D. brought debt againſt him *as adminiſtrator*, for a true debt, (whereas in truth he *was executor*) J. S. confeſſed the latter action, and pleads this recovery in bar of the firſt action: and it was reſolved to be no good plea; firſt, becauſe the recovery was had againſt him as adminiſtrator, and ſo is void, although this had been only a plea to the writ; and a ſtranger ſhall not falſify that which is only to the writ; 2dly, he, that firſt ſueth ſhall firſt be ſerved, and the executor might have pleaded the firſt action againſt him, that brought the ſecond. Trin. 27 Eliz. C. B. Cro. E. 41. Anon.

18. The

18. The rule, that one *ſhall not falſify, where himſelf is party*, has *three exceptions.* 1ſt, If I can ſhew by way of replication, that this recovery is *void in law*, I may falſify it in an aſſiſe, as 36 H. 6. 32. 39 Aſſ. pl. 6. and 6 E. 3. 54. 2dly, If a man recover againſt me certain *tenements in B. and they lie in A.* and I bring an aſſiſe of my franktenement in A. the recovery in B. ſhall not bar, 20 E. 2. Faux. Recovery 12. 3dly, Where the recovery by default was *upon a writ abated*; as if an aſſiſe were brought againſt my father, and he died hanging the iſſue, and judgment is afterwards given againſt him; in this caſe becauſe the writ was abated *de facto*, I may falſify the recovery per Doderidge J. Cro. J. 466. Hill. 15 Jac. B. R. in caſe of Holford v. Platt.

19. An *infant brought an aſſiſe in B. R.* for lands in Middleſex, depending which the *tenant* in the ſame aſſiſe *brought an aſſiſe for the ſame lands in C. B.* which laſt writ bore date, and was returnable after the firſt writ; and the demandant in the ſecond writ *recovered againſt the infant by default* by the aſſiſe, who *found the ſeiſin and diſſeiſin*; and upon a plea in bar of the firſt aſſiſe of that recovery, the infant by way of replication, ſet forth all the ſpecial matter; and that the demandant at the time of the ſecond writ brought, was tenant of the land; and prayed that he might falſify the recovery; and it was adjudged that he might falſify the recovery; for in all caſes where a man ſhall not have error, nor attaint he may falſify. But in this caſe he could not have error nor attaint, becauſe the judgment in C. B. was not given only upon the default, but alſo upon the verdict. And it ſhould be in vain for him to bring an attaint, becauſe he ſhall not be admitted to give other evidence than what was given at the firſt trial; alſo he ſhall falſify the recovery, becauſe it was a *practice* to defeat and take away the right of the infant, and to leave him without any remedy whatſoever. Hill. 15 Jac. in B. R. Godb. 271. Plot's caſe.

(F) Falſifying Recoveries. By other Perſons than Termors. In reſpect of Covin. [127]

1. IN aſſiſe the *tenant pleaded a recovery* by himſelf *in formedon againſt N.* and the eſtate of the plaintiff meſne, the plaintiff ſaid, that *pending the aſſiſe againſt the tenant*, and the ſame N. the *tenant enfeoffed N.* and after *brought the formedon* againſt him *by conſent* and covin between them, and demanded judgment; and a good plea; and the plaintiff recovered in aſſiſe. And it is ſaid that if he was tenant the day of the writ purchaſed, and the other had entred upon him of his aſſent, and he had brought a formedon and recovered, that yet the plaintiff ſhould recover by the aſſiſe. Br. Faux. Recov. pl. 17. cites 25 Aſſ. 1.

2. If *feoffee upon condition ſuffers one, who has good right, to recover by a falſe writ*, as if he brings ad terminum qui præteriit, as ſuppoſing the leaſe made to A. where it was to E. and where his

entry was not lawful, feoffor may enter and falſify the recovery. Br. Faux. Recov. pl. 5. cites 44 E. 3. 8.

3. *So* a *feme, who demands dower*, may falſify ſuch recovery; quod nota; for ſhe may ſay, quod non dimiſit præfato A. modo & forma, &c. Ibid.

4. In *formedon*, the *tenant confeſſed the action*; by which *proclamation was made*, if any could ſay any thing why the demandant ſhould not recover, and *a third perſon came and alleged covin* to toll him of his entry, where he had infeoffed the tenant upon condition broken and the tenant, [ſhewed cauſe] &c. by which judgment was ſtayed. Br. Judgm. pl. 18. cites 7 H. 4. 19.

See (G) S. P. Further v. Further

5. In pleading recovery to be *by covin the cauſe of covin muſt be ſhewn*, per Cur. Br. Faux. Recov. pl. 3. cites 9 H. 6. 41.

6. Nota, it was ſaid for law in attaint, and not denied, that where *J. is diſſeiſed by W.* and a *ſtranger recovers againſt him bona fide, or by covin by title* which is *younger than the title of J.* there J. may enter upon the recoveror, and plead this matter, and the recovery itſelf, &c. and a good plea. Br. Entre Congeable, pl. 4. cites 34 H. 6. 44.

See (D).—*Tenant by ſtatute merchant, or his grantee* of his intereſt

7. *Conuſee* of a ſtatute may falſify a recovery had againſt the conuſor; and it was agreed in a manner by all, that if the conuſee has no remedy by the common law, then he ſhall be *reſtored by equity*. Br. Faux. Recov. pl. 25. cites 7 H. 7. 10.

may have aſſiſe and falſify recovery had by covin againſt the conuſor. Br. Faux. Recov. pl. 48. cites 21 E. 3. 1.——Ibid. pl. 57. cites 19 E. 3.

8. If one be ouſted by covin, between the demandant and him that ouſts the tenant, and the demandant brings an aſſiſe againſt the party that ouſted the tenant; the tenant may have an aſſiſe; and on the ſpecial matter ſhewed, ſhall avoid this recovery. Pig. Recov. 156, 157.

[See Executor (P. a. 4)—Fraud.]

(F. 2) Falſifying Recoveries. Barred by Covin, notwithſtanding a true Title.

1. WHERE a man *pending an aſſiſe* enfeoffs another, or *ſuffers* him to enter upon him by conſent, and *to recover by formedon by an elder gift*, this ſhall not hinder the *plaintiff in aſſiſe*, but that he *ſhall recover*. Br. Colluſion, &c. pl. 28. cites 25 Aſſ. 1.

2. A man *had title of action*, and *cauſed J. N. to enter, againſt whom he recovered*; there by this covin the tenant, who was ouſted may falſify the recovery, notwithſtanding that the title was true, and he ſhall not have aſſiſe, and he, that recovered, ſhall not be by this
[128] remitted; quod nota bene, where the *demandant himſelf is privy to the covin*; for otherwiſe, it ſeems that, the covin is no plea in another caſe without *alledging cauſe of the covin* in deſtruction of the title of the party. Br. Faux. Recov. pl. 40. cites 41 Aſſ. 28.

3. It

3. It was held clearly by Parſhy, Tank, and Kirton, that if *one hath action to certain land*, and *by his aſſent*, and covin the *tenant be ouſted*, and *he, who has action, brings his action againſt the diſſeiſor*, he, who was ouſted, ſhall have aſſiſe, and the poſſeſſion of him, who recovered, ſhall be adjudged by abatement againſt him, and not by recovery; becauſe he was a diſſeiſor, 44 E. 3. 46. pl. 63.—Br. Colluſion, pl. 10. cites S. C.—ibid. pl. 31. cites S. C. and 41 Aſſ. 2.

As where a woman has *title of dower* and cauſes J. N. to enter, and to ſuffer her to recover againſt him, the tenant, who is ouſted thereby, ſhall have *aſſiſe againſt her and J. N.* and ſhall falſify this recovery by ſuch covin, *though the title be true.* Br. Faux. Recov. pl. 43. cites 44 Aſſ. 29.——5 Rep. 31. in Coulter's caſe.—— 8 Rep. 132. b. 133. a. in Turnor's caſe.—Pl. C. Arg. 51. cites Fitz. tit. Dower. pl. 42.—So ſee that a man may falſify a recovery, though it be *upon true title by reaſon of the covin.* Br. Faux. Recov. pl. 6.—S. P. Br. Judgment. pl. 134. cites 25 Aſſ. 1. and 27 Aſſ. 74. and M. 30 E. 3. accordingly. *But* if a man who has a *defeaſible title, grants a rent-charge*, and after is *impleaded by him, who has title and confeſſes the action*, the demandant ſhall recover, and he ſhall hold diſcharged, though the *tenant agrees to the loſs of the land*; for *in the firſt caſe, the poſſeſſion was altered by corrupt means; contra in the other caſe.*

4. In *dower* the tenant *ſaid, that he himſelf diſſeiſed J. N. who re-entered pending the writ*, and prayed judgment of the writ; and a good plea. The *demandant ſaid that J. N. re-entered by covin to abate the writ*, and no plea; for where his *entry* is *lawful*, it *cannot be covin.* But where a man has title of formedon, or a feme title of dower, and makes another to enter, againſt whom he or ſhe recovers, it may be avoided by covin; for the entry was a wrong, and a man may do a wrong by covin, but he cannot do a right by covin; quod nota, per Littleton and Cur. Br. Colluſion, &c. pl. 20. cites 15 E. 4. 4.

5. A man *granted a rent charge*, or ſuch like, where a *ſtranger who had good title, brought a writ againſt the grantor*, and he *confeſſed the action* to the intent to defeat the rentcharge; there the grantee hath no remedy, nor he cannot falſify it by this covin, becauſe the title is true. *But* where a man who has title, *cauſes another to enter and after he brings an action againſt him* and recovers, it is otherwiſe; nota the *diverſity.* Br. Faux. Recov. pl. 46. cites 5 H. 7. 40.

6. Covin may be, where the title is good, and the title ſhall not give benefit to him, who has it, for cauſe of the covin; for the *mixture of good and ill together makes all ill, and the truth is obſcured by the falſity, and the virtue is merged in the vice.* Per Montague Ch. J. Mich. 4 E. 6. Pl. C. 54. b. in caſe of Wimbiſh v. Talbois.

7. *As* where *G. T. ſeiſed in tail to him, and the heirs male of his body diſcontinued*, and *retook to him and E. his wife, and to the heirs of their two bodies*, and had *iſſue T. and W.* and *died*, and *E.* his wife *ſurvived*, and *T. had iſſue E. and died*, and after *W. by covin of E.* his mother *brought formedon upon the firſt tail againſt his mother*, and ſhe appeared at the firſt day, *and* W. *recovered per nient dedire*, and *E.* the daughter of T. the eldeſt ſon and *heir of G. entred by the ſtatute of* 11 *H.* 7. the entry was adjudged lawful by the ſame ſtatute, which ſays, that the recovery is void, and *need not ſay that the recovery was executed*; for ſince it is void it never ſhall be executed; and E. the heir averred, that ſhe was the ſame perſon, to whom the reverſion belonged, and did not ſhew how ſhe was heir to

it, and yet well, per Molineux and Hales Justices, contrary Browne and Montague Ch. J. of C. B. But all agreed that it was a recovery by covin, notwithstanding that it was upon true title and good, though that she did *not shew cause of the covin*, quod nota, Br. Entre Cong. pl. 140. cites 32 H. 8. and * Pl. C. fo. 42.— Br. Collusion, pl. 47. cites tempore H. 8. Wimbish v. Talbois.

* Wimbish v. Talbois.

[129] (G) Falsifying Recoveries for Dilatories.

1. WHERE a baron loses by dilatory, which does not disaffirm his possession, as *nontenure*, *misnosmer of the vill*, &c. and dies; the feme shall have writ of *dower*, and falsify the recovery, per Wich. quod non negatur. Br. Faux. Recov. pl. 8. cites 50 E. 3. 9.

2. A man shall not falsify in dilatories, as in *utlawry*, *excommengement* in the demandant, and the like; nor by *entry of the demandant* into the land *pending the writ*, nor, because the land was in *ancient demesne*, and the like; for those do not disprove the title of the demandant. Br. Faux. Recov. pl. 15. cites 36 H. 6. 32. per Fortescue Ch. J.

3. An *executor* shall not falsify for *variance between the will and the writ*, per Jenney. Br. Faux. Recov. pl. 13. cites 9 E. 4. 12.

S. P. per Catesby. But may in that which goes *in destruction of the title or action*

4. A *stranger* shall not falsify a recovery for a dilatory matter. D. 67. pl. 16. obiter. S. P. *as* to say *that a feme demandant took baron pending the writ*. Br. Faux. Recov. pl. 15. cites 36 H. 6. 32.

; for a stranger shall not plead *misnosmer* nor *jointenancy*, but he may plead *nontenure*. Because in such case the recovery is void where the tenant had nothing, per Catesby. Br. Faux. Recov. pl. 13. cites 9 E. 4. 12.

Per Anderson and Beaumont, a stranger cannot falsifying a recovery for *jointenancy or nontenancy*, or by such dilatories, but *for matter of substance only*. Cro. E. 471. (bis) in case of Further v. Further.—See S. C. at larg inf.

A stranger shall not falsify in a thing which *proves the writ abated*, as by the death of any party; but otherwise of a thing which proves the writ *abatable*, *as* if a feme plaintiff takes baron pending the writ, &c. Br. Faux. Recov. pl. 13. cites 9 E. 4. 12. per Choke.———*But in debt* upon an obligation *against F. and 3 others, administrators* of J. S. who *pleaded, that* one *J. D. had brought debt* in B. R. upon an obligation of 100l. against one of the administrators, *and recovered by nihil dicit*, and that they had riens in ses mains to satisfy over and above the said debt; and it was thereupon demurred. Glanvill moved, that this was not any plea, for in regard the *defendant in the first action might have abated the bill by saying that he had co-administrators not named*, this recovery shall not bind any stranger; this recovery is also covenous being by default, and in proof thereof, see 9 Ed. 4. 12. But Anderson and Beamond J. held, that it was a good plea prima facie; for a stranger cannot falsify a recovery by reason of jointenancy, or nontenancy, or by such dilatories, but only for matter of substance; and, if the recovery be for a true debt, it is not reason, but that the administrator might suffer it to pass by default; and it is reason it should be allowed to all the others; and if there be any *covin* it is to be averred by the plaintiff; for prima facie, it shall not be so intended, but that it is true; and if there be any covin in it, he may falsify it for that cause; and a recovery against one administrator shall bind him and all his companions, and therefore it is reason it should bind all strangers; and of that opinion Owen and Walmsley said they were; but they would be advised, &c. Cro. E. 471 (bis) Hill. 38 Eliz. B. R. Further v. Further.—Br. Faux. Recov. pl. 34. cites 21 E. 4. 23.

(G. 2) By whom. For or againſt Succeſſor of Parſon.

1. *COMPOSITION* was made between an abbot and dean for tenths to the dean, and annuity to the abbot; and after the abbot brought writ of annuity and recovered; the dean died, and the abbot brought ſcire facias againſt the ſucceſſor of the dean, who pleaded that the compoſition was *made by the dean without the chapter*, which cannot charge but for term of life; and a good plea; and ſo ſhall falſify *by plea*, per Finch. *becauſe he cannot have writ of right* in this caſe; quære of the falſifying; for Belknap held the contrary. Br. Faux. Recov. pl. 52. cites 39 E. 3. 17.

2. Judgment given againſt a *parſon of a church upon an action tried* ſhall bind the ſucceſſor, though the predeceſſor did not *pray aid* before of the patron and ordinary; for the ſucceſſor may have writ of *error, or attaint*, and not falſify the recovery. Br. Judgment, pl. 102. cites 8 H. 6. 25. per Strange.

3. A man recovered *againſt a parſon by default* in *ceſſavit* de cantaria, the parſon died, and the plaintiff brought ſcire facias againſt his ſucceſſor, who *prayed aid of the patron and ordinary*, and they would not join; ſo the defendant pleaded non ceſſavit; and per Cur. he ſhall not falſify in this manner, but ſhall be put to his *juris utrum*, quod nota. Br. Faux. Recov. pl. 53. cites 10 H. 6. 5. [130] See 6 Rep. 8. a. in Ferrer's caſe.

4. *Parſon and patron in writ of annuity* traverſe the preſcription, which paſſed againſt them: the ſucceſſor cannot traverſe this again, and falſify the firſt verdict, inaſmuch as the *jurors are all dead*; ſo that he cannot have attaint; for it was the folly of him, or his predeceſſor to ſuffer the time to expire. Br. Faux. Recov. pl. 11. cites 19 H. 6. 39. Br. Barre, pl. 24. cites S. C.

5. If an *abbot* had *confeſſed the action in aſſiſe* brought againſt him, the ſucceſſor ſhould not falſify; and ſo it was of a *fine* acknowledged by abbot. Br. Faux. Recov. pl. 28. cites 10 E. 4. 2.

6. The ſucceſſor of a *vicar or parſon* cannot falſify *in the ſame point*, which was once *tried*; becauſe he may have attaint; *but in a collateral point* they may falſify; for they have not the fee-ſimple, and therefore cannot have writ of right, but only juris utrum; contrary of an *abbot*, who may have writ of right. But ſucceſſor of a parſon or vicar may falſify *by releaſe not pleaded, or* by *condition broken not pleaded*; but he who cannot have attaint, may falſify in the point tried before. Br. Faux. Recov. pl. 29. cites 12 E. 4. 16. See 6 Rep. 8. a. in Ferrer's caſe. ——Annuity againſt a *parſon*, who *prays aid* of patron and ordinary, who make *default*, and the parſon *tries the title, and loſes*; this binds the ſucceſſor, and he ſhall not falſify the recovery in the point tried, though *all the jury be dead, ſo that he cannot have attaint*. Fig. of Recov. 158, 159. cites 34 H. 6. 2. b. 10.——Br. Faux. Recov. pl. 4. cites S. C. per Priſot and Moile. [But I find no notice in Brooke, or in the year book, as to the jurors being all dead.] But ſee ſup. pl. 4.

7. Patron and parſon join in annuity brought againſt them, and loſe. The ſucceſſor ſhall falſify, *for that another was parſon the day*

day of the writ purchaſed, and that he, againſt whom the recovery was, was not ſo then, vel unquam poſtea, pending the writ. Br. Faux. Recov. pl. 33. cites 21 E. 4. 7.

Per Hawes, Davers, Townſend and Fairfax, the ſucceſſor may falſify, and Huſſey and Brian the 2 Ch. Juſtices and the Ch. Baron e contra, quære. Br. Faux. Recov. pl. 24 cites 4 H. 7. 2.

8. In *annuity* by a prior againſt a parſon he counted by preſcription, the *parſon prayed aid* of the *patron and ordinary*, who were *ſummoned*, and made default, and the *parſon confeſſed the action*; the plaintiff recovered, the parſon died; the prior brought *ſcire facias againſt the ſucceſſor*, who prayed aid again, and they *appeared and traverſed the preſcription*; and therefore the prior demurred; and by award they ſhall not falſify, nor traverſe contrary to the firſt record, notwithſtanding that the recovery was upon confeſſion; becauſe the aid was granted and they were ſummoned and came not. Br. Faux. de Recov. pl. 51. cites 12 H. 8. 7.

In ſcire facias againſt an *abbot* on a judgment in annuity had againſt his predeceſſor, the abbot pleads, that his predeceſſor confeſſed the judgment, when he had a releaſe of the annuity; and per Cur. he ſhall not thus avoid the recovery; for *his predeceſſor had the fee ſimple*, and not like a *parſon* who *is quodammodo tenant for life*, who ſhall avoid it, where it is *without aid prayed* of patron and ordinary. Pig. of Recov. 358. cites 30 H. 6. 45, 46.

9. If a biſhop or parſon ceaſes, by which the *lord brings ceſſavit*, and recovers, it ſhall bind the ſucceſſor. Br. Forfeiture de Terres, pl. 102. cites Doct. and Stud. lib. 2. fo. 123.

10. *So* of alienation in mortmain. Br. ibid.—But Brook ſays it ſeems not to be law: for a feme ſhall have cui in vita of ſuch alienation made by her Baron. Ibid.

[See (C)]

[131]

(H) By whom. Tenant in Tail.

1. IN aſſiſe the tenant pleaded a recovery *by default in a writ of entry ſur diſſeiſin made to his grandfather againſt L. mother of the plaintiff*, to which the plaintiff *ſaid, that A. was ſeiſed in fee, and gave to N. his father and L. his mother in frankmarriage, and* N. died, and L. ſurvived, and died, and *we entered as heir abſque hoc, that the grandfather of the tenant*, who was ſuppoſed to be diſſeiſed, had ever any thing, Priſt, &c. and ſo it ſeems that the iſſue in tail may falſify the recovery; but it ſeems by this that he *cannot falſify it againſt him that is to execute the recovery*; for the iſſue was taken if the recovery was *executed or not*. Br. Faux. Recov. pl. 19. cites 28 Aſſ. p. 32.

2. In aſſiſe, the *feme recovered in* a writ of *dower* againſt tenant in tail *by nient dedire*, the tenant died, his iſſue entred, the *feme brought aſſiſe*, and made her title by the recovery; now the iſſue in *tail ſaid, that ne unques accouple* and ſo falſified the recovery; quod mirum, *without* action brought of formedon to recover the land. Br. Faux. Recov. pl. 20. cites 28 Aſſ. p. 52.

But if he dies after judgment and before execution, and the

3. If a man recovers againſt tenant in tail by falſe recovery, and *does not ſue execution*, but dies, the iſſue enters, the other ouſts him, the iſſue ſhall have *aſſiſe*, and if the other pleads the recovery, the iſſue ſhall falſify it with *allegation of the continuance of the poſſeſſion*,

ſeſſion, but if execution had been ſued it is otherwiſe; for then the iſſue is put to a *formedon*, and ſhall falſify in this. Br. Faux. Recov. pl. 10. cites 7 H. 4. 17. demandant brings ſcire facias againſt the heir; *he may falſify in the ſcire facias.* Br. Faux. Recov. pl. 58. cites Litt. tit. Remitter.

4. *Formedon* is brought *againſt tenant in tail*, who pleaded that *ne dona pas, where he had a releaſe from the demandant* to plead, or a *deed of his anceſtor with warranty and aſſets deſcended* in fee; and it is *tried for the demandant*, by which he recovered; the tenant in tail dies, his iſſue brings formedon; the recoveror pleads the recovery by action tried; there the iſſue in tail may falſify by the matter ſupra, per Forteſcue, which Paſton and Aſcue juſtices utterly denied; for he ſhall not falſify *in the ſame point which was tried*; *becauſe he may have** *attaint*, nota. Br. Faux. Recov. pl. 11. cites 19 H. 6. 39. * S. P. *or error.* Br. Formedon pl. 35. cites S. C.

5. Tenant in tail, *who is not the eldeſt ſon*, as where he is ſon by a ſecond venter, ſhall falſify; becauſe he cannot have attaint. Br. Attaint, pl. 124. cites 22 H. 6. 28. per Forteſcue.

6. If a recovery be had againſt tenant in tail, and the title is *tried* againſt him, viz. quod *non dedit*, &c. the iſſue has no remedy but by attaint; for he ſhall not falſify in this point. But if the *verdict be upon other ſpecial matter*, and *not upon the title, or* if it was a recovery *by default*, in theſe caſes, the *heir in tail* may falſify the recovery. Br. Faux. Recov. pl. 4. cites 34 H. 6. 2.

7. The iſſue in tail cannot falſify *in the ſame point which was tried*; but *reddition or confeſſion* ſhall not bind the iſſue in tail from his falſifying; and *notwithſtanding recovery in value ſuppoſed*, yet the heir ſhall falſify *in the point, ſuppoſing that his anceſtor was not tenant at the time, &c. and ſo the recovery void*, per Choke J. and per Brian, ſuch recovery ſhall not bind the tail, but where the tenant was ſeiſed by force of the tail at the time of the recovery, &c. and when the heir of the donor is vouched. Br. Faux. Recov. pl. 30. cites 12 E. 4. 14.

8. The juſtices were of opinion, that if iſſue paſſed by jury againſt tenant in tail, and he *has iſſue and dies and all the petty jury die*, yet the iſſue in tail ſhall not falſify in this point which was tried. Quod nota. Br. Faux. Recov. pl. 31. cites 13 E. 4. 3. *But* if *treſpaſs* be brought *againſt the anceſtor in tail and A. and B.* and it *paſſes againſt them*, if *tenant in tail dies*, and *A. and B. ſurvive*, the heir in tail ſhall not be eſtopped to falſify *in the ſame point*; for the attaint is given to the ſurvivor, quere. Br. Eſtoppel, pl. 168. cites 13 E. 4. 2 and 3.

9. A. tenant for life, remainder to B. in tail. *A. leaſeth for years*; a *recovery is had againſt B.* living A. the recoverors enter, and ouſt the leſſee for years; the ſon and heir of B. *releaſeth with warranty* to him to whom the recoverors have aſſured the lands; the *leſſee enters*; B. *dieth*; the *releaſor dieth*, &c. It was holden that the entry of the leſſee before that the warranty had attached upon the poſſeſſion which paſſed, had avoided the warranty. And the Ld. Anderſon conceived, that the recovery ſhould not prejudice the iſſue in tail, but that the iſſue ſhould falſify the ſame. Mich. 30 Eliz. C. B. 2 Le. 58. Ards v. Smith. [132] 3 Rep. 58. b. S. C. by name of Lincoln Coll. caſe. —2 And. 31. S. C. by name of Chamberlaine v. Lincoln College — Mo. 255. S. C. by name of Bricot v. Chamberlaine.

10. A præcipe is brought againſt tenant in tail, who *prays in aid of a ſtranger as tenant for life*, who *enters into the aid*, and bars the demandant, and afterwards the tenant in tail dieth; his iſſue is at large to claim the eſtate tail, although the mouth of his father was eſtopped as to it. 2 Le. 27. in caſe of Ards v. Smith.

11. Tenant in tail brought a *quod ei deforceat* and *counted upon an eſpecial tail, whereas* in truth *it was a general* tail, and recovered and died; the ſaid recovery ſhall not conclude the iſſue. 2 Le. 57. in caſe of Ards v. Smith.——cites 33 H. 6. 18.

Lev. 41. S. C. Raym. 19. S. C. —8 Mod. 113. cites S. C.

12. *A. tenant for life*, remainder *to B. his ſon in tail. A. entered into a ſtatute* and dies. The conuſee ſued a *ſcire facias againſt B.* The ſheriff returned *ſcire feci*, &c. and thereupon execution was had without any plea pleaded by the heir, and the heir, being *ouſted by the execution brought ejectment*. It was adjudged, that B. was bound, and that he had no remedy by ejectment, error, aud. quer. or any way, but againſt the ſheriff, in caſe he made a falſe return; but Windham J. thought B. the heir might falſify this recovery *in action of a higher nature*, but not in this action of ejectment, becauſe it is of a lower nature, according to FERRER'S CASE, 6 Rep. But Twiſden J. doubted if he could falſify in any action, becauſe it is *no more than a term*. Mich. 13 Car. 2. B. R. Sid. 54, 55. Day v. Guildford.

[See **Recovery Common.** (C. a).]

(H. 2) By Infant or Feme Covert.

1. IF a man *recovers againſt a feme covert without naming the baron in the writ*, the *baron and feme ſhall have aſſiſe*, per Shard and Stouff. Br. Judgment. pl. 147. cites 12 E. 3. and Fitzh. Aſſiſe 147.

2. *But if it be not reformed in the life of the baron*, but he dies; there the feme ſhall be barred by ſuch recovery, and is put to her writ of right, per Shard and Stouff. Ibid.

3. Brook ſays the caſe is briefly reported, but he believes that it is *intended of a recovery by action tried*; and by appearance of the party; for if it was *upon a recovery by default*, it ſeems to him that the *feme ſhould have writ of error*; for *infant ſhall have a writ of error* of a recovery had by default againſt him; and ſo it was uſed in the time of H. 8. and anno 2 M. 1. Ibid.

Br. Aſſiſe, pl. 262. cites S. C.— Br. Judgment, pl. 68. cites S. C.

4. Aſſiſe by infant; the tenant *pleaded recovery of the ſame land in aſſiſe againſt the ſame plaintiff*, to which he *ſaid, that at the time of the recovery he was within age, and the aſſiſe was taken by bailiff, and at the time of the recovery A. held it for term of life, the reverſion to the now plaintiff and his ſiſter*; and the opinion of the court was that the infant ſhall well have the plea; quære cauſam, whether becauſe he was an infant, or becauſe it was taken by plea of the bailiff, or becauſe the infant was not tenant; for it ſeems by 18 Aſſ. 16. that *recovery upon appearance* cannot be confeſſed and avoided

avoided in pleading, contrary of recovery *by default*; for there the pleader ſhall aver that he was tenant at the time of the recovery, to which the other ſhall have anſwer. Br. Confeſs and Avoid pl. 33. cites 26 Aſſ. 6.

(I) At what Time,

1. IN aſſiſe, a recovery is pleaded againſt the plaintiff, and he hath *cauſe to falſify* it, and does not, *but takes iſſue upon another point, which is againſt him*, and he is barred by judgment; there if he brings another action, and the recovery is pleaded againſt him, he cannot falſify it, becauſe the judgment ſtood in force; and the plaintiff might have taken this by plea at firſt, quod nota, by the opinion of the whole court. Br. Faux. Recov. pl. 39. cites 40 Aſſ. 4.

2. *Debt* by a prior; the defendant pleaded the *cuſtom of London* at large of *foreign attachment*, and that one H. brought debt againſt the ſame plaintiff, which was returned nihil in London, and thereupon this debt was attached in the hands of this defendant, and ſo the plaintiff recovered, judgment ſi actio; and the now plaintiff *ſaid, that the recovery was by covin*; for he ſaid he did not owe the ſaid ſum to the ſaid H. which was by him demanded in London modo & forma prout; and per Laicon he ſhall not have the plea to falſify the ſaid recovery in London now, becauſe *he might have come into London within the year*, and have pleaded and * diſproved the debt, and have barred the then plaintiff, and becauſe he did not, therefore, *now he hath paſſed his time* and cannot falſify it. Br. Faux. Recov. pl. 16. cites 39 H. 6. 19.

* Orig. reprove.

3. If *tenant for life* ſuffers a recovery, he in reverſion may falſify *during the life* of the tenant for life, *or after his death*. Pig. of Recov. 165, 166.

[See Trial (B. 2).]

(K) By Warranty and Aſſets.

1. NOTE, that where tenant in tail diſcontinues with warranty, and leave aſſets and dies, and 2 *by conſpiracy cauſe E. to enter and ouſt the alienee, againſt whom the iſſue* (within age) of the tenant in tail *recovers in ſcire facias upon fine of the ſame tail*; that in this caſe he who loſt ſhall have action and falſify the recovery by the warranty and aſſets. Br. Faux. Recov. pl. 18. cites 27 Aſſ. 74.

(L) For want of Juriſdiction.

1. IT was admitted, that a man may falſify a recovery had *againſt himſelf* for a point, which proves ſuch recovery to be void, as becauſe it was *coram non judice*. Br. Faux. Recovery, pl. 38. cites 39 Aſſ. 6.

2. In treſpaſs, it was not denied, but that if a *fine* be levied *of land in ancient demeſne at the common law*, and *after a recovery is had in the court of ancient demeſne*, that this recovery is feint in law; by which he falſified it. Br. Judgment, pl. 17. cites 7 H. 4. 3.

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Br. Faux. Recov. pl. 15. S. C.

3. In aſſiſe tenant pleads in bar a recovery *in dower*; plaintiff replies, that the lands demanded are in the cinque ports, ubi breve domini regis non currit, and the plea held ill; for judgment at *Weſtminſter for lands in the cinque ports* is good; aliter of lands in *Wales*. Pig. of Recov. 159. cites 36 H. 6. 6. 32.

(M) For Prior Right.

1. IF I am *ſeiſed by title*, *and A. ouſts me*, and *I re-ouſt him*, and *A. recovers againſt me by aſſiſe*, I may have attaint or aſſiſe of my firſt poſſeſſion; and therefore if the recovery in the aſſiſe be pleaded, the plaintiff may confeſs and avoid it, becauſe his aſſiſe was of elder poſſeſſion. Per. Parning. Quære inde, the judgment of the aſſiſe being in force. Br. Aſſiſe, pl. 186. cites 13 Aſſ. 1.

Br. Barre, pl. 9. cites S. C.

2. Note, it was ſaid for law in attaint, and not denied, that where *J. is diſſeiſed by W.* and a *ſtranger recovers againſt him bona fide*, *or by covin by title*, which is *younger than the title of J.* there J. may enter upon the recoveror and plead this matter, and the recovery meſne, &c. and a good plea. Br. Entre congeable, pl. 4. cites 34 H. 6. 44.

Br. Faux. Recov. pl. 59. S. C.

3. Writ or forcible entry; the plaintiff makes title by a *recovery in a writ of right againſt the leſſor* of the defendant; the defendant *pleads that at the* time of the *writ* of right *brought*, his *leſſor had aliened* the reverſion to A. to whom he attorned, and held good. Pig. of Recov. 159. cites 1 H. 7. pl. 7.

4. If *A. has title* by formedon or cui in vita *and enters*, and *B. recovers againſt him*; A. is remitted to his firſt action. Br. Judgment, pl. 111. cites 23 H. 8.

5. *But* if B. *recovers* againſt A. *by falſe title* by action tried, *where A. is in by good title*, he ſhall then have *error*, *or attaint*, *or writ of right*. Ibid.

(N) For Feint Pleading.

1. A *Parſon* made a leaſe for years, and afterwards in a *quare impedit* brought *againſt him and the patron* they pleaded feintly; leſſee ſhall not falſify, becauſe if the parſon had reſigned, the leaſe had been gone. Pig. of Recov. 159. cites T. 26 H. 8. pl. 3. Br. Faux. Recov. pl. 1. S. C.

(O) Pleadings.

1. IN aſſiſe, the tenant pleaded recovery in mortdanceſtor againſt N. and the plaintiff *ſaid, that N. againſt whom, &c. was not tenant of the franktenement*; and it was admitted a good plea. Br. Faux. Recov. pl. 37. cites 19 Aſſ. 4.

2. Where a *recovery is pleaded againſt my anceſtor*, I may ſay, that my anceſtor *had nothing in the land at the time, &c. without ſhewing who was tenant thereof*; contra in avoidance of a *fine*. Quære, if it ſhall not be *intended a recovery by default*; for it ſeems to be contrary upon a recovery upon appearance. Br. Judgment, pl. 24. cites 14 H. 4. 33.

3. In *warranty of charters*, the defendant may *ſay, that the plaintiff in the firſt action entered* upon the plaintiff then tenant *pending the writ*, which matter the plaintiff might have pleaded and did not; *or* that the plaintiff in this action *had nothing in the land loſt by the firſt action*; and a good plea, per Arden in a præcipe quod reddat, quod non negatur. Br. Faux. Recov. pl. 45. cites 21 H. 6. 49. [135]

4. In aſſiſe, if the *tenant makes a bar at large*, and the *plaintiff makes title by recovery*, and the *tenant deſtroys the recovery by proving it to be void*; it is no plea without making title to himſelf; for if the plaintiff was in by a void recovery, this is no reſort to the tenant; for it is not lawful for the tenant to enter upon him, if he has no title: and ſo ſee that the tenant ſhall not avoid the title of the plaintiff without making title to himſelf. Br. Aſſiſe, pl. 103. cites 36 H. 6. 33, 34.

5. A. *pending a writ of entry* ſur diſſeiſin againſt him, *recovered by formedon againſt his own feoffee*. The beſt opinion was that the *traverſe* ſhall be of the *diſſeiſin* and *not* of the *feoffment*. Br. Faux. Recov. pl. 27. cites 7 E. 4. 19.

6. A man recovered land, and brought *ſcire facias againſt W. N. and after* he brought ſcire facias *againſt J. tertenant*, who *ſaid that W. N. againſt* whom the recovery was had, *was not tenant* of the franktenement *the day of the firſt ſcire facias*, &c. *nor ever after, but one A. whoſe eſtate he the now tenant hath*, &c. and ſo the recovery void; and this was held a good avoidance of the recovery; and yet nontenure generally is no plea; and it ſeems that this recovery

covery was by default; for it is ſaid elſewhere that *upon recovery by default*, the tenant may ſay that, he was not tenant the day of the writ, &c. nor after; for *in pleading* ſuch recovery, the party *muſt aver that the writ was brought againſt ſuch a one, then tenant* of the land; but he who appears and pleads and loſes, ſhall not do ſo. Br. Faux. Recov. pl. 32. cites 14 E. 4. 2.

7. Note, by the juſtices, that the *termor* may falſify a recovery againſt his leſſor being in reverſion at the time of the recovery, as he may of a rent which the leſſor ſuffered to be recovered againſt him; and per Brian and Townſend, he ſhall ſay that *before the writ brought againſt his leſſor*, the *leſſor granted his reverſion* to W. N. to whom he *attorned before* the writ brought, and *ſo was not tenant at the time* of the writ brought, and recovery had. Br. Faux. Recov. pl. 23. cites 14 H. 7.——pl. 59. cites 1 H. 7. 9.

8. Præcipe quod reddat ſur diſſeiſin in the poſt; the *termor* for years *by the ſtatute of Glouceſter* prayed to be received, and ſaid that this recovery is by covin to make him loſe his term, and traverſed the diſſeiſin; and per Pollard and Fitzherbert he cannot do otherwiſe; for *the covin is not material without traverſing the point of the writ.* But per Port, if the *tenant in tail makes diſcontinuance*, and the *diſcontinuee makes a leaſe for years*, the *iſſue* in tail *brings formedon by covin of the diſcontinuee* to make the termor loſe his term; there the covin is only material. Per Pollard the termor is without remedy in this caſe; for the heir in tail ſhall be remitted; for by them where the *recovery* is *upon a true title*, the *covin is not material.* Br. Colluſion, &c. pl. 21. cites 14 H. 8. 3.

9. In *præcipe quod reddat* the tenant *pleaded in abatement* of the writ, that one A. after the laſt continuance had brought an *aſſiſe* againſt him, and *recovered by action tried*, viz. by verdict; and the demandant ſaid that this aſſiſe was brought by covin between the ſaid A. and the tenant to the intent to abate his writ; and there it is granted by all the court, that this is no plea without *ſhewing cauſe of the covin.* Pl. C. 46. b. Arg. cites 9 H. 6. 41.—And Plowden ſaid he agreed the law to be ſo; and the reaſon is becauſe the title was tried by verdict of 12 men, and then the demandants ſaying that it was by *covin cannot be intended* true *againſt the verdict.* Ibid.

10. *But* where (as in the principal caſe) the recovery was by *default*, in which caſe there is no trial; but the default of the defendant *was the cauſe of the judgment*, by which in this caſe, and where the recovery is by default, a man ſhall aver that it was by *covin generally*, and ſo the diverſity. Arg. Pl. C. 46. b. in caſe of Wimbiſh v. Talbois.

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11. By the 21 H. 8. 15. the leſſee ſhall be received to falſify the recovery before judgment, and it ſhall ſuſpend the execution. But then he muſt *not only aver the colluſion, but plead ſome act to bar the plaintiff's title.* Pig. of Recov. 51.

12. Notwithſtanding the ſtatute of Glouceſter, and the 21 H. 8. it never lay in the mouth of a *tenant to the præcipe* to *plead* a leaſe for years, or to ſtop execution upon any ſuch plea. If an *aſſiſe* be brought *againſt tenant for life*, he cannot ſay that there is a *leaſe for*

years precedent to his right, though the tenant for years himſelf may falſify a recovery againſt him in reverſion. Trin. 1 Annæ, B. R. 7 Mod. 42. Per Holt. Ch. J. in the caſe of Smith v. Angell.

(P) Bar. Plea in Bar to the Falſifying.

1. *ASSISE* by A. againſt the Lord C. of land in T. in the county of E. the *defendant pleaded in bar, that at another time he himſelf recovered the ſame tenements againſt the plaintiff in the county of W. and the plaintiff ſued to reverſe the judgment in B. R. affirming them to be in the county of W. and had judgment and reſtitution, and after the tenant brought aſſiſe in the county of W. againſt the plaintiff, and recovered the land in the county of W.* judgment if the plaintiff who ſued to reverſe the firſt judgment, affirming them to be in the county of W. ſhall now have aſſiſe in the county of E. For he ought to have brought aſſiſe and not to have ſued to reverſe it; for it was ſaid, that where a man recovers land in a baſe court, which does not lie within the juriſdiction of it, and brings writ of falſe judgment of it; he ſhall not have aſſiſe after, becauſe he affirms that it lies within the juriſdiction; quod nota, by ſome; but here the aſſiſe was taken, becauſe it cannot be intended to be of the ſame tenements which are in plaint. Br. Judgment, pl. 58. cites 10 Aſſ. 25.

2. In *mortdanceſtor againſt the baron and feme and S.* the *baron diſclaimed for himſelf and his feme*, and *S. vouched the baron, who* came and *pleaded a recovery by action tried by himſelf againſt one S. by dum fuit infra ætatem, where in truth he recovered againſt S. named in the writ pending this action*; *and ſaid that the eſtate of the anceſtor of the demandant, of whoſe ſeiſin he demanded, was meſne between his title and his recovery*; to which the *demandant ſaid, that S. was ſeized, and enfeoffed this ſame S. with warranty, of which ſeiſin S. was ſeized at the time of the judgment given, and ſo* the recovery falſe and feint in law, judgment, and prayed the aſſiſe, and the *vouchee demurred* thereupon; and becauſe by the demurrer all the points of the writ are confeſſed, therefore the *demandant releaſed his damages and had judgment* to have ſeiſin of the land *immediately*. Quod nota; and ſo good cauſe to falſify, becauſe the *feoffment and warranty were not pleaded in the firſt action*. Br. Faux. Recov. pl. 22. cites 30 Aſſ. 10.

3. A man cannot falſify, unleſs he *makes himſelf a title* to the land; for though the recovery be void, yet when the recoveror is in by it, it is not lawful for the plaintiff to enter and ouſt him without title, and therefore it is no plea without making title; for where the tenant in aſſiſe pleads a bar, the plaintiff muſt make a title to himſelf before he can avoid the bar. Br. Faux. Recov. pl. 15. Per Forteſcue Ch. J. cites 36 H. 6. 32.

4. In *annuity by the abbot of C. againſt the vicar of T.* and *counted that he and his predeceſſors time out of mind have been ſeiſed of the annuity* in right of his church of C. aforeſaid; and the *defendant traverſed* [137]

verſed the preſcription, and *it was found with the plaintiff*, and he recovered; and after *the annuity was arrear at another time*, and *the abbot brought ſcire facias againſt the ſucceſſor* of the vicar, *who ſaid that the abbot and his predeceſſors have been parſons of T. and held it in proper uſe* as parſons imparſonee in right of their church of C. time out of mind, *and that the ſaid abbots have claimed the ſaid annuity as parſons*, &c. *and* that the ſaid abbots and their predeceſſors *were ſeiſed of* the ſaid annuity *only as parſons of the ſaid church* as he has alledged; and ſo the ſaid recovery void and null in law. And becauſe he *does not ſay, that the predeceſſors of the abbot have been ſeiſed* of the ſaid annuity in fact *as parſons*, &c. *nor* has *traverſed, that* the abbot and his predeceſſors *were not ſeiſed of any other annuity*, therefore the plaintiff recovered, quod nota; but by ſeveral the matter was good cauſe to have falſified, &c. For otherwiſe the abbot might have two annuities, the one as abbot, and the other as parſon; and this falſifying goes to the action; and yet if it had been pleaded in the firſt action, he muſt have concluded to the writ. Br. Faux. Recov. pl. 29. cites 10 E. 4. 16.

5. In annuity, one *outlawed of treaſon brought* a writ of *error*, and had *ſcire facias* againſt the *lords* mediate and immediate, who are returned warned, and made default, and the utlawry is reverſed by impriſonment. In aſſiſe brought the lords, cannot aver that he was at large and ſhall not falſify the recovery; for thoſe who are ſummoned are bound for ever. Br. Faux. Recov. pl. 24. cites 4 H. 7. 2.

6. *In aſſiſe* againſt tenant in fee ſimple the *plaintiff recovered by default*; he can never falſify, though he may have writ of right. per Keble. Ibid.

(Q.) Other Action. In what Caſes after Recovery againſt a Man by Default, he may have other Action, and what.

1. 13 *E.* 1. 4. recites that *WHEREAS before time, if a man had loſt his land by default, he had none other recovery than by a writ of right, which was not maintainable by any, that could not claim of meer right as* tenants for *term of* life, *in* free marriage, *or* in tail, *in which eſtates a reverſion is reſerved.*

And provides that from henceforth their default ſhall not be ſo prejudicial, but that they may recover their eſtate by another writ than by a writ of right, if they have right; *and that,*

For land in free marriage loſt by default, ſuch a writ ſhall be made.

2. In aſſiſe the *defendant pleaded in abatement of the writ, that pending the writ J. N. had recovered againſt him by dum fuit infra ætatem of elder date*, and was *by nient dedire*; and notwithſtanding this the aſſiſe was awarded, quod nota; quære cauſam, whether, becauſe that the tenant did *not ſay, that he, who recovered entred*; or becauſe

becauſe the recovery was by nient dedire, and *not by action tried.* Br. Brief, pl. 278. cites 22 Aſſ.

3. Per Mordaunt, Wood, Townſend and Brian, if *tenant for life* be impleaded, and *prays aid of* him in *reverſion, who is ſummoned, and makes default*, and the tenant for life confeſſes, or loſes otherwiſe, yet he in reverſion may have *writ of right, or ad terminum qui præteriit*, and ſhall falſify the recovery. Quod Nota Bene. Br. Faux. Recov. pl. 24. cites 4 H. 7. 2.

[See Bar, (D)]

(R) Other Action. In what Caſes a Man may falſify by other Action. [138]

1. IF ſuch *particular tenants* as tenants in *dower, &c. loſe by action tried in a real action*, it ſeems, that at this day they themſelves are without remedy. per Coke. 6 Rep. 8. b. and ſays that with this accords 50 E. 3. 7.

2. If *tenant for life* be impleaded, and *prays aid of* him in *reverſion, who is ſummoned, and makes default*, and the tenant for life confeſſes, or loſes otherwiſe; yet he in reverſion may have a *writ of right, or ad terminum qui præteriit*, and ſhall falſify the recovery, quod nota bene; per Mordant, Wood, Townſend and Brian. Br. Faux. Recov. pl. 24. cites 4 H. 7. 2.

3. If a man *loſes in aſſiſe*, the tenant is not put to his writ of right, but may have aſſiſe of *mortdanceſtor*, per Coke. 6 Rep. 8. b. cites 5 Aſſ. 1.

4. *So* recovery in aſſiſe is no bar in *formedon in reverter.* per Coke. 6 Rep. 8. b. cites 6 H. 4. 2.

5. Real actions, as writs of right, writs of entry, &c. and their ſeveral appendages, as grand cape, &c. were ſeveral great titles in the year books, but now much out of uſe; for in moſt caſes at this day the entry of him that has right being lawful, men chooſe to recover their poſſeſſions by *ejectment*, excepting that in common recoveries the form of ſuch real actions is preſerved. And ſometimes, though rarely a writ of *dower* or *formedon*; becauſe ordinarily, where an entail is ſuſpected, a common recovery is had. And ſometimes in the grand ſeſſions in *Wales* they proceed by a *quod ei deforceat.* Ld. Hales's Pref. to Roll's Abr. pag. 5.

(S) Equity.

1. A. had *land extended* to him *in ancient demeſne by ſtatute merchant*, and afterwards *B. purchaſed the land*, and recovered by ſufferance in the ancient demeſne court upon voucher, and entered *and ouſted A.* who brought ſubpœna; and it was held, that A. *could not falſify* the recovery, *and therefore ſhould be reſtored by chancery*; becauſe there was no remedy at common law. Br. Conſcience, pl. 8. cites 7 H. 7. 11.

Father and Son, or Child, &c. Or Parent and Child.

(A) What Actions a Father, &c. may have on Account of his Child.

1. TRESPASS *quare filiam & hæredem ſuam rapuit* & abduxit lies for the father, but not for the *mother*; for the father of common right ſhall have the *ward* of his ſon or daughter; per Cateſby. Br. Garde. pl. 55. cites 9 E. 4. 53.

Action lies not for the father, though it

2. Father ſhall not have action againſt a maſter for beating his ſon and heir apparent, and *laming him ſo as he is diſparaged as to his marriage.* Le. 50. Paſch. 29 Eliz. B. R. Gray v. Jeffes.

was objected that he was *at the charge of curing* his ſon of his wounds, becauſe he was not compellable to it. Cro. E. 849. RIPPON v. NORTON.——But it was admitted arg. that action might have lain for the father, if he had ſhewn, that the ſon *was his ſervant*, whereby he loſt his ſervice. But alleging loſs of ſervice, without alleging that the ſon was his ſervant, is not ſufficient. Cro. E. ut ſupra.

3. If the ſon *marries without conſent* of the father, the father has no remedy. Le. 50. Gray. v Jeffes.——See 5 Mod. 222. King alias Michel v. Thorp.

4. The father ſhall not have action *for taking* any of his children except *his heir*; and that is, becauſe the marriage of his heirs belongs to the father, but not of any other his ſons or daughters. And the father has no property or intereſt in the other children, which the law accounts may be taken from him. Cro. E. 770. Trin. 42 Eliz. B. R. Barham v. Dennis.——But Glanvil. J. contra. Ibid.

(B) Inter ſe; as to Legacies, &c. to the Children by Others.

1. *BONDS releaſed* by the father, which he had *taken in the names of his ſons being infants*, thought good and allowed. Toth. 88. cites Hill. 20 Jac. Simonds v. Lomley.

2. The *grandfather deviſed lands to his ſon to pay* 10 *l. per annum to the ſon's* 3 *daughters*, the *father gives* 200 *l. in marriage with one* whether the 10 *l.* per ann. ſhall be included in the 200 *l.* or not? it was decreed that it ſhould be included. Toth. 141. cites Mich. 13 Car. Kirrington v. Aſty.

3. The

3. The father received a legacy of 100 *l.* and another of 50 *l.* left to B. his eldeſt ſon by the grandfather and grandmother; afterwards the *father gave bond to pay his ſon*, whom he had *diſinherited*, 6000 *l.* It was inſiſted that the bond included the legacies. But Ld. Jefferies, in favour of a diſinherited heir, would allow no more than [140] what they could prove to have been actually paid towards ſatisfaction of theſe legacies, and eo nomine as in part of the legacies, and the reſt to be paid with intereſt. Mich. 1687. Vern. 480. Sir Wm. Cann v. Lady Cann.

4. A legacy of 150 *l. to the daughter of B.* was paid to B. who after, on her marriage with J. S. *gave her* 1000 *l. portion, and* ſettled *a church leaſe* upon her, *and maintained her and her huſband* 14 *years* at his own houſe. The Maſter of the Rolls decreed the legacy with coſts, but ſaid, though he would not diſcharge it, he diſliked the ſuit. Hill. 1703. Ch. Prec. 228. Sir George Chudley v. Lee.

5. Children *not demanding* their legacies of their father when they come of age, or after, is no diſcharge of them; and the father is bound to maintain them during their minority, and their portions given by a ſtranger are nothing to him more than if they had not any; and where they lived to be fit for ſervice and *ſerved their father*; their ſervice was more worth than the intereſt of the legacy (which was 50 *l.* a piece) and ſo *intereſt* was allowed. But where one of the daughters married, and ſhe and her huſband had a *year's board after marriage*, the father muſt be allowed for it, unleſs an agreement be proved to the contrary. Paſch. 7 Annæ, 3 Ch. R. 168. Strickland v. Hudſon and Maſon.

[See **Deviſe**. (L. c)]

(C) Allowances to Parents for Maintenance out of Children's Fortunes.

1. A. Deviſed 250 *l.* to his ſon, and made his wife executrix, who married another huſband. On a bill brought againſt them by the ſon for the legacy, the defendants would have diſcounted maintenance and education; but the court would not permit it ſo as to *diminiſh the principal ſum*; for it was ſaid that the mother ought to maintain the child. 2 Vent. 353. Mich. 33 Car. 2. Anon.

2. *But* a ſum of money paid for the *binding him out an apprentice* was allowed to be diſcounted. 2 Vent. 353. Anon.

3. *And* the mother was decreed a *reaſonable allowance for maintenance* of her ſon from 2 years of age, when the father died, to 18, when the ſon died; ſhe having received the rents of 33 *l.* per annum deſcended from the father on the ſon, as heir at law. Paſch. 7 Annæ, 3 Ch. R. 164. Wallis v. Everard.

(D) Coertion. What Acts done by a Child ſhall be ſaid to be done by Coertion, and ſo relieved againſt.

1. A Father *prepared a bond conditioned for payment of* 120 *l. a year to him for life by his ſon, to whom a very large eſtate had been deviſed*, and upon propoſing it to the ſon, he refuſed to execute it, ſaying it was more reaſonable that the father ſhould depend upon his honour. Upon which the *father left the bond* with the ſon, *ſaying, if he would not ſign it he might let it alone.* But *afterwards in the father's abſence the ſon ſigned it*, juſt before he went to travel, *and directed, that it ſhould be delivered to his father.* Ld. C. Parker
[141] ſaid that thoſe words might be ſpoke ſo, as to amount to a threatning and to intimidate; but it might alſo be otherwiſe, and the father ſeemed to acquieſce under the ſon's anſwer. And that for aught appeared it was his free act, and what he thought himſelf obliged in honour to do, and therefore without any proof to impeach it, it ſhould not be ſet aſide in equity. Wms's Rep. 602. 607. Hill. 1719. Blackborn v. Edgely.

2. If it ſhould ever appear that the *power of a parent over a child has been abuſed*, as by his gaining a releaſe of the child's orphanage part *by threats*, &c. a court of equity will certainly ſet aſide a releaſe thus unduly gained. per Ld. C. Parker. Paſch. 1720. Wms's Rep. 639, 640. in caſe of Blunden v. Barker.

(A) Fealty and Homage.

1. 17 *E.* 2. *ENACTS that when a freeman doth homage to his lord of whom he holdeth in chief, he ſhall hold his hands between the hands of the lord, and ſay thus:*

I become your man from this time forth, for life, for member and for worldly honour; and ſhall owe you my faith for the lands that I hold of you, ſaving the faith I owe unto our lord the king, and to mine other lords.

When a freeman doth fealty to his lord, he ſhall hold his right hand upon the book, and ſhall ſay thus:

Hear you my lord R. that J. P. will be to you both faithful and true, and ſhall owe my fidelity to you for the land that I hold of you, and lawfully ſhall do ſuch cuſtoms and ſervices as my duty is to you at all terms aſſigned. So help me God and all his Saints.

2. *Seiſin*

2. *Seiſin of* homage and fealty is ſo ineſtimable in law, that no *diſtreſs* for them of any goods or chattles of *whatever value*, is in judgment of law exceſſive; and though the lord diſtrein *oftentimes* for them, that the tenant cannot manure his land, yet the tenant ſhall not have *aſſiſe of ſovent diſtreſs* as he ſhall have for rent or other profits. 4 Rep. 8. b. Mich. 17 and 18 Eliz. C. B. Bevil's caſe.

3. Fealty gives *ſeiſin* of all annual ſervices ſufficient to make ſeiſin in avowry, but not in an aſſiſe; but of accidental ſervices this gives ſeiſin in aſſiſe. per omnes J. 2 Brownl. 99. Trin. 9 Jac. C. B. Anon.

4. A *diſtreſs* is a good demand of fealty, but the lord cannot avow for fealty upon a demand made *after the death* of the tenant. Mo. 883. Trin. 15 Jac. C. B. Kingſwell v. Crawley.

But if after fealty *demanded, and refuſed tenant dies*, the lord may diſtrein after his death for it. per Hobart. Noy. 24. Crawley v. Kingſmill.

5. If a man holds land *at will rendring rent*, fealty is not *incident* to it; for it is but a rent diſtrainable of common right. Co. Litt. 37. b.

6. One *within age* may do homage, but he cannot do fealty; becauſe that is to be done upon oath. 2 Inſt. 11.

7. Homagium is either *ligeum or feodale*. Vaugh. 279. in caſe of Craw. v. Ramſey.——cites 7 Rep. 7. Calvin's caſe.

There are 2 kinds of homage, ſovereign and feodal; ſovereign homage is due to the king only in right of ſovereignity, and this commonly is called liege homage, from ligando, becauſe it binds the ſubject to the king; but ſo alſo was the other anciently, becauſe it likewiſe binds the tenant to his feodal lord. Spelm. Gloſs. verbo Homagium. 296.

Fee-Farm Rents. [142]

(A) Notes in General.

FEE-FARM, or *feodi firma is* when any one, of the gift or grant of another, holds to him and his heirs rendering either the half or the third part, or at leaſt the fourth part of the true value. And ſuch tenant is bound to no ſervices, but what are contained in the charter itſelf, except fealty, which all tenures are liable to. Spelm. Gloſſ. verbo Feodum, page 221.

45 E. 3. 15. b. per Finchden—Br. Relief. pl. 8. cites S. C.—pl. 5. cites old Tenures.

By 22 *Car.* 2. 6. *ſect.* 4. Letters patents *granted by the king of certain fee-farm rents*, before the 24th of June 1672, are confirmed.

This act of parliament was *not neceſſary*

to enable the king to make a

Sect. 10. Purchaſors may buy *and enjoy the ſame rents*, notwithſtanding any ſtatute of mortmain.

grant of theſe rents, *but* to encourage purchaſers, and *to give ſuch privileges* to the ſubject *which* the king *could tranſfer without act of parliament*, and to cure and ſupply the defect of *nonrecital* or *miſrecital*: and the act itſelf is an authority that the king might alien; for the act declares the letters patents good, which were granted before. Per Holt Ch. J. Mich. 7. W. 3. B. R. Skin. 606. In the Bankers caſe.——Fee farm rents will *merge in the inheritance*. Per Parker C. Mich. 10 Geo. 1. 10. Mod. 526. Atcherley v. Vernon.

(B) Conveyances thereof. How directed to be made by the Truſtees.

22 *Car.* 2. *cap.* 6. *ſect.* 6. *Enacts that the* truſtees *and the ſurvivor or ſurvivors of them*, ſhall execute *to purchaſors*, indentures of bargain and ſale *containing a conveyance of the ſaid rents, and reciting the conſideration of money paid*, which ſhall be enrolled *in any of the four courts of Weſtminſter, within ſix months after the date thereof.*

Sect. 12. *Inſtructions to be obſerved in the ſale of theſe rents, yet ſo as the non-purſuance of them ſhall not weaken purchaſors titles.*

1. *Contracts for ſales ſhall be ſigned by the lord treaſurer or commiſſioners of the treaſury, or two of them.*

2. *The truſtees ſhall convey to ſuch as by order from the lord treaſurer or commiſſioners of the treaſury, or two of them, they ſhall be directed.*

3. *Every contractor ſhall at or before ſealing his conveyance, pay one moiety at leaſt of his purchaſe money into the exchequer; and before he receives his conveyance give ſuch ſecurity as the lord treaſurer or commiſſioners, &c. ſhall approve for the other moiety.*

4. *Such as pay down their whole money, ſhall be allowed for preſent payment of their ſecond moity, not exceeding* 10 *l. per cent.*

5. *Immediate tenants liable to pay any rents, ſhall be preferred in the purchaſe of it before others, ſo as they tender themſelves to the lord treaſurer or commiſſioners of the treaſury, to contract within ſix months after paſſing the ſaid patent; and notice thereof publiſhed by proclamation, and perfect their contract, and pay or ſecure the money within ſix months after, at ſuch rate as ſhall be agreed, not exceeding* 20 *years purchaſe.*

[143] 6. *If the immediate tenant, or ſome on his behalf do not tender and perfect his contract, all benefit of performance to be loſt.*

7. *The purchaſor may have his conveyance in the names of any perſon he ſhall deſire.*

8. *If any rent be charged with an incumbrance, conſideration ſhall be had of it and reprize allowed; and the purchaſor ſhall covenant to take upon him ſuch incumbrance.*

9. *The truſtees ſhall hold the rents to the king's uſe till ſale.*

10. *The truſtees ſhall covenant with the purchaſors againſt their own acts.*

22 &

22 & 23 *Car.* 2. 24. *ſect.* 9. *Impowers the truſtees to* convey *the ſaid rents to purchaſors either* by the words expreſſed in the letters patents, or by particulars *to be made by the auditors, or by the original grants from the crown, ſaving the queen's right to the rents hereby veſted.*

(C) Purchaſors indemnified and favoured; and how enabled to ſue.

22 *Car.* 2. 6. *ſect.* 7. *Enacts that purchaſors ſhall hold the ſame diſcharged of any breach of truſt, which may be pretended to be committed by the truſtees, and may recover the ſame as the king might, excepting the prerogative proceſs out of the exchequer.*

To encourage purchaſing fee-farm rents, this act gives the purchaſors the ſame power of diſtreſs, not only on the land out of which the fee-farm rent iſſues, but on any other of the lands of the

Sect. 9. *Purchaſors of rents reſerved by any letters patents of lands and tenements, &c. and ſold after the paſſing of this act, ſhall enjoy them; any cancelling, avoidance, or determination of ſuch letters patents notwithſtanding. This act ſhall not be conſtrued to avoid any covenants or agreements on the king's part, in the original reſervation of ſuch rents; nor decrees in the court of augmentation or court of exchequer before the 23d of October* 1642. *or ſince 29th of May* 1660. *whereby fee farmers were to be diſcharged, and allowances out of the ſaid fee-farm rents to be made.*

tenant as the king had. Hill. 1715. 2 Vern. 713. Att. Gen. v. Mayor, &c. of Coventry.

Fee-Farm rents, when granted by the king, *became rent ſeck*, and therefore not to be extended. Arg. 9. Mod. 72. cites Cro. E. 656.——Fee farm rent is *extendible upon an elegit*, and yet the words of the ſtatute, which give the ſheriff authority, are only land, viz. *Moiletatem terræ.* Arg. 10 Mod. 526.

A. claims a fee-farm rent under this ſtatute, and there is a *ſequeſtration* on the land, out of which the fee-farm rent iſſues; the court cannot order the ſequeſtrators to pay the arrears out of the money in their hands, but declared the *grantee might take his remedy at law, notwithſtanding the ſequeſtration.* Per Cowper C. Hill. 1715. 2 Vern. 713. Att. Gen. v. Mayor, &c. of Coventry.

The court left him at liberty to diſtrain for his rent at law, without incurring any contempt in equity, and that no leaſe or eſtate derived under the ſequeſtrators ſhould be made uſe of in evidence againſt the claimant of the fee-farm rent, to prevent the diſtreſs. Wms's Rep. 308. S. C.

Though the king might *diſtrain* on any other lands of his tenant, as well as on thoſe out of which the rent iſſues; yet, if the tenant *alien, deviſe or leaſe at will only* his other lands, the crown cannot diſtrein on thoſe lands. Hill. 1715. Arg. 2 Vern. 714. Att. Gen. v. Mayor, &c. of Coventry.

S. P. Held by Cowper C. aſſiſted by the Ld. Ch. J. Parker and King. Wms's Rep. 307. Hill. 1715. S. C.

So, if there be an *extent upon an elegit* of ſuch other lands, the goods or chattels on the premiſſes ſo extended will not be liable; for this is a greater eſtate than an eſtate at will. Per Cowper C. aſſiſted by Ch. J. Parker and King. Wms's Rep. 307. S. C.

As to the caſe of the Att. Gen. v. the mayor of Coventry, the reporter ſays, that afterwards Ch. J. Parker informed him that he thought it might have been proper to have determined, that the *ſequeſtration was as the hand of the court upon the eſtate*, and where a right to a fee-farm rent appeared to be prior and indiſputable, the court might reaſonably enough have ordered payment, elſe A. for ought appeared, would be in a worſe condition, than if there had been no ſequeſtration; for till the ſequeſtration, the corporation paid the rent voluntarily, and now are diſabled purely by the ſequeſtration; and putting A. to diſtrain was putting the charge of the ſuit upon the eſtate; whereas nothing appeared to the contrary; but that the corporation was ſenſible of A.'s right to the rent, and deſired it might be paid. Wms's Rep. 308, 309.

By 22 *and* 23 *Car.* 2. 24. *ſect.* 2. *All purchaſors thereof are to be kept harmleſs from all incumbrances made by the truſtees.*

(D) Extent

(D) Extent of the Act, as to the Power of the Truſtees, and what they might Convey.

22 *Car.* 2. *cap.* 6. *ſect.* 9. *Enacts that rent not uſually paid by the greater ſpace of* 40 *years laſt paſt, ſhall not be inſerted in ſuch letters patents, and tenants ſhall hold their lands diſcharged of any rent, reſerved by virtue of any patent of concealment, or commiſſion of defective titles, not uſually paid by the greater ſpace of* 40 *years, until the ſame ſhall have been recovered by due courſe of law.* And by

Sect. 14. *So much as is due for any uſes out of the premiſſes to be ſettled upon truſtees ſhall continue to be paid; and the truſtees are hereby authorized to convey, for performance of ſuch uſes, ſuch of the ſaid fee-farm rents, &c. as ſhall amount to the ſums charged, after which conveyance, the purchaſors of the reſidue to be diſcharged thereof.*

(E) How to be ordered till Sale. And liable to what Payment or Allowances.

By 22 *and* 23 *Car.* 2. 24. *ſect.* 4. *Till ſale of the ſaid rents, the receivers of the king's revenue ſhall gather the ſame.*

9 *and* 10 *W.* 3. 8. *Subjected fee-farm rents to payment of taxes.*

7 *Geo.* 2. *cap.* 7. *ſ.* 5. *Enacted that lands, &c. ſubject to fee-farm rents, &c. if ſuch rent amounted to* 20 *s. per ann. or more, the landlord may deduct the taxes; ſuch deductions to be allowed by the perſons intitled to the rent without fee or charge for ſuch allowance.*

S. 26. *Receivers of fee-farm rents to allow* 2 *s. per pound to the parties without fee on penalty of* 20 *l.*

(F) Pleadings by Purchaſors.

22 *Car.* 2. *cap.* 24. *ſect.* 8. *All purchaſors may make a* general juſtification, *without producing any letters patents, by* ſaying *that the* truſtees were ſeized in fee, and ſo granted *to them.* And by

10 *Annæ*, 18. *ſ.* 4. *Where any fee-farm rents, intended by the acts of* 22 *Car.* 2. *and* 22 *and* 23 *Car.* 2. *to be ſold, and which are ſold purſuant thereunto, ſhall be named and deſcribed in any deed or fine, declaration, or other pleading, by ſuch or the like names or deſcriptions, as the ſame were deſcribed in the indentures of bargain and ſale made by the truſtees for ſale thereof, ſuch* names and deſcriptions *may ſerve for conveying or pleading the title to ſuch rents from and under the truſtees.*

Sect. 5. Provided, that this act shall not give any benefit in pleading, or deriving a title to any rent, which hath not been paid or levied within 20 years next before the time of such pleading or deriving a title.

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* Fees.

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* It was the *ancient law of England* that *none having any office concerning the administration of justice should take any fee* or reward of any subject for the

(A) Fees of Sheriffs.

[1. *WESTM.* 1. *c.* 26. That no sheriff or other *minister* of the king take no reward for doing his office, but be paid of that which they take of the king; and he who shall do so, shall render the double to the plaintiff, and shall be punished at the will of the king.]

doing his office, to the end he might be free, and at liberty to do justice, and not be fettered with golden fees, as fetters to the suppression or subversion of truth and justice. 2 Inst. 176.

Here are understood *escheators, coroners, bailiffs, gaolers*, the king's *clerk of the market, aulnager*, and other *inferior ministers*, and officers of the king, whose office do any way concern the administration, or execution of justice, or the common good of the subject, or for the king's service; that none of the king's officers or ministers do take any reward for any matter touching their offices, but of the king. And some do hold that the king's *heralds* are within this act; for that they are the king's ministers, and were long before this statute. 2 Inst. 239.——See 2 Inst. 74.

A *promoter* of the king brought an action upon this statute against J. B. under sheriff for taking 20 *d.* over his fee contra formam statuti, of a prisoner in his ward, &c. the defendant said that he did not take contra formam statuti, &c. and the defendant gave in evidence, that he and all under sheriffs there time out of mind have used *to take of every prisoner taken for suspicion of felony and acquitted*, which were in their ward, 20 *d.* when they are acquitted, called *barr fees*, and *that the prisoner was in his ward for suspicion of felony, and before such justices, &c. was acquitted* of the felony, by which he took 20 *d.* for a barr fee, &c. and the plaintiff demurred upon the evidence, &c. and by the opinion of all the justices, this is out of the case of the statute; for the intent of the statute is, where he so takes of them, that be in ward, to ease them, but here, when he is acquitted, he is no prisoner; for if he escapes, the sheriff shall not be charged of the escape, and this fee *was assigned* by the court for a barr fee by their discretion *in consideration of the great charge, which the sheriff has in keeping, bringing, and carrying back the prisoners, and in keeping the number of servants to carry them, and in attendance* for fear of escapes; and so the clear opinion of the justices was, that the 20 *d.* for a barr fee is out of the case of this statute. Br. Fees, pl. 6. cites 21 H. 7. 16.

And if a sheriff *takes of the prisoner his cloaths, or money out of his purse in spite of his teeth*, it is out of the case of this statute, because *trespass lies*. Br. ibid.——Br. Prescription, pl. 36. cites 21 H. 7. 15. S. C.

The common law giving no fees to sheriffs made them backwards in executing writs, by reason of the great danger both in taking desperate men, by reason of resistance; and also in detaining them, for fear of escapes, so that they would have great rewards, or otherwise would do nothing. Whereupon the parliament thought fit to stint their fees, as in the 29 Eliz. 4. per Doderidge J. Lat. 18. in the case of Walden v. Vesey.

[2. Capitula justiti. in Magna Charta, fol. 155. articulo 99, of sheriffs and other bailiffs and ministers of the king, taking gifts or reward for executing their offices. See also there article 121.]

Br. Corone, pl. 103. cites S. C. per Shard, Br. Office and Off. pl. 31. cites S. C.—S. P. Br. Preſcription, pl. 9. cites 40 E. 3. 4 ——but ſhould be 42 E. 3. 4.

3. A man was *arraigned of two felonies*, and *paid but for one deliverance* only. Quod Nota. Br. Fees, pl. 8. cites 26 Aſſ. 47.

4. In replevin, the *ſheriff preſcribed to have* 40 *s. per ann.* of J. N. and his anceſtors, *for holding of his tourne at D. for the eaſe of the defendant and his tenants*, for which ſum he diſtrained; and per Cur. he cannot preſcribe; for he is an officer removeable yearly, and therefore the taking of the ſaid ſum is *extortion*. Br. Fees, &c. pl. 18. cites 42 E. 3. 4.

5. He, who renders himſelf, and has *ſuperſedeas before he is arreſted* by capias in debt, ſhall make an attorney in bank at the day, and this though cepi corpus be returned, and ſhall pay no fees upon the ſpecial matter returned, *though he does not ſhew the ſuperſedeas to the ſheriff till after the taking*, if he renders himſelf to him before the taking. Br. Fees, pl. 4. cites 21 H. 6. 20.

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6. It was held, that a ſheriff cannot take money for fees, *upon delivery of warrants general to his own bailiffs*, but muſt ſtay till the money is levied. *But* in caſe of ſpecial bailiffs of plaintiff's own naming, the ſheriff may take his fees preſently. Clayt. 79. 15 Car. Baynes v. Robinſon.

7. If, upon a ſtatute, *one ſheriff takes the body, and another the goods*, per Cur. both ſhall have their fees. And whereſoever the ſheriff hath *double trouble*, he ſhall have *double fees*. Comb. 220. Mich. 5 W. & M. B. R. Pope v. Haman.

(A. 2) Fees by Sheriff upon Executions.

1. * 29 *Eliz.* 4. *ENACTS, that it ſhall not be lawful for any ſheriff, under ſheriff, bailiff, of franchiſe, or liberties in any of their offices by colour of their office, to receive or take of any perſon, directly, or indirectly, for ſerving and executing any extent or execution upon the body, lands, goods, or chattels of any perſons, more than* 12 *d. for every* 20 *s. where the ſum does not exceed* 100 *l. and* 6 *d. for every* 20 *s. over and above the ſum of* 100 *l. which they ſhall ſo levy or extend, and deliver in execution, or take the body in execution for, upon pain that every ſheriff, &c. and every their officers, which ſhall directly or indirectly do the contrary, ſhall forfeit to the party grieved his treble damages, and ſhall alſo forfeit the ſum of* 40 *l. one moiety to the queen, and the other to the proſecutor.*

* This ſtatute doth only extend to their executing of writs of execution in counties and *not in cities*, and there they are allowed 12d. in the pound for the firſt 100 l. and 6 d. in every hundred afterwards. But then they ought to pay their own bailiffs out of their poundage money for their pains. But of late, the ſheriffs of cities do demand the ſame as ſheriffs of counties have: and I have heard they have recovered it. L. P. R. 598.——* The printed book of the year of this ſtatute is falſe, and by the Parliament Roll. it appears to be the 28th. 1 Salk. 331. in caſe of Brookwell v. Lock. Trin. 7 W. 3. B. R.——Skin. 364. accordingly. Mich. 5 W. and M. B. R. in caſe of Pope v. Hayman.

2. *Provided*

2. *Provided that this act do not extend to any fees to be taken for any execution in any city, or town corporate.* It was resolved that the proviso extends to a city corporate, when *judgment* is there *given within their franchise*, and execution upon that, and *not when judgment and execution issues out of superior courts*; for in the first case, the officer is not at that * grand care and peril. But as to the sheriff of a county, his travel and labour is all one, be it in the body of the county, or in a franchise; but if that *town be a county of itself*, there the sheriffs shall have their fees according to this statute. And now judgment was given for the plaintiff. Noy. 76. Walden and Gesner v. Veasely.

* 5 Mod. 97. Brockwell v. Lock. Because he is at less trouble, the jurisdiction is narrow and the sheriff not so much in danger of an escape; but where in the principal case the jurisdiction being the palace court of the bishop of Rochester, and as large as the diocess, and so was insisted not to be within the like reason. But non allocatur.

In an information on this statute against the sheriffs of Gloucester, for taking above 12 d. in the pound for *executing process upon a judgment in C. B.* the defendants *pleaded the proviso* in the statute, *wherein all cities and corporations, and their officers are excepted*, upon which it was demurred; for Owen Serjeant, moved that this proviso extended only for serving executions upon judgments in their courts but not upon executions of judgments in other courts; and so it may be collected by the preamble and body of the act. But all the court contra; for it shall be expounded as well for serving executions upon judgments in other courts, as in their own courts. Cro. E. 263, 264. Mich. 33 and 34 Eliz. C. B. the Sheriffs of Glouceſter's case.

And, whereas it was objected, that the county *of the city of Glouceſter extends four or five miles* further than the city, and that this *execution was not in the city*, but within the county of the city; and so is not within the proviso, the court said, that if it had been so pleaded, peradventure it should be otherwise; but as it is pleaded, it appears not to the court; and thereupon it was adjudged for the defendants. Cro. E. 264. the Sheriffs of Glouceſter's case.——Lat. 19. 52. S. P. per 3 J. † Walden v. Veſſey.

† S. C. Paſch. 1 Car. Palm. 399.

3. The sheriffs of London brought debt against A. upon the statute of 28 *Eliz.* 4. for the fees there allowed for the making of an execution. And upon *nihil debet* the special matter was found of the statute, which *was that the sheriff should not take ultra*, &c. *such a sum* for making of an execution; and all the court thought, that *this implied*, that they *should take so much*, which is not prohibited; and though the statute gives no action for this, yet because it is a duty, action is given of necessity by the law. Therefore judgment was given, that the sheriffs should recover the 12 l. which were demanded. Mo. 853. pl. 1166. Pasch. 14 Jac. B. R. Proby and Lumley v. Mitchell. [147]

4. No fee is due to the sheriff for executing a *cap. utlag.* or for a warrant to execute it, or for a return of it, per tot. Cur. Het. 52. Mich. 3 Car. C. B. Wildshire's case. A sheriff was *committed to the Fleet* for taking 20 s. for a warrant on a general cap. utlag. For all the justices held that he shall not take any fees for making of a warrant or execution of that writ, but *only* 2 s. 4 d. which is *given by the statute* 23 *H.* 6. for it is at the suit of the king. *But* upon *cap. utlag. unde convictus est*, which is after judgment it is otherwise. Mich. 7. Jac. 1. 2 Brownl. 283. Sheriffs of Berkshire's case.

5. There was much doubt upon the words of the statute, and the court divided upon the point, whether the sheriff should not have 12 d. in the pound for every pound to 100 l. and after that 6 d. or whether he should have but 6 d. for every pound when the execution is more than 100 l. Noy. 75, 76. Walden and Gesner v. Veasely. * Per 3 Just. against Crew Ch. J. the sheriff shall have 1 s. in the pound for the first 100 l. and 6 d. for what is over 100 l. Poph. 173. S. C. Welden v. Vesey.——Poph. 176. cites the case of Empton v. Bathurst, where two justices contra, one held, that, where the sum exceeds 100 l. he should have but 6 d. for levying of every 20 s. of the first 100 l. but that judgment was given upon other points, (but adds) that all the court seemed to be of opinion, that he shall have 12 d. for every 20 s. of the first 100 l. and 6 d. for every 20 s. of the residue.—Held accordingly upon the first argument on a demurrer. Sed Quære, quia adjornatur. Cro. E. 335. Guerney v. Somer.—Per Hobert and Winch J. the sheriff shall have 6 d. only if the sum exceeds 100 l.

Mich.

Mich. 20 Jac. C. B. Winch. 51. in case of Empson v. Bathurst.—* Lat. 52. accordingly, Walden and Gefner v. Urfy, S. C.—S. P. adjudged and affirmed in error. Cro. C. 286. Lister v. Bromley. —Jo. 307. Mich. 8 Car. B. R. S. C.

6. Per Glyn Ch. J. There are *no fees* due to the sheriff *for executing an habere facias possessionem*; and so let it be declared, although they have usually taken fees for executing such writs. Pasch. 1659. in case of HENE v. NISBIT. L. P. R. 597.

7. In an action against a sheriff for his fees it was objected, that this was a *Ca. Sa.* the which was not a satisfaction, and the statute does not give any fee to the sheriff, but only permits him to take a fee not exceeding such a rate. But per Cur. the usage has always been since the statute of 28 Eliz. to take a fee upon a Ca. Sa. and such a fee is allowed to the sheriff for his trouble, which he had in the execution; and therefore, if there be a *second execution*, he ought to have a fee for that also for his trouble, as well as for the first; and per Holt Ch. J. an *action* would lie for his fee, for the *law* * *permitting him to take* it, *makes it a duty*. Skin. 363. Mich. 5 W. and M. B. R. Pope v. Hayman.

* Comb. 220. S. C. and P.

8. It was held by the court, that the statute extends to all *judgments in Westminster*, and that whether the sheriff executes them in a county, or a franchise, he shall have his fees within this statute, viz. 1 s. per pound for the first 100l. and 6 d. per pound for every other 100l. and so it is of the bailiff of a liberty, when he executes any execution on a judgment given in the courts at Westminster within his liberty; but if the bailiff or other officer, executes process on a judgment given *in a court of a corporation*, or *liberty*, he is not entitled to fees within this statute. 1 Salk. 331. Pasch. 7. W. 3. B. R. Brockwell v. Lock.

9. It was resolved, that the statute 29 Eliz. 4. does *not extend to real executions*, but only to executions in personal actions, therefore it does not extend *to an habere facias seisinam, or possessionem.* Pasch. 8 W. 3. C. B. 1 Salk. 331. Peacock v. Harris.

10. *Nor* does it extend to executions upon *statutes-merchant, recognizances*, &c. for the act is to be understood of cases *where the judgment redditur in invitum*, and not by the voluntary confession of the party. 1 Salk. 332. Peacock v. Harris.

[148] 11. Upon a *capias ad satisfac'* the sheriff shall have his fees for the whole debt. 1 Salk. 331. Pasch. 8 W. 3. C. B. Peacook v. Harris.

12. Powell jun. J. said that it was the opinion of Holt Ch. J. that the sheriff should have fees for *executing an elegit*, but he said he doubted of that; because it would be unreasonable when the whole debt is 500l. and perhaps the land extended but 20l. per ann. that the sheriff should have fees for 500l. Treby Ch. J. said that he should have fees *according to the sum levied*, and not according to the debt recovered, as upon a fieri facias. To which Powell answered, that that could not be; because the party might detain the land till he was satisfied the intire debt, and the plaintiff is, by having made his election, barred of all other executions. 1 Salk. 332. Peacock v. Harris.

13. If

13. If an *erroneous writ* be delivered to the ſheriff, and he executes it, he ſhall have fees, though the writ be erroneous. 1 Salk. 332. Paſch. 9 W. 3. B. R. Earl v. Plummer.

14. For fees of *executing an elegit*, debt lies. *Extent generally* is the word of the ſtatute of Eliz. and that an extent upon an extent upon an elegit was an extent within the ſtatute, as well as an extent upon the ſtatute. 1 Salk. 333, 334. Mich. 4 Annæ. B. R. Tyſon v. Paſke.

(A. 3) Fees of other Officers.

Weſtm. 2. 42. *SEVERAL ancient fees of marſhals, chamberlains, porters of juſtices in eyre and ſerjeants, bearing verge before the juſtices at* Weſtminſter. 2 Inſt. 462, 463.

2. *Weſtm.* 2. 44. *Porters bearing verge before the juſtices of the bench in the circuit, ſhall take for keeping a jury only* 10 *d. for the bills, nothing; upon a recovery without a jury, nothing; upon a recovery againſt many by one writ,* 4 *d. for homage done in the bench they ſhall have their upper garment; of great aſſiſes, attaints, juries, and battel waged, the fee is* 12 *d. for the pleas of the crown the fee is* 12 *d. the dozen; for every priſoner delivered* 4 *d. the chirographer's fee is* 4 *s. the clerk's fee for writing originals, for every writ* 1 *d.* 2 Inſt. 467, 468.

(A. 4) Of Coroners.

1. 3 *E.* 1. 10. *Weſtm.* 1. *ENACTS that they ſhall take nothing of any man to do the office of coroner, in pain of great forfeiture to the king.* 4 Inſt. 271. —1 Hawk. Pl. C. cap. 68. ſ. 5.—

2 Hawk. Pl. C. cap. 9. ſ. 46.—2 Inſt. 176. ſays, that this ſtatute was made *in affirmance of the common law*; this only is added, ſur paine de greve forfeiture al roy, and this ſtatute ſtood in force untill the ſtatute made 3 H. 7. 1.

2. Coroners, who had taken *half a mark at divers times* of the people contra formam ſtatuti, were thereof *indicted*, and put into the grace of the king *and made fine*. Br. Fees, &c. pl. 9. cites 27 Aſſ. 14.

3. 3 H. 7. 1. *Gave him a fee of* 13 *s.* 4 *d. upon the view of the body, of the goods of the murderer, &c.* 4 Inſt. 271. —2 Hawk. Pl. Cr. cap. 9. ſ. 47.

4. A *coroner received* 1 *d. of every viſne* when they came before *the judges in eyre*, as belonging to his office, which was neither againſt the common law, nor this ſtatute; for he took it *not for doing his office, but a right due to his office*, which might have a reaſonable beginning, viz. for and towards his travel, attendance, and charges. 2 Inſt. 176.

5. 1 *H.* 8. 7. *Enacts that, where any perſon ſhall be ſlain by miſadventure, the coroner ſhall not take any thing for doing his office on pain of* 40 *s. The juſtices of aſſiſe and juſtices of peace are impowered to hear and determine the ſaid offence.* 2 Hawk. Pl. Cr. cap. 9. ſ. 48.

(B) By

(B) By Officers in Court. [*Detainer of the Body till paid, Juſtifiable in what Caſes.*]

S. P. Br. Office and Of. pl. 41. cites 8. E. 4. 18.

[1. A *Gaoler* may *retain a priſoner* for *due fees*. P. 14 Car. B. R. agreed per Cur. in Jennings's caſe.]

* S. P. Br. Office and Off. pl. 41. cites 8 E. 4. 18.

[*But* a gaoler can *not* retain a priſoner *for* * *meat, drink, or lodging*; for theſe are not of neceſſity for him to provide. P. 14. Cur. in B. R. per Cur. agreed.]

[2. If *due fees* are due to an officer and *upon a habeas corpus he ſends the body charged with his fees*; it ſeems that he ought to be detained till the fees paid. A queſtion in the ſaid caſe of Jennings.]

[See **Gaoler** (C) (D) **Warden of the Fleet** (B)]

(C) In Courts. [*Marſhall, &c.*]

* *Orig. is* [d'auters & d'el Gardein, &c.]

[1. 2 H. 4. numero 54. THE fees of the *marſhall of the marſhalſie of the king's houſehold*, and ibidem numero 55. Upon *prayer of the commons* that the marſhall of the King's Bench, and * others, and the warden of the Fleet ſhall not take other fees than ſhall be limited in this parliament, under pain to loſe their offices, and to render treble damages. To which it is *anſwered*, that this petition is committed to his council, to call to them the chancellor and juſtices to examine it, and ordain due remedy, as to to them ſhall ſeem [good] by authority of parliament.]

2. In *attaint*, the *plaintiff was nonſuited*, by which judgment was given, and every one of the *petit jury paid* 12 *d. to the fee of the marſhall*, and went quit, and ſo it ſeems that it was in B. R. Br. Fees, &c. pl. 7. cites 19 Aſſ. 13.

3. *By* 2 *H.* 4. 23. *The fees of the marſhall of the king's houſe ſhall be as in times paſt, and no more, viz. for him that comes in by* capias 4 d. *and if he be* bailed 2 d. *more*; *of the defendant in treſpaſs that findeth* bail to anſwer the ſuit, 2 d. *for every* commitment by judgment, 4 d. *for every one* delivered of felony, and of a felon bailed *by the court*, 4 d. *And if the marſhall, or his officers take more, they ſhall loſe their offices, and pay* treble damages *to the party and the party grived ſhall have his ſuit before the ſteward of the ſame court.*

Here a ſerver of bills *ſhall take no more than* 1 *d. for every mile diſtant from the court to the place where he doth his office*; *but when he ſerves a* venire facias, *or a* diſtringas, *he ſhall have the double*; *if ſuch an officer* takes more *he ſhall be* impriſoned, *make a* fine to the king *at the diſcretion of the ſteward, and be from thenceforth forejudged the court.*

4. The marſhall *cannot detain* any perſon *after* that he is *diſcharged* of the court, *for any thing but for fees of the court*, and *not for*

for eating and drinking, and other things which he had bought of him in priſon, and if he does otherwiſe, perhaps he may be *indicted of extortion*. Br. Fees, &c. pl. 15. cites 8 E. 4. 18.

5. *Gloves* were demanded by the court *for themſelves and officers*, before they would allow the reading of a *pardon*. Paſch 22 Car. 2. B. R. Sid. 452. the King v. Webſter. Two dozen of gloves were given to the officers in B. R. for allowance of charter of pardon for felony. Br. Fees, pl. 14. cites 4 E. 4. 10.—Br. Appeal, pl. 92. cites S. C.—Keling 25. S. P.—2 Jo. 56. in Ld. C's caſe.—2 Hawk. Pl. C. 399. ſ. 71. ſays they may do ſo.

(C. 2) *Eccleſiaſtical.* [150]

[1. M. 17. E. 3. B. R. Rot. 20. JURATORES preſentant quod Raymondus procurator archidiaconi Buck. communiter capit pro acquietancia teſtament. faciend. de aliquibus 2 s. & pro aliquibus 40 d. ad opus prædicti archidiaconi. Ideo præceptum eſt vicecomiti, &c. qui venit & profert breve de ſuperſedendo uſque proximum parliamentum.]

[2. P. 3 H. 5. B. R. Rot. 15. Pardonatur archiepiſcopus Eborum pro extorſione diverſarum pecuniæ ſummarum de diverſis, &c. pro probatione teſtamentorum. Et in Rotulo 16. pardonatio ejus ſequeſtrationum pro conſimili.]

[3. *Rot. Parliamenti 1 H. 5. numero 23. The commons pray* that where by the law of England in time of your noble progenitors, it was ordained, that no ordinary of holy church of the realm ſhould take of any executors of the teſtament of their teſtators for *proving the* ſame *teſtament, and for the making an acquittance* in this party, but 2 *s.* 6 *d.* and now they will take 100 *l.* and ſometimes 40 *l.* 20 *l.* &c. pray, that if they take for it more than 2 *s.* 6 *d.* they ſhall loſe ten times as much as they ſo take, &c.]

Anſwer.

[1. [4] *The king has charged the lords ſpiritual to ordain due remedy*, and if they do not, the king will have it well in memory, and cauſe it to be amended in time to come. The like 2 H. 5. ſecond part, number 2. 3 H. 5. number 47. where this is made an act for a year.]

[2. [5] Rot. Parliamenti 45 E. 3. numero 24. Complaints againſt extortions of the ordinaries in fees for proving of teſtaments.]

[3. [6] Rot. Parliamenti 46 E. 3. numero 37. complaints of the ordinaries for taking from executions, the ſeals, and * chains of the teſtators, or fines and redemptions for the ſaid ſeals, or otherwiſe they will not deliver adminiſtration of the teſtator's goods, &c.]

* *Orig.* Cheines

Anſwer.

[7. Let the prelates and other their miniſters have the ſeals and chains of thoſe who will give them willingly, ſo that none be conſtrained to give them againſt his will.]

8. *By* 31 E. 3. 4. *Biſhops ſhall retain their officers from taking exceſſive fees for probats of teſtaments, in pain to have them indicted before the juſtices for extortion, as hath been heretofore uſed.*

9. Where a *biſhop acts as judge*, he ſhall have his fees; as where the church is litigated, he is not bound to award a *jus patronatus*, unleſs required by the party, or his clerk and at their coſts. *But where he acts as an officer only*, as where the court writes to him to certify baſtardy, matrimony, &c. it ſhall be at his own coſts. Br. Fees, pl. 1. cites 34 H. 6. 38.

10. *By* 21 *H.* 8. 5. *Nothing ſhall be given for the probate of wills, or commiſſion of adminiſtration, when the goods of the dead exceed not* 5 *l. ſave only* 6 *d. to the regiſter. Nevertheleſs the judge ſhall not refuſe to prove ſuch a teſtament, being exhibited unto him in writing, with wax ready to be ſealed, and proved* communi forma, *but ſhall diſpatch the party without delay.*

For the probate of a will, and all other things concerning the ſame, when the goods of the dead exceed 5 *l. but not* 40 *l. the judge's fee is* 2 *s.* 6 *d. as before, and the regiſter's* 12 *d. and when they exceed* 40 *l. the judge's fee is* 2 *s.* 6 *d. as before, and the regiſter's as much, or the regiſter may refuſe the* * 2 *s.* 6 *d. and take a penny for* 10 *lines of the will, each line being conceived to contain* 10 *inches in length; and for theſe fees they ſhall diſpatch the party without fruſtratory delay.*

Nothing ſhall be given for letters of adminiſtration, when the inteſtates goods exceed not 5 *l. and when they exceed* 5 *l. but not* 40 *l. the officer's fees are only* 2 *s.* 6 *d.*

The fee of the copy either of the will, or inventory, is the ſame with that above allowed for regiſtering of the will, or elſe the regiſter may take a penny for every 10 *lines of the length as aforeſaid.*

The officer, that takes more than his due fee, ſhall forfeit that exceſs to the party grieved, and beſides 10 *l. to be divided betwixt the king and the ſame party grieved.*

This act ſhall not alter the cuſtom where leſs money hath been for probate of teſtaments.

If a man makes his teſtament in paper, and dies poſſeſſed of goods and chattles above the value of 40*l.* and the *executor* has the teſtament *tranſcribed in parchment*, and brings both to the ordinary, &c. to be proved, it is at the election of the ordinary, whether he will put the ſeal and probate to the original, or the tranſcript; but whether he put them to the one or the other, there can be taken of the executor, &c. but 5 *s.* only viz. 2 *s.* 6 *d.* to the ordinary, &c. and his miniſters, and 2 *s.* 6 *d.* to the ſcribe for regiſtering the ſame; or elſe the ſaid ſcribe may refuſe the 2 *s.* 6 *d.* and have for writing every 10 lines of the ſame teſtament, whereof every line to contain 10 inches, one penny. 3 Inſt. 149, 150.——13 Rep. 24, 25. Hill. 6 Jac. Neale v. Rowſe.

If the *executor deſires*, that the teſtament in paper *may be* tranſcribed *in parchment, he muſt agree with the party* for the tranſcribing; but the ordinary, &c. can take nothing for it, nor for the examination of the tranſcript with the original, but only 2 *s.* 6 *d.* for the whole duty belonging to him. 3 Inſt. 150.

Where the goods of the dead do not exceed 100 *s.* the ordinary, &c. ſhall take nothing, and the ſcribe to have only for writing of the probate 6 *d.* ſo the ſaid teſtament be exhibited in writing with wax thereupon affixed, ready to be ſealed. Where they do amount to above the value of 100 *s.* and do not exceed 40 *l.* there ſhall be taken for the whole but 3 *s.* 6 *d.* viz. 2 *s.* 6 *d.* to the ordinary, &c. and 12 *d.* to the ſcribe for regiſtring the ſame. 3 Inſt. 150.

Where by cuſtom leſs hath been taken in any of the caſes aforeſaid, there leſs is to be taken; and where any perſons requires a copy or copies of the teſtament ſo proved, or inventory ſo made, the ordinary, &c. ſhall take for the ſearch, and making of the copy of the teſtament or inventory, if the goods exceed not 100 *s.* 6 *d.* and 12 *d.* if the goods exceed 100 *s.* and exceed not 40 *l.* and if the goods exceed 40 *l.* 2 *s.* 6 *d.* or to take for every 10 lines thereof, of the proportion aforeſaid, one penny. 3 Inſt. 150.

*[151]

11. Moſt

11. Moſt of the fees in the ſpiritual court are *appointed by conſtitutions provincial*, and they prove them by them. Mich. 25 Car. 2. C. B. Mod. 167. per Vaughan and Windham in caſe of Horton v. Wilſon.

S. C. cited Arg. Mod. 240. 242.— It is cuſtom and not the authority of

conſtitutions which intitles proctors, &c. to take fees, for which an action will lie at the common law, and rule was to declare upon a prohibition. 4 Mod. 254. Hill. 5 W. and M. B. R. Johnſon v. Oxendon.

12. A prohibition was granted to a ſuit for fees in the ſpiritual court *by an apparitor* upon a *ſuggeſtion, that there were no ſuch fees due by cuſtom.* For that is triable by law, and not by a *decimaria*, or *vicenaria præſcriptio*, which is allowed in their courts; but they may ſue there for their due, and * *cuſtomary fees.* Mich. 23 Car. 2. B. R. Vent. 165. Anon.

* But then it ought to be determined at law, whether ſuch a fee was cuſtomary, or

not; and for want thereof a prohibition was granted. Mod. 167. ſaid to have been lately done in B. R. in caſe of a proctor for his fees.

[See Prohibition (F)]

(D) Puniſhment for taking more than uſual Fees.

1. IF any officer or judge take more than the uſual fees, he is puniſhable *at* the *common law.* Per Chamberlain J. 2 Roll. R. 263. in the caſe of Smith v. Mall.

[See Coroner (H). Extortion.]

(D. 2) In what Caſes they may not inſiſt, and Puniſhment of Officers inſiſting, on prompt Payment, before they will do the Duty of their Office. [152]

1. IT is no return for the ſheriff to ſay, that he *did not execute the writ*, becauſe the party did not give him his fee or coſts. Br. Fees, pl. 1. cites 34 H. 6. 38.

S. P. and ſo of officer or miniſter, as biſhop, or

the like. Br. Office and Off. pl. 1. cites 34 H. 6. 38, 39.

2. The ſheriff may *refuſe* to make execution, until his fee be paid him. But then ſee if a new ſheriff be made * before the old one had made execution, what remedy now hath the party; and it ſeemed to me, that he may have an account, or an action upon the caſe in nature of an aſſumpſit. Noy. 76. Walden and Geſner v. Veaſeley. —— The ſheriff ſhall not have his fees *before the liberate.* Poph. 176. cites it as reſolved. M. 19 Jac. C. B. Empſon v. Bathurſt.

It was moved, that an under ſheriff might attend for refuſing to execute a *fieri facias* till his

ſhilling-pence was paid. But the court would not grant the rule, but ſaid it was *execution*, for which he might be *indicted.* 1 Salk. 331. pl. 5. Hill. 7 W. 3. B. R. Anon. ——— * The book is *and before that.*]

3. Upon a *hab. corp.* the officer ought to *bring the priſoner to the court*, and his refuſal to bring him, unleſs paid his fees aforehand, is a contempt; for the king's writ muſt be obeyed, and the court will tax the charges, and compel payment, if the officer and priſoner cannot agree, or payment is not made according to the agreement. 2 Jo. 178. Mich. 33 Car. 2. B. R. the King v. the Steward of ———.

4. An under ſheriff refuſed to *execute a capias* ad *ſatisfaciendum* till he had his fees; and upon motion againſt him, the court ſaid that the plaintiff might bring an *action* againſt him for not doing his duty, or might pay him his fees, and *then indict him for extortion*. 1 Salk. 330. Mich. 6 W. & M. B. R. Heſtcott's caſe.—— cites Noy. 75.

(E) Fees granted, and aſcertained, how.

1. ALL new offices erected with new fees, or old *offices with new fees are within the ſtat.* 34 *E.* 1. *ſtat.* 4. for that is a tallage put upon the ſubject, which cannot be done without aſſent by act of parliament. 2 Inſt. 533.

2. If the *king grants an office with a fee*, it is void; becauſe the king cannot charge the ſubject. Per Rainsford J. Hill. 15 and 16 Car. 2. Hard. 353. Veale v. Prior.

3. The queen grants an office of *regiſtering policies of inſurance*, and afterwards 43 Eliz. 12. directs, how the office ſhall be regulated. The patent was void; but what validity it has, is derived from the ſaid ſtatute; but there being *no fee limited*, it was objected, that there was no office at all. But it was anſwered, that though there was no certain fee, yet the party muſt have *what he reaſonably deſerves*, as every one muſt that does any thing for another at his requeſt. Now the policies muſt be entered by the ſtatute, and the law will allow a reaſonable matter for entering them. And *uſage*, ſince the ſtatute has now ſettled it, *if not as a fee, yet as a competent recompence for his labour*; as labourers rates, though not fees, yet are *quantum meruits*. per Hale Ch. B. Hill. 15 and 16 Car. 2. Hard. 355. Veale v. Prior.

4. *No court has a power of ſettling* the fees of its officers, ſo as to conclude the ſubject; but thus far they may go, as *to judge what are reaſonable fees*. Hill. 13 W. 3. 12. Mod. 609. Ballard v. Gerard.

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5. A. was libelled againſt in the eccleſiaſtical court for fees, and upon motion a prohibition was granted; for *no court has power* to eſtabliſh fees. The judge of a court may think them reaſonable, but that is not binding: but if, *on a quantum meruit, a jury think them reaſonable*, then they become eſtabliſhed fees. Mich. 3 Annæ, B. R. 1 Salk. 333. Gifford's caſe.

S. P. and by Holt. Ch. J. the judges aſſeſſing them reaſonable may be good, but not concluſive evidence. And ſo of the *table of uſual fees* of a court not newly erected. 12 Mod. 609. cites 15 Car. 2. Veale v. Prior.

(F) Prohibited, or due, in what Caſes, and how much to Officers in Courts.

1. 2 *H.* 4. 10. *ENACTS, that when divers perſons are jointly indicted of one felony or one treſpaſs, and they all plead to any iſſue as not guilty; the clerk of the crown ſhall not take for the venire facias, not for entering of the plea, but one fee, viz.* 2 *s. for them all, and not ſeveral fees for each perſon.* This act is made in affirmance of the common law. 4 Inſt. 74. —So, if *one* man be *indicted of two ſeveral felonies* or treſpaſſes, and is acquitted, he ſhall pay but for one deliverance. 4 Inſt. 74.

2. 1 *Jac.* 1. 10. *Enacts that none ſhall take any money, or promiſe for the report of any order or cauſe referred unto them by any of the king's judges or court, directly or indirectly, on pain of* 5 *l. and to loſe his office or place in the ſame court. But*

Not to prohibit the clerk from taking for his pains in writing the report 12 *d. for the firſt ſheet, and* 2 *d. a piece for the reſt.*

3. If a client, when his buſineſs in court is diſpatched, doth *refuſe to pay* unto the officer in court the fees which are due to him for doing his buſineſs; the court will upon motion grant an *attachment* againſt the client, to have him committed, until he pays the fees due. per Roll. Ch. J. 1650. For the not paying the fees is a *contempt* to the court, and the court is bound to protect their officers in their rights. L. P. R. 598.

4. It ſeems clear, that it is no excuſe for not obeying a writ of *habeas corpus ad ſubjiciendum*, that the priſoner did *not tender the fees* due to the gaoler. Alſo it ſeems to be the better opinion, that the want of ſuch a tender is no excuſe for not obeying a writ of habeas corpus *ad faciendum & recipiendum*; however, it is certain, that if the gaoler bring up the priſoner by vertue of ſuch habeas corpus, the *court will not turn him over, till the gaoler be paid all his fees*, nor, as ſome ſay, till he be paid all that is due to him for the priſoner's *diet*; for that a gaoler is compellable to find his priſoner ſuſtenance, but this is denied by others. 2 Hawk. Pl. C. 151. ſ. 21.

(F. 2) Determined by Acceſſion of other Office.

1. NOTE for law, that if *a man has a fee of a lord*, and after *is made a juſtice*, this fee is not void by the law; but after the making him juſtice, he is not to take any fee, unleſs of the king. Br. N. C. 29 H. 8. pl. 116. Br. Office and Off. pl. 47. cites S. C.

2. *So* of him who has the *office of ſteward*, and after is made a juſtice. Ibid. [154] Br. Office and Off. pl. 47. cites S. C.

Br. Office and Off. pl. 47. cites S. C.

3. *And* by ſeveral, where a man is *bailiff of a manor by patent*, and after *is made ſteward of the ſaid manor*, both patents are good; for the ſuitors are judges, and not the bailiff. Ibid.

(G) Actions, and Pleadings in Actions for Fees.

Mo. 699. ſays judgment was reverſed in the exchequer, but was ended by compoſition. Vid. tamen.—

1. IF A. delivered an execution to the ſheriff at his ſuit againſt B. and in conſideration that the ſheriff without any fee will execute it, he promiſed the ſheriff *to pay him a certain ſum*, which *was the ſame as the ſheriff was allowed to take* by the ſtatute 28 Eliz. Glanvill J. held the conſideration not good; for at common law he ought not take any fees, but it was extortion, which the ſtatute is only to diſcharge the ſheriff from; but the other juſtices and barons held it to be a good conſideration, and were of opinion to have affirmed the judgment. But another error being aſſigned, viz. that the tales de circumſtantibus was returned by the plaintiff, who brought the action by the name of ſheriff of the ſame county, and therefore judgment was reverſed. Cro. E. 654. Hill. 41 Eliz. B. R. in Cam. Scacc. Stanton v. Suliard.

Adjudged that debt lies; for when a ſum is given by a ſtatute

2. The ſheriff may have *debt on the ſtatute* for his fees, and therefore having taken a *double bond for payment of his fees*, it was reſolved that the bond was void. Pogh. 176. cites it as reſolved. M. 19 Jac. C. B. Empſon v. Bathurſt.

though no action is mentioned or appointed, yet debt lies. Cited per Jones J. Lat. 51. as the caſe of Proby and Lumley.——Noy. 75. cites S. C.——Becauſe it is a duty, an action is of neceſſity Mo. 853. Paſch. 14 Jac. B. R. Proby and Lumley v. Mitchell.——Lat. 20. Empſon's caſe Winch. 20. 51. Empſon v. Bathurſt.

Raym. 360. S. C.

3. *Caſe* was brought by a *ſheriff againſt the grantee of a hundred for years* for fees, and plaintiff had judgment. 2 Jo. 194. Paſch. 34 Car. 2. B. R. Cole v. Ireland.

4. For fees of *executing an elegit*, debt lies. 1 Salk. 333. Mich. 4 Annæ, B. R. Tyſon v. Paſke.

5. In the ſettling a diſpute, whether the Warden of the Fleet might return a non eſt inventus whereupon to found a ſequeſtration, or that ſuch return muſt be by the *ſerjeant at arms* before a ſequeſtration could go, Ld. Chancellor ordered the regiſter to look into precedents, and certify him, how the practice had gone. But ſaid, that if the ſerjeant at arms was *intitled by the antient courſe* to a fee by the caption in ſuch caſes, *it could not be altered without an act of parliament*. Mich. 1720. Ch. Prec. 551. Jephſon's caſe.

(H) Actions for Fees, in what Court.

1. A Demurrer put into a bill for fees for ſoliciting to diſcharge a tenure, and which was diſcharged accordingly, yet the demurrer to ſtand. Toth. 85. cites 12 Car. Read v. Gilbert.

2. A *bill* for fees was *diſmiſſed*. Toth. 84. cites 15 Car. Harding v. Tedwell,———and More v. Rowe.

3. *Regiſter* of ſpiritual court cannot ſue there for fees. Mich. 13 W. 3. B. R. Salk. 333. Ballard v. Gerard.

4. There is no ſuing in the *court of admiralty*, or *court of honour* for fees, per Eyre J. who ſaid that a prohibition was granted by all the judges of England, in the caſe of DONVILL and OLDISH. [155] Mich. 1 Geo. 1. 10 Mod. 264. in the caſe of Clerk v. Lee.

5. Pratt J. ſaid, he ſaw no reaſon why fees in the *ſpiritual court* may not be recovered at common law, as well as *fees in chancery*. 10 Mod. 264. in the caſe of Clerk v. Lee.

6. Whether a *proctor* may ſue *in the ſpiritual court* for his fees, is a matter much litigated, and reſolutions both ways per Parker Ch. J. 10 Mod. 264. Clerk v. Lee.

2 Roll. R. 50. is that he may——Allowed.

Mod. 167. Mich. 25 Car. 2. C. B. Horton v. Wilſon.———Prohibition granted, and a rule to declare upon the prohibition. Hill. 5 W. & M. B. R.——5 Mod. 254. Johnſon v. Oxendon.——5 Mod. 242. S. P. debated, but adjournatur. Johnſon v. Lee.

7. A prohibition was moved for to the conſiſtory court of the Bp. of London to ſtay proceedings in a ſuit commenced there by a *pariſh clerk*, for his *dues according to a rate* agreed to by the pariſh. Againſt the prohibition it was ſaid, that he is to be choſe by the parſon, and that his office is eccleſiaſtical, and conſequently his fees are of eccleſiaſtical conuſance. On the other hand it was urged, that, whoever has the nomination of him, his office is merely temporal, and the profits of it muſt be ſo likewiſe, and eſpecially in the preſent caſe, where they are demanded purſuant to a rate. Per Cur. the queſtions, who has the right of nomination, and what eſtate the clerk has, whether at will only or for life, are quite immaterial in the preſent caſe. The law is certain, that his office is temporal, it was ſo determined in 2 Brownl. 38. And if ſo, his ſalary, or whatever is given for the ſervice of that office, muſt of conſequence be of temporal conuſance. But whether his office be temporal or ſpiritual, if the matter in demand is temporal, the eccleſiaſtical court can have no juriſdiction. Now here the demand is in purſuance to a rate agreed to by the pariſh; and there is no doubt but he may bring his action upon that agreement: and accordingly a prohibition was granted. Hill. 12 Geo. 2. C. B. Pitts v. Evans.

[Vide (C. 2). **Prohibition** (F).]

For *more* of the head of Fees, ſee under the heads of the *ſeveral officers*.

Feigned Action.

(A) Feigned Action, or Iſſue, in what Caſes.

1. IN ſuch *caſes*, which are *merely local*, and the venire cannot be altered, they will, *upon good reaſon*, make them try it upon feigned action, and if no conſent be they will grant imparlance. Per Pemberton Ch. J. Paſch. 34 Car. 2. B. R. Skin. 44. in the caſe Ld. of Shaftſbury v. Grayham.

2. *And* Dolben J. remembered the caſe of LD. GERARD OF
[156] BROMLEY AND SPENCER in the Exchequer when Hale was Chief Baron, who, *upon affidavit, that the plaintiff had lived long in Lancaſhire, and kept great hoſpitality*, and bid every body welcome, &c. *and the defendant was* a ſouthern gentleman, and *lately come into Lancaſhire*, Hale did not ſuffer them to proceed in their *ejectment* in Lancaſhire, but made them try it in five feigned actions by a jury of Hertfordſhire. Skin. 44. Paſch. 34 Car. 2. B. R. ut ſup.

3. On a motion for a *mandamus to the old church-wardens to deliver the pariſh books* to the new church-wardens, &c. it was afterwards ſhewn for cauſe againſt the motion, that it was new, and the like had never been made before in this court. But it was inſiſted on, that the old church-wardens had a right to keep the pariſh books, and ſo the rule was diſcharged. For a *conteſt between pariſh officers which of them ought to keep the books*, muſt be tryed at law by a feigned iſſue. 8 Mod. 98. Mich. 9 Geo. 1. the King. v. Street and Stroud.

Felo de ſe.

(A) How conſidered, and what Perſon may be ſo.

1. BEING a felo de ſe is not murder within the *exception of murder* in a *pardon*. Mich. 12 Car. 2. B. R. 1 Lev. 8. the King v. Ward.

2. Homicide

2. Homicide againſt a man's own life brings him under the notion of felo de ſe, if at the time he were *of the age of diſcretion and compos mentis*. 1 Hawk. Pl. C. abr. 72. cap. 27. ſ. 2. 1 Vol. in Fol. 67. ſ. 1. cites as in the Marg. *

* Crompt 30. a. b. 31. a. H. P. C. 28. Dalt. 92. 3 Inſt. 54.

(B) Forfeiture of what.

1. FELO de ſe ſhall not *forfeit* his lands, but his goods, chattels, leaſes and debts. Bacon's Uſe of the Law, 39.

2. *Goods* of felo de ſe are *forfeited before inquiſition*. 1 Lev. 8. Mich. 12 Car. 2. B. R. the King v. Ward.

3. A. was indebted to B. in 2000 l.——B. is felo de ſe, and inquiſition returned. An act of *oblivion* is paſſed, by which all forfeitures, &c. are pardoned. Yet there being no *words of reſtitution* in the act, the adminiſtrator of *B. cannot recover againſt A.*—*Nor the king neither*; for the pardon operated only to the benefit of A. 1 Saund. 362, 363. Mich. 21 Car. 2. Toomes v. Ethrington.

1 Lev. 120. Mich. 15 Car. 2. S. C. by name of Tombes v. Etherington.——Sid. 167. Mich. 15 Car. 2. S. C.——And the year in 1 Saund. ſeems to be miſtaken. For though it cites the entry of the caſe Paſch. 18 Car. 2. in page 353. yet in page 362. it ſays,—that judgment was given for the defendant, in Mich. Term. 15 Car. 2.——

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4. A felo de ſe forfeits *all his chattels* whatever *in poſſeſſion*, and alſo all *perſonal choſes in action*, which he has ſolely in his own right; and all *chattels real*, which he holds, either jointly with his wife, or in her right, and *all perſonal things in action*; and as ſome ſay, entire chattels in poſſeſſion, to which he is *intitled jointly with another* on any account, *except merchandize*: but he forfeits nothing, that he has as *executor* or adminiſtrator; and as ſome ſay, a *moity* only *of ſuch joint chattels as may be ſevered*. 1 Hawk. Pl. C. abr. 72. cap. 27. ſ. 5.——1 Vol. in Fol. 68. ſ. 7. cites as in the Marg. *

* S. P. C. 189. F. G. 262, 3. H. P. C. 29. Pl. C. 262, 3. S. P. C. 188. a. Crom. 31. a. 3 Inſt. 55. 19 H. 6. 47. a. S. E. 4. 24. b. Raym. 7. pl. C. 243, 259, 323.

5. Neither is his *blood corrupted* or his *lands of inheritance* forfeited; nor does his wife loſe her *dower*. 1 Hawk. Pl. C. abr. 73. cap. 27. ſ. 6. cites as in the Marg. *——1 Vol. in Fol. 68. ſ. 8.

* Pl. C. 261, b. 262. a.

(C) What ſhall be ſaid ſuch Offence.

1. IN ſome caſes a man may be a felo de ſe *by conſtruction of law, without any intention againſt his own life*; *as*, where one is killed by the *breaking of a gun*, which he diſcharges at another with an intent to murder him; or by falling *down on a knife*, which a perſon ſtruck by him to the ground, happens to have in his hand. 1 Hawk. Pl. C. abr. 72. cap. 27. ſ. 3.——1 Vol. in Fol. 68. ſ. 4. cites as in the Marg *.

* Dal. cap. 92. 44 E. 3. 44. 44 Aſſ. 55. Br. Cor. 12, 14.

2. *But*

* S. P. C. 16. a. 20. H. P. C. 28, 29. Pult. 119. b. Crom. 28. 3 Inſt. 54. contra.

2. *But* if a man be killed by *haſtily running on a knife* or ſword, which a perſon aſſaulted by him, and driven to the wall, holds up in his defence; he ſhall not be adjudged a felo de ſe, but the other ſhall be judged to have killed him *ſe defendendo*. 1 Hawk. Pl. C. abr. 72. cap. 27. ſ. 3.——1 Vol. in Fol. 68. ſ. 5. cites as in the Marg. *

* Kelw. 136. a. Mo. 754. pl. 1041.

3. If a man be killed by another *on his own requeſt or command*, yet is he not a felo de ſe; but the other is as much a murderer, as if he had acted merely on his own head. 1 Hawk. Pl. C. abr. 72. cap. 27. ſ. 4.——1 Vol. in Fol. 68. ſ. 6. cites as in the Marg. *

(D) Relation. To what Time the Forfeiture ſhall relate.

* 5 Rep. 110. 3 Inſt. 54. Saund. 362. Sid. 150. 162. 2 Mod. 53. 3 Mod. 100, 241, 242. Lev. 8. contra. Keb. 67, 68.

1. NO part of a felo de ſe's perſonal eſtates is veſted in the king, before the ſelf-murder is *found by ſome inquiſition*; and therefore the forfeiture is ſaved by a *pardon* before the inquiſition. But if there be no pardon, the whole is forfeited immediately after the inquiſition, *from the time of the wound*. 1 Hawk. Pl. C. abr. 73. cap. 27. ſ. 7.——1 Vol. in Fol. 68. ſ. 9, 10. cites as in the Marg. *

Pl. C. 260. H. P. C. 29. 5 Rep. 110.

(E) Inquiſition, by whom, and how to be taken.

* H. P. C. 29. 3 Inſt. 55.—† 3 Inſt. 55. H. P. C. 29. 2 Lev. 141.—‡ No traverſe can be taken to make a man felo de ſe. per Hale. Vent. 239. Hill. 24 and 25 Car. 2. B. R. Anon.

1. IF the * body can be found, the inquiſition ought to be taken by the coroner *ſuper viſum corporis*; and it was a ‡ queſtion whether an inquiſition ſo taken be *traverſable?* but if the *body cannot* † *be found*, the inquiry may be by juſtices of peace, or by the King's Bench, if the felony were in the county where the court ſits; and ſuch an inquiſition ‖ is certainly traverſable. 1 Hawk. Pl. C. abr. 73. cap. 27. ſ. 8.——1 Vol. in Fol. 68, 69. ſ. 11, 12. cites as in the Marg. *

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* 3 Lev. 140. 3 Mod. 100. 2 Lev. 152. Salk. 177. contra. ——‡ Sid. 225, 229. 3 Mod. 101. Keb. 907. Saund. 273.

2. All inquiſitions of this kind ought *certainly and particularly* to *ſet forth the circumſtances of the fact*, and in the concluſion to add, that the party in ſuch manner *felonice*, &c. murdered himſelf. * And if the premiſſes be inſufficient, as if they *ſet forth the fact in a non-ſenſical manner*: as that the party flung himſelf into the water, and ſic ſeipſum emergit: or if it *want the word murdravit*, &c. it ſhall be quaſhed: ‡ But if it be full in ſubſtance, the coroner may be ſerved with a rule, to *amend* it *in form*. 1 Hawk. Pl. C. abr. 73. cap. 27. ſ. 9.——1 Vol. in Fol. 69. ſ. 14, 15. cites as in the Marg. *

Felony under Colour of Law.

1. A Man came to Smithfield market to ſell a horſe, and a jockey coming thither to buy a horſe, the *owner delivered his horſe to the jockey to ride up and down* the market *to try his paces*; but inſtead of that, the jockey *rode away* with the horſe: this was adjudged felony. Keling 82.

2. Coming into a houſe by colour of a *writ of execution*, and carrying away the goods is felony. 2 Vent. 94. cites Farr's caſe. ——Sid. 254. Paſch. 17 Car. 2. B. R. The King v. Farr. S. C. cited Raym. 276.

3. A. comes into a ſemſtreſſes ſhop and cheapens goods and *runs away with the* goods *out of the ſhop, openly, in her ſight*, this is felony. Raym. 276. Chiſſer's caſe. —— So, *under colour of outlawry* to take a man's goods, when the officer knows there is no outlawry, is felony. —— So ‡ *ſuing a replevin* to get another's horſe, and then running away with the horſe. —— So *by ejectment falſely obtained* getting into poſſeſſion of a houſe, and converting the goods. Paſch. 31 Car. 2. in Scacc. Raym. 276. in Chiſſer's caſe. ‡ 3 Inſt. 108. cites Paſch. 15 Eliz. —— 2 Sid. 254. in the caſe of the KING v. FARR. S. P. cited as held accordingly in time of Popham Ch. J. ——Raym. 276. cites Dalt. Off. of Sheriffs. Cap. 121. Fol. 489.

4. A *ſpecial truſt* prevents the felony, until ſuch ſpecial truſt is determined, Paſch. 8 Geo. 8 Mod. 76. King v. Maſon. But, when that truſt is determined, the party may be guilty of felony. As where a *carrier carries goods to the place appointed, and after takes them away, and diſpoſes of them*, this is felony; becauſe by bringing them to the place appointed, the bargain for his bringing them is determined, and the poſſeſſion is then in the firſt owner. Keling 83. cites 13 E. 4. 9. b. ——*So*, if *one delivers goods to a porter in London to carry to a certain place, and he* takes them and *carries them* away *to another place, and there opens and diſpoſes of them*; this is felony, which ſeems to be warranted by the 13 E. 4. 9. Ibid.

Feme. [159]

(A) Capable of what.

1. THE *office of reaper or mower of the manor of D.* was granted to a feme with a fee of 20 quarters of corn yearly, for exerciſing the ſaid office for term of her life. Br. Grants, pl. 127. cites 30 Aſſ. 4.

2. A

2. A feme ſole may be a *baily*, and chargeable in account, as *receptrix denariorum*, & ut balliva. Br. Account, pl. 43. cites 19 H. 6. 5.——Ibid. pl. 68. cites 4 E. 4. 25.

3. Siſters of an hoſpital incorporated, may by cuſtom together with the brothers *chooſe a maſter*. Br. Action ſur le Statute, pl. 9. cites 34 H. 6. 27.

4. A woman may be a *commiſſioner of ſewers*, and the ordinances and decrees of ſewers made by her and the other commiſſioners of ſewers are not to be impeached for the cauſe of her ſex. Callis of Sewers, 201, 202. cites Counteſs of Warwick's caſe.

5. *Cuſtody of a caſtle* was granted to a feme to be exerciſed *per ſe vel deputatum ſuum* and held, that it may be good, though it was objected, that it appertains to the war, and to be executed by men only. Mich. 1 Jac. B. R. Cro. J. 18. Lady Ruſſel's caſe.

6. A woman was appointed by the juſtices to be *governeſs of a workhouſe* at Chelmsford, and it was moved to quaſh the order, becauſe it was in the nature of a houſe of correction, and ſo the office was *not ſuitable to her ſex*. But per Cur. abſente Holt, it is a good appointment, and ſhe may be capable of executing the office, either by herſelf or *deputy*; as the Lady Broughton did, who was *keeper of the Gatehouſe* at Weſtminſter. 3 Salk. 2. cites Mich. 2 Annæ. Anon.

7. In an aſſumpſit for money had, and received to the plaintiff's uſe, tried in London coram Lee Ch. J. the following caſe was made for the opinion of the court of B. R. (viz.) that upon the death of Robert Bly, *ſexton of the pariſh church* of St. Botolphs without Aldersgate, two candidates offered themſelves to be elected in his room; viz. the widow of the ſexton deceaſed, and the plaintiff: that upon caſting up the books the plaintiff appeared to have a majority of *male* votes, but that afterwards, the widow *polled* 40 *women*, and then ſhe had the majority; that the widow, and all the female voters were *houſe-keepers paying ſcot and lot*, and to all pariſh rates and aſſeſſments. And the firſt queſtion was, whether a woman was capable of this office. (2dly) Whether women could vote in ſuch election. After three arguments at bar, it was reſolved, that the office of ſexton was *no publick office, nor* a *matter of ſkill* or judgment, *but only a private office of truſt*; (viz.) to take care of the church, the veſtments of the miniſter, and the books, &c. of the pariſhioners; and therefore a woman was very proper to execute it, and if there was any thing to be done in this pariſh by a ſexton, not proper for a woman (as in every place the office varies in ſome reſpect or other) the court ſaid, the caſe was defective in not ſetting it forth. Trin. 13 Geo. 2. B. R. Olave v. Ingram.

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8. *And* ſecondly, it was reſolved, that being a matter of no publick concern, but only relating to themſelves and the reſt of the pariſhioners, women *have* likewiſe a *right of election* of ſuch officer; for they have an equal intereſt in the church, &c. as the male pariſhioners, and therefore ought to have an equal right to appoint a perſon to take care of it. Trin. 13 Geo. 2. B. R. Olave v. Ingram.

[See Barretor (B).]

(B) Feme

(B) Feme Sole Merchant. Who is; and of her being a ſeparate Trader in General.

1. FEME ſole merchant *is*, where the feme trades by herſelf in one trade, with which her huſband doth not meddle, and buys and ſells in that trade; there the feme ſhall be ſued, and the huſband named only for conformity, and if judgment be given againſt him, execution ſhall be only againſt the feme. Cro. Car. 69. Paſch. 3 Car. C. B. Langham v. Bewett. Litt. R. 31. S. C. Het. 9. S. C. Bewett v. Langham. —10 Mod. 6. Anon. S. P.—But

if the wife *uſe the ſame trade, that her huſband does*, it was adjudged, though not reported by Croke, that ſhe was not within the cuſtom. Mod. 26. Mich. 21 Car. B. R. Anon.

2. Such a feme may ſue an *action without her huſband*, per Wray Ch. J. Paſch. 31 Eliz. B. R. Le. 131. in caſe of Chamberlain v. Thorp. S. P. *for debts owing to her within the city.* But

for thoſe due to her elſewhere, the huſband muſt join. Mich. 8 Annæ, B. R. 11 Mod. 253. Mrs. Poole's caſe.

3. Every feme ſole, which tradeth in London, *is* not a merchant. Cro. C. 69. Langham v. Bewett.

4. In a writ of execution the ſheriff returned, that the plaintiff brought his *action* in the ſheriff's court in London *againſt the defendant and his wife* as a feme ſole merchant, and had a verdict; and how that by cuſtom in the city of London the Lord Mayor is Chancellor, and may call cauſes before him out of the Sheriff's court, and rule them according to equity; and ſhews how that the Lord Mayor had called this cauſe before him, and ordered the plaintiff ſhould have judgment, and that the defendant ſhould pay coſts within 14 days; and that ſhe ſhould pay the debt by 50*s.* quarterly, or elſe that execution ſhould go; and that this was the reaſon why he could not make execution: the court held the return ſufficient, and the *cuſtom reaſonable*, though it had of late been abuſed. Skin. 67. Mich. 34 Car. 2. B. R. Barns v. Barns.

5. Caſe was brought in the Mayor's Court upon an indeb. Aſſ. for 57 *l.* according to the cuſtom of the city. The evidence was for goods ſold to the defendant's wife in her life, the jury found, that defendant had been a freeman, but left off his trade 20 years before, and turned diſſenting teacher, but the wife lived apart from him within the liberty of the city, and exerciſed the art of making gimplace, and the huſband no ways intermeddled; that ſhe paid her own rent, *kept no ſhop* but worked in the garret; that ſhe had goods of the plaintiff to carry on her trade, amounting to 57 *l.* And that *after her death the defendant promiſed payment*; judgment was given by Rider for the defendant, and he declared, that Treby was of the ſame opinion. Mich. 2 W. and M. Show. 183. Fabian v. Plant. —The reporter who argued this caſe for defendant, makes a quære, and ſays it deſerves conſideration, if ſuch a feme ſole trader dies, and leaves It was argued for defendant, that carrying on ſuch trade need not be in a ſhop; for that ſome trades are never exerciſed in ſhops, and particularly this, and that ſo was Mr. Phillips's reading on this

cuſtom which he ſays he had ſeen in Mr. Lightfoot's cuſtody. Ibid. 184.

leaves an eſtate, and the huſband poſſeſſes himſelf of it, if he ſhall not be anſwerable for her debts.

6. If the *huſband* relinquiſh, or become *bankrupt*, or be *over ſea*, or of *another trade*, or never intermeddle with her trade, ſhe is within the cuſtom. Show. 184. in the caſes of FABIAN v PLANT. cites Het. 9, 10.——*Or* if both *exerciſe the ſame* trade *diſtinctly* by themſelves, and not intermeddle with one another, Het. 9, 10. Paſch. 3 Car. C. B. Bowet v. Langham.

7. A woman, whoſe *huſband had left her above* 12 *years* before, had carried on a trade in her own name as a widow, and *gave receipts in her own name*, being ſued for a debt contracted in the way of her trade gave coverture in evidence, and *gave evidence of her huſband's having been lately alive in Ireland*; and Holt Ch. J. directed the jury to find for the defendant, and ſo they did. 12 Mod. 603. Mich. 13 W. 3. Anon.

8. A. widow and adminiſtratrix of B. uſed to deal in tea in B's life time, and bought 4 tubs of C. at ſo much per tub, one of which A. paid for and took away, leaving 50 *l.* in earneſt for the other 3; ruled at Guildhall, per Holt. Ch. J. that the *huſband was liable* on the wife's contract, becauſe they *cohabited*. Paſch. 3 Annæ. 1 Salk. 113. Langfort v. Adminiſtratrix of Tiler.

Fences.

(A) Who muſt make them; and againſt whom; And where none were before.

1. IF I am bound to fence againſt land, and I *purchaſe that land*; I am not bound to make a fence againſt my own land. Per Newton. Br. Curia Claud. pl. 2. cites 22 H. 6. 7, 8. Sir Geo. Sackvill v. Milward.

2. A. ſeiſed of 200 acres of *common moore enfeoffs B. of* 50 verſus Boream.—The purchaſor is bound to *encloſe* or * keep the beaſts within the 50 acres, and ſo ought A. to do of the reſidue for his beaſts, and adjudged accordingly. Mich. 22 and 23 Eliz. D. 372. pl. 10. —— Arg. cited 2 Roll. R. 289. in caſe of Holbeech v. Warner.

* For if the beaſts of either eſcape into the land of the other *treſpaſs* lies, though wild dogs drive the beaſts of the one into the lands of the other. F. N. B. 128. (298) in the notes there cites Raſt. Ent. 621. and 20 E. 4. 10.

3. A. having 2 *cloſes adjoining*, *ſells one* of them, per 2 Juſt. the vendor ſhall make the incloſure, but per other 2 Juſt. the vendee ſhall make it. Mo. 775. Trin. 2 Jac. Doyly v. Drake.

4. By

4. By *unity of poſſeſſion*, a duty of fencing may be extinguiſhed, and ſhall *not revive*, though the cloſes after come into ſeveral hands. Vent. 97. Hill. 35 Car. 2. B. R. Polus v. Hanſtock.

(B) Caſes of Treſpaſſes through Fences; or, where no Fences are. [162]

1. IF *A. has land adjoining to his own park*, and it belongs to him to fence his park; yet he is *not bound to fence againſt his own land.* Per Newton. Ch. J. But by Paſton è contra. Br. Curia Claud. pl. 2. cites 22 H. 6, 7, 8. and Brook ſays, that he is of opinion with Newton.

2. If *A. has land on one ſide of a very large field, and ought to fence* againſt it; and *B. has land on the other ſide, and ought to fence* againſt it; if the beaſts of A. enter into the field, and thence into the cloſe of B. and for default of the fence of B. yet B. may have treſpaſs againſt A. and ſo vice verſa. Br. Curia Claud. pl. 2. ut ſupra per Newton.

3. If *A.* be bound to *incloſe againſt B.* and *B. againſt C.* and *beaſts eſcape out of C's land into B's land, and* thence *into the land of A.* In this caſe A. ſhall not have treſpaſs againſt C. *But* if A. be bound to incloſe againſt B. and *B's beaſts eſcape into A's land*, and thence *into the land of one D.* a ſtranger, there *D. ſhall have treſpaſs*, and B. be put to a curia claudenda againſt A. F. N. B. 128. (298) in the notes there, cites 10 E. 4. 7. 36 H. 6. Bar * 68.

If A. has a cloſe next the highway, and beaſts come out of the highway into the cloſe of A. and thence they *go into a cloſe of B.* adjoining, and which B. ought to fence; there in default of incloſure, &c. it is a good plea againſt A. but not againſt B. or another ſtranger, &c. Noy. 107. HARVEY v. GULSTON cites 36 H. 6. Barr. 168.—Jenk. 161. pl. 5. cites 22 E. 4. 49. but if ſeveral cloſes of A. lie contiguous, and the beaſts go into all the cloſes of A. it is no treſpaſs.—* It ſhould be 198.

4. If cattle break in at my fence, I cannot puniſh the owner; but if *after notice he ſuffers them to continue there*, he ſhall be puniſhed, though it be through my default. 2 Le. 93. Arg. cites 22 E. 4. 49.

5. A. and B. *exchanged lands*, whereupon *A. agreed to make* the fences and maintain them.—A. did not make them, but for want thereof, B's beaſts break into A's ground.—A. brings *treſpaſs*. Per 3 J. againſt Popham, this agreement is no bar to treſpaſs, though by deed; but his remedy is by an action of caſe on the promiſe, if without deed, or on *covenant*, if by deed. Mich. 41 and 42 Eliz. B. R. Cro. E. 709. Nowell v. Smith.

6. One cannot have *treſpaſs* for *breaking another man's fence*; but if he be damnified by the breaking of it, he may have action on the caſe againſt the party that broke it, per Roll. J. Mich. 24 Car. B. R. Sti. 131. in caſe of Sir A. A. Cooper v. St. John.

7. A. ſells to B. a piece of *paſture lying open to another piece* of paſture *of vendor's*; B. muſt keep his cattle from running into A's piece.

piece. So of dung, &c. per Cur. Mich. 3 Annæ, B. R. 6 Mod. 314. in case of Tenant v. Golding.

[See Consequential Losses.—Distress (B).—Rent (P. c).—Trespass (I. a).

(C) Actions for want of Repairing Fences.

1. *TRESPASS on the case* lies for not inclosing against the land of the plaintiff, by which defendant's cattle entered ad damnum, &c. For in this action he recover *damages only*. Br. Curia Claud. pl. 5. cites 11 R. 2.

2. If A. and B. have lands adjoining, where there is *no inclosure*, and the beasts of the one escape into the land of the other; trespass lies; and the writ shall be *quare clausum fregit*, for it is a close in law. F. N. B. 128. (298) in the Notes there, cites 22 H. 6. 9.

[163] 3. A. and B. had lands contiguous, and the fences were always made by those who had the lands of B. *The beasts of B. escaped into the lands of A.* for want of B's repairing his fences, *and thence into the lands of C.* for which *C. brought trespass against A. and recovered*; whereupon *A. brought case against B.* and had a verdict; but it was moved in arrest of judgment for want of good pleading, & adjornatur. Hill. 20 Jac. B. R. Cro. J. 665. Holbach v. Warner.

4. A *writ for one vill against another* vill, to make them repair their fences, was granted; but per Cur. it shall be but in the nature of a sci. fa. retornable in this court. Sti. 26. Pasch. 23 Car. B. R. Anon.

5. A. was *possessed of a close adjoining to a close of* B. the fence between the said two closes had time out of mind been repaired by the tenants and occupiers of B's Close. The fence was not repaired, so that *B's cattle came into A's close*. A. brought an action on the case against B. setting forth this matter, and had judgment in C. B. and upon error brought in B. R. this judgment was affirmed; and per Cur. *either trespass or case lies*; trespass, because it was the plaintiff's ground and not the defendants; and case, because the first wrong was a non feazance, and neglect to repair, and that omission is the gist of the action; and the trespass is only *consequential damage*. Mich. 9 Annæ, B. R. 1 Salk. 335. Starr v. Rookesby.

[See (A) (B).—Consequential Losses.]

(D) Curia Claudenda. In what Cases it lies, and for whom, and when.

1. CURIA claudenda lies to incloſe *between houſe and houſe*, and *court and court*; and by this action the defendant ſhall be compelled to make the incloſure. Br. Cur. Claud. pl. 5. cites 11 R. 2. per Richill. and Fitzh. Barre. 36.

2. If A. has a *cloſe adjoining to a cloſe* of B. which B. is bound to make the incloſure between the two cloſes, but he does not make it, a *curia claudenda* lies. Br. Curia Claudenda, pl. 1. cites 2 H. 4. 11.

3 If *A. be bound to incloſe againſt B. who has* 20 *acres* adjoining, and *A. purchaſes one acre* contiguouſly adjacent to the incloſure; A. ſhall not be compelled to incloſe. F. N. B. 128. (299) cites it as reſolved *. 21 H. 6. 3. 22 H. 6. 8.

* This ſeems to be miſ-cited, and ſhould be 21 H. 6. 5. or 33. Sackville v. Milard.

4. A. was ſeiſed of the *park of C.* in C. and *B. was ſeiſed of* 30 *acres in C. adjoining. A.* and all thoſe, whoſe eſtate, &c. he has, *uſed to make the fence* between the park and the 30 acres. B. put his beaſts into the 30 acres, and they for want of a fence entred into the park. In treſpaſs for this entry, A. proteſtando that he, &c. had not uſed to make the ſaid fence pro placito ſaid, that one *C. is ſeiſed of* 10 *acres, lying between the ſaid* 30 *acres and the park*; and becauſe B. by pleading as above, had confeſſed the treſpaſs; A. had judgment; for the replication is good; becauſe *A. is not bound to fence but againſt him, who has the land next his park, unleſs in a ſpecial caſe* Br. Curia Claud. pl. 2. cites 22 H. 6, 7, 8. Sackville v. Milward.

If *A. has a cloſe which he uſed to incloſe, and after, has an acre* of land *contiguous*, and then *leaſes his incloſure with limits*, &c. yet he that has the contiguous land ſhall not *juſtify for default of incloſure*. F. N. B. 128 (299) in the notes there, cites it as reſolved † 21 H. 6. 3. and 22 H. 6. 8.——† This ſhould be 21 H. 6. 5. or 33.

5. *As* if *B. or another had common in the* 10 *acres*; but then this *ought to be ſhewn*. Br. Curia Claud. pl. 2. ut ſupra.

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For the *commoner has intereſt in the land* by reaſon of his common, though he is not owner of the land. Ibid.

6. He, *who has no land adjoining*, though grieved, *ſhall not have curia claudenda*. Per Newton. Ch. J. Br. Curia Claud. pl. 2. cites 22 H. 6, 7, 8.

A *commoner* in the land adjoining may diſtrain damage feaſant, but he ſhall not have a curia claudenda for the damages ſuſtained by him; for the writ ſuppoſes *ad nocumentum liberi tenementi*; ſo that the plaintiff ought to have the ſoile. F. N. B. 128. (C).——F. N. B. 128. (B) and in the notes there (D).

7. *Curia claudenda lies only* where a man ought to incloſe *by præſcription*; for if he is bound to it by indenture, or compoſition in writing, then writ of *covenant* lies, and not curia claudenda. Br. Curia Claud. pl. 2. ut ſupra.

F. N. B. 128. (E)

8. One may have a curia claudenda *before he is damniſied*, and

F. N. B. 127. (I) Mag.

ſhall *ſurmiſe damages*; for this is *not traverſable*. Br. Curia Claud. pl. 3. cites 5 E. 4. 118, 119.

9. In *avowry* the plaintiff ſaid that the land *adjoined to the high way, and was open in default of incloſure of the tenant*, and he *chaſed the beaſts into the way, and they eſcaped in*, and the *defendant took them*, and the *plaintiff made freſh ſuit*; and *did not alledge preſcription, that the tenant ought to make the hedges*, and yet well; the *defendant ſaid that they were there for two nights*, and no plea without a traverſe of *the eſcape, or the freſh ſuit*; for one of them *ought to be traverſed*. Br. Avowry, pl. 135. cites 15 H. 7. 17.

It lies only for a tenant *in fee*: for it is a writ of right.

10. A curia claudenda lies not for *tenant for years*. Fin. Law, 8vo. 276. Mich. 9 Annæ, B. R. 1 Salk. 336. in caſe of Starr v. Rookſby.—F. N. B. 128. (B).

(E) Curia Claudenda. Pleadings, &c. in that and Treſpaſs.

1. TRESPASS of a cloſe broken and graſs eaten; Yelverton pleaded, to the vi & armis, and the entry guilty; and, to the reſt, we are *ſeiſed of an acre of land in B. which is adjoining to your cloſe in F. and* we *put our cattle in our acre* for paſture, *and there is a hedge between the land of the plaintiff and our acre, which the plaintiff*, and all thoſe, whoſe eſtate he has in this land, have *uſed to make* time out of mind; and becauſe *the hedge was open*, broke, and waſte, our cattle entered into his land, and did the treſpaſs, &c. *which is the ſame treſpaſs*, of which the plaintiff brought his writ, &c. Judgment ſi actio, and a good plea per tot. Cur. Br. Treſpaſs, pl. 129. cites 19 H. 6. 33.

S. P. ibid. pl. 145. cites 21 H. 6. 33. and 22 H. 6. 7.

2. Treſpaſs of a cloſe broken, and graſs eaten, the *defendant ſaid that A. is ſeiſed of a cloſe in D. containing* 100 *acres, and B.* is ſeiſed *of another cloſe adjoining*, containing 30 acres, *and the plaintiff and thoſe whoſe eſtate, &c. have uſed*, time out of mind, *to make the hedge between them, and the plaintiff abated the hedge*, and *B. leaſed his cloſe to the defendant for* 10 *years*, &c. and he put his cattle into it, and they entred into the cloſe of the plaintiff for default of incloſure, and eat the graſs, judgment, &c. Per Yelverton this is a good anſwer to the depaſture, but not to the breaking; and per tot' Cur' the act of the beaſts is the act of the defendant, and the entry of them is a breaking in a manner, by which they awarded the plaintiff not to anſwer, quod nota. Br. Treſpaſs, pl. 136. cites 21 H. 6. 5.

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Br. Preſcription, pl. 25. cites S. C.

3. Treſpaſs of a cloſe broken and graſs eaten, the *defendant ſaid that T. P. was ſeiſed of a cloſe* containing 7 acres there, *and leaſed it to the defendant for* 7 *years*, the term commenced, &c. during, &c. *and the plaintiff was ſeiſed of another cloſe adjoining*, in which the treſpaſs is ſuppoſed, *and* that the plaintiff and all thoſe whoſe eſtate, &c. *have uſed to make the fence time out of mind, and the defendant put his cattle into his cloſe, and they entered into the cloſe of the plaintiff*

for default of his own incloſure, &c. he ought to ſhew, againſt whom he ought to make the fence, &c. and ſo he did; *and that the other defendants as ſervants of the defendant, came in aid to put the cattle into the land*, &c. and no plea; but *ſhall ſay not guilty for them*; for they did nothing but put the cattle into the land of their maſter. Br. Treſpaſs, pl. 155. cites 22 H. 6. 36.

4. *Contra, where they juſtify for common of their maſter, for there they confeſs that they put the cattle into another's ſoil which is treſpaſs*, unleſs it be excuſed; but in the firſt caſe, the maſter only is the treſpaſſor with his cattle, and not the ſervants. Ibid. Br. Preſcription, pl. 25. cites S. C.

5. *And for other cattle*, the *defendant juſtified, that they eſcaped* into the land of the plaintiff, and eat his graſs, *and he freſhly retook*, and no plea, but is a *confeſſion of the treſpaſs*, by which he *preſcribed in the eſcape*, as appears. Ibid. The defendant ſaid, that *T. P. his leſſor, and all thoſe whoſe eſtate &c. have uſed to have eſcape in the cloſe of the plaintiff*, and, that for the eſcape the plaintiff, nor any of thoſe whoſe eſtate he hath, ought to have ſatisfaction, or amends, if they are freſhly re-taken. &c. but per Port, this preſcription does not lie in the mouth of the tenant for years, but he *ought to ſay, that the ſaid T. P. his leſſor, and all thoſe whoſe eſtate, &c. for them and their tenants for life, for years, and at will have had ſuch cuſtom*; by which he pleaded accordingly; and per tot. Cur. it is a good preſcription; for it may have lawful commencement, as by grant of thoſe who were ſeiſed of the land, where the treſpaſs was, &c. Br. Preſcription, pl. 25. cites S. C.

6. Curia Claudenda may be in the right, (viz.) *in the debet*, as well as in the *debet and ſolet*. Br. Curia Claud. pl. 3. cites 5 E. 4. 118, 119. Where the queſtion is as to the *right of incloſing* to charge the inheritance, the title ſhould be ſhewn in the debet and ſolet, but not where it is *in excuſe of treſpaſs only*. Yelv. 75. Mich. 3 Jac. B. R. Faldo v. Ridge.——Ibid. 76. ſays, that this judgment was reverſed in the Exchequer Chamber [But does not ſay for what.]

7. If in curia claudenda the *defendant ſays*, that it is *well incloſed*, the plaintiff ſhall recover immediately; for by this bar the *matter is confeſſed*, per Keble. Br. Barre, pl. 111. cites 16 H. 7. 9.

8. The *judgment* in curia claudenda, *is to recover the incloſure and damages* for the non-incloſure. Br. Barre, pl. 111. cites 16 H. 7. 9. per Fineux.

9. The declaration muſt *ſhew the certainty of the land*, which the plaintiff hath *adjoining* to the defendant, and the certainty of the land which the defendant hath there adjoining, which he ought to incloſe; and to *alledge a preſcription* of the incloſure. F. N. B. 128. (E). See a precedent F. N. B. 128. (298) in the notes there.

10. If *A's beaſts eſcape into the land of B. where B. ought to incloſe*, A. ſhall have no advantage thereof on the general iſſue; but ought to *plead it ſpecially*. F. N. B. 128. (298) in the notes there cites 18 H. 8. 6.

11. It is a good iſſue to *traverſe the preſcription*; for if the plaintiff be not bound to incloſe (though he *has voluntarily incloſed*) it will be to no purpoſe. F. N. B. 128 (298) in the notes there.

12. If the defendant *pleads that he is ſeiſed in his demeſne as of fee* of the cloſe of D. the plaintiff may *reply, that J. S. was ſeiſed, abſque hoc, that the defendant was ſeiſed in his demeſne as of fee*, and ſo cauſe the *preciſe eſtate* to come in queſtion. *But if defendant* had *pleaded generally* that he was *ſeiſed* of the cloſe adjoining, or that the cloſe adjoining was his freehold; there the plaintiff ſhall *reply*, that

he had *nothing in the close adjoining at the time*, &c. and this shall make the issue. F. N. B. 128. (298) in the notes there cites D. 365 * Sir Francis Leak's case.

* D. 365. a. b. pl. 32. 33. Mich. 21 and 22 Eliz. S. C.

13. In *case*, the count was, *that A. the plaintiff was possessed of a close* 30 *Mar.* 18 *Jac. called H. in W. and that B. the defendant was possessed of a close* † *called G. in W. and* that *omnes possessores of the close called G. had used time whereof, &c. to make the fences betwixt, &c. so as the cattle in the plaintiff's close should not come into the defendant's close, and that for default of fences, the defendant's cattle went out of his own into the plaintiff's and from thence into a close of J. S. who sued and recovered against him.* After verdict it was moved in arrest of judgment, that this prescription by *omnes possessores* was not good; because that may be for years, or at will, though * *terrarum tenentes* implied a fee simple; and of this opinion were Doderidge and Houghton J. but Lea Ch. J. contra; because it was in action on the case. And adjornatur Cro. J. 665. Hill. 20 Jac. B. R. Holbach v. Warner.

2 Roll. R. 288. S. C and Palm. 331. S. C. and they both report, that Chamberlain J. was of the same opinion with Doderidge and Houghton, that the prescription was insufficient.

* S. P. 1 Salk. 336. Mich. 9 Annæ, B. R. in case of Starr v. Rookesby.

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14. A. was *possessed of a close adjoining to a close of B.* the fences between the said two closes had, time out of mind, been repaired by the tenants and occupiers of B's close. The fence was not repaired, so that *B's cattle came into A's close*; A. brought an action on the case against B. setting forth this matter, and had judgment in C. B. and upon error brought in B. R. this judgment was affirmed; and per Cur. the plaintiff has made himself a sufficient title in his *declaration*, by *shewing the defendant bound to this charge by prescription*, which prescription is sufficiently alleged; for by * *tenentes* is meant the owners of the fee simple, and by *occupatores* those that come in under them. That tenentes is so taken, appears by the writ de curia claudenda, which is a writ of right, and lies only for a tenant in fee; and as this is a charge upon the land, which runs with it, there is good reason, why every occupier should be bound; and it is sufficient for the plaintiff to charge the tenentes, and occupatores; because it is impossible, that he, who is a stranger, should be able to know, and set forth their particular estates, titles, and interests; but the prescription is annexed to the tenentes, that is to say, tenants of the fee; yet, on a traverse of the prescription, it would be good *evidence*, that the tenants for years have from time to time fenced, and repaired; for perhaps the estate has not since time of memory been in the actual occupation of the owner of the fee. 1 Salk. 335, 336. Mich. 9 Annæ, B. R. Starr v. Rooksby.

* Cro. J. 665. Holbach v. Warner.

[See (C)]

Fens.

(A) Contracts relating to Draining them.

1. 43 *Eliz.* 11. *ENACTS that all contracts, or bargains made of part of such wasts commons, or several grounds, (lying in or near the same) as are subject to surrounding, between the lords, commoners, or owners thereof, on the one part, and the drainers on the other part, shall be good in law according to the manner and forms of such contracts, or bargains.*

Where the queen, her heirs and successors, hath an interest in such wastes, &c. such contracts or bargains, shall not bind them, unless they be written in parchment, indented and certified in chancery, and the royal assent thereunto first obtained and signified under the privy, or great seal, when the wastes or soils are of the possessions of the crown; but under the seal of the dutchy of Lancaster, and enrolled in that court, when they are of that kind.

This act shall not impair, or take away the interest of such lords, commoners, or owners in any part of the residue of the wastes or commons not assigned to the said drainers, or any franchise, or liberty, but that the same may be lawfully used, as if this act, or such contract, or bargain had not been made. [167]

This act not to be prejudicial to ports, or havens, neither shall it be put in execution within 8 *miles of Yarmouth, or* 6 *miles of Lynn.*

Feoffment.

(A) Livery. [*Or what is a Feoffment.*]

[1. A feoffment *properly is*, where there is a *transmutation of possession* from one person to another. 11 H. 4 33.]

2. A feoffment *properly betokens* a conveyance in *fee*, though sometimes it is so called, when a freehold only passes. Co. Litt. f. 1. 9.

Br. Feoffmt. de terres. pl. 10. Feofare dicitur qui, feodum simplex feofatorio confert; *donare* qui feodum talliatum. Spelm. Glos. Verb. Feofare, &c.

3. A feoffment is by the feudists called an *investiture*. See Spelm. Glos. verbo Feofare.

4. If

4. If a man makes a deed of feoffment to another, and *delivers the deed to him in the land, or upon the land*, it is a good feoffment, by all the juſtices in C. B. Br. Feoffment de terre, pl. 74. cites 35 H. 8.

5. A. ſeiſed in fee leaſed to B. for years; after A. made deed of *feoffment to leſſee of the ſame lands in fee*, by the words *dedi & conceſſi*, *with letter of attorney*, within the ſame deed, *to make livery to leſſee*. The deed of feoffment was delivered to J. to deliver the ſame to B. who delivered the ſame accordingly.—(Leſſee may take the conveyance as a feoffment, or *confirmation*) leſſee delivered the ſame to the attorney named in the deed, who made livery accordingly.—By acceptance of which livery B. has determined his election to take by Feoffment. 2 Le. 192. Trin. 28 Eliz. C. B. Lennard's caſe.

Ow. 1. S. C. by name of Leonard v. Stephens.

6. If *tenant in tail* be *diſſeiſed*, and *makes a deed* of feoffment, *and delivers* the ſame *to the diſſeiſor*, who delivers the ſame to the *attorney named* in the deed, who *makes livery* accordingly; this is a good feoffment and diſcontinuance, per Anderſon. 2 Le. 192. Leonard's caſe.

Notwithſtanding a conſideration expreſſed the uſe ſhall not change, nor any eſtate ſhall paſs by it but at will, until the livery be made thereupon, per Popham Ch. J. and agreed by all the juſtices Poph. 49. in caſe of Collard v. Collard.

7. It is not a feoffment without *livery and attornment*. Cro. J. 637. Paſch. 20 Jac. B. R. Smith v. Melſer.

[See (B. 2.)]

(A. 2) The Force of a Feoffment. And what is Extinguiſhed by it.

1. IF my *entry be taken away*, and I ouſt the tenant, and after enfeoff him by deed, he is remitted, and I ſhall be barred; for this is a good confirmation. Br. Feoffment de terre, pl. 84. cites 11 H. 7. 20.

2. *And if a feme who hath title of dower, enters and enfeoffs the heir* by deed, her title of dower is determined; for it is a good [168] *confirmation* and diſcharge of the dower, and e contra, without deed. Br. Feoffment de terre, pl. 84. cites 11 H. 7. 20.

See (A. 4)

3. *Future right*, and *right of action*, is gone by Feoffment. Arg. 2 Roll. R. 323. cites 9 H. 7. 24.——Per Trevor Ch. J. Gibb. 234. in caſe of Arthur (alias Archer) v. Bokenham.

4. *Power of revocation* is extinct by Feoffment. Arg. 2 Roll. R. 337 cites 1 Rep. Diggs's caſe.

5. Poſſibility to be *tenant by the curteſy* is gone by feoffment; ſo of *attaint*; and ſo of *writ of diſceit*. Arg. 2 Roll. R. 337. cites 9 H. 7. 1. 4 H. 6. 38 E. 3.

* Arg. Godb. 301, 320. cites 1 Rep. 111.

6. A feoffment *excludes the feoffor* of all *right*, *entries*, *actions*, *titles*, *poſſibilities*, and *conditions*, per Jones and Hutton J. Jo. 72. ——It * barrs all *preſent* rights, and all *after rights* ariſing to the

the ſame parties by cauſes before the feoffment, and that without reſpect to the loſs of ſtrangers. Hob. 337. in caſe of Sheffield v. Radcliff.——Per Hobert Ch. J. 2 Roll. R. 506. in S. C.——1 Rep. 174. a. S. P.—— It is a bar to a *writ of error*. Arg. Godb. 320. cites Barton v. Ewers. Albany's Caſe.—See Co. Litt. S. 1. 9.

[See **Fines** (C. 2)—As to barring Entails ſee **Eſtates** (X. 2) &c.]

(A. 3) Uſes Veſted, or Changed. In what Caſes by a Feoffment.

1. A. made a *feoffment* to B. *to the uſe of his laſt will expreſſed in the ſame deed*, viz. to his own proper uſe for his life, and after to F. C. his ſon in tail, &c. and after he made a leaſe for years, and died; and it was the opinion of the court, and of all except Shelly, that he may alter his will in this caſe; for where this *word will is expreſſed in the deed*, or ſchedule, he may *alter* his will notwithſtanding the other words; but where the uſe is declared upon the livery without this word will, there he cannot alter his will. Br. Feoffment, &c. pl. 1. cites 19 H. 8. 11. If a man makes a *feoffment*, and *annexes a ſchedule* to the Deed, *containing the uſe*, he cannot change the uſe afterwards.

Br. Feoffments al Uſes, pl. 47. cites 30 H. 8.

So if he *expreſſes the uſe in the deed* of feoffment. *But* contrary where he declares the uſe *by words of a will*, viz. I will, that my feoffees ſhall be ſeiſed to ſuch a uſe; there he may change the uſe, becauſe it is by will, &c. Br. Feoffments al Uſes, pl. 47. cites 30 H. 8.

2. The Lord Audley made a Feoffment to B. G. and others, and afterwards by *indenture reciting the ſaid feoffment he declared the ſame was made to the intent his feoffees ſhould perform his laſt will*, to this effect (viz.) *my will is, that my feoffees ſhall ſtand ſeiſed*, &c. *to pay all my debts, and afterwards* that they *make an eſtate* of the lands *to me and Elizabeth my wife, and to the heirs of our bodies*, with divers remainders over; the ſaid lord had iſſue by one wife a ſon, and by another a daughter; the feoffees made no eſtate to the lord and his wife; adjudged, that, by this feoffment and deed, no uſe was changed; for though the feoffees ſhall be ſeiſed to the uſe of the feoffor and his heirs (for there was *no conſideration*, for which they ſhould be ſeiſed to their own uſe) yet the ſame cannot make a new uſe to the lord and to his wife in tail; neither can this writing take effect as a will; becauſe it appoints an eſtate to be made to the lord himſelf, and he cannot take by his own will. 2 Leon. 159. 21 Eliz. in Canc. Ld. Audley's Caſe. 4 Le. 166. 210. S. R. D. 166. a. pl. 8. Hill. 1 Eliz. S. C. —324. b. pl. 37. Paſch. 15 Eliz. S. C. —Dal. 88. pl. 3. 15 Eliz. in ejectment, ſays, it was held that an uſe was raiſed preſently. Mo. 515, 516. cites S. C.

3. If a feoffment is made, but *no livery*, and *feoffee enters*, he is become *tenant at will* to the feoffor; becauſe he enters by his conſent; but feoffor may ouſt him when he pleaſe. Co. Litt. ſ. 70. pag. 56. b.

4. A feoffment to a man *upon condition, that he will kill B.* ſhall be good; but a *bond* with ſuch a condition void. For in the one caſe, leſt the man ſhould have any temptation to do the act, the law ſecures him the poſſeſſion of the land without per-

forming the condition; and in the other, frees him from the penalty of the bond; ſo that the law has the ſame end in view in making the feoffment good, and the bond void, viz. the prevention of the fact; per Parker Ch. J. in delivering the opinion of the court. Hill. 11 Annæ, B. R. 10 Mod. 134. in caſe of Mitchel v. Reynolds.

[See Eſtate (I. 6) Jointenants (L) Uſes (A. a. 4)]

(A. 4) The Difference between Feoffments at Common Law, and Feoffments by the Statute 1 R. 3.

2 Roll. R. 334. S. P. Arg. in S. C.

1. THERE is a difference betwixt a feoffment at the common law, and a feoffment according to the ſtatute of R. 3. which operates ſub modo. Feoffments are the ancient conveyances of lands; but feoffments according to the ſtatute of 1 R. 3. are upſtarts and have not had continuance above 150 years. In caſe of feoffments *at* the *common law* the *feoffor ought to be ſeiſed* of the lands *at the time* of the feoffment, but if a feoffment be according to the ſtatute of 1 R. 3. in ſuch caſe the feoffor need not be in poſſeſſion. Feoffments at the common law *give away both eſtates and rights*, but feoffments by the ſtatute of R. 3. give the eſtates, but not the rights. In caſe of feoffment at the common law, the *feoffee is in, in the per*, viz. by the feoffor; but in caſe of feoffments by the ſtatute of R. 3. the feoffees are in, in the poſt, viz. by the firſt feoffees. So a feoffment by ceſty que uſe by force of the ſtatute of 1 R. 3. will not faſten upon any thing but what the ſtatute requires. Godb. 318. Arg. Paſch. 21 Jac. in caſe of the Ld. Sheffield v. Ratcliff. —— cites 5 H. 7. 5. 21 H. 7. 25.

(B) Livery. In what Caſes, [*and of what Things*] a *Livery* is *Neceſſary*. Upon what Conveyance.

But if he *grants to him in reverſion during the life of the leſſor rendering rent* during his life, this leaſe is not good without livery. And. 33. pl. 81. Paſch. 8 Eliz. Brown v. King.

[1. *LESSEE for life* may *ſurrender to him in reverſion*, without making any livery. 44 Aſſ. 3. Curia.]

2 Salk. 620. By Holt Ch. J.

[2. *By exchange* a franktenement may paſs without livery. Co. Litt. 1. 49.]

[3. If a *houſe* or land *appertains to an office*, this may paſs by grant of the office without livery. Co. Litt. 49.]

[4. If a houſe or chamber *appertains to a corody*, it may paſs by grant of a corody without livery. Co. Litt. 49.]

5. A

5. A *freehold* may, *by cuſtom be ſurrendered* without livery. Co. Litt. 49. a.

6. It was held by all the juſtices in the Exchequer chamber, that if the *king makes feoffment of the land, which he hath by the dutchy of Lancaſter, in fee, or for life*, he muſt make livery as well as a common perſon, if it be *not of the lands within the county palatine*; for they paſs by letters patents of the dutchy without livery; but a leaſe for years of them, or of other lands ought to be by deed, quod nota bene, and quære if the act of 1 E. 4. which annexed it to the king and his heirs, kings, was remembered. Br. Feoffment de terre. pl. 51. cites 21 E. 4. 60.

7. If a man makes feoffment *to the king* by deed, it is good without livery, if he *inroll the deed*, otherwiſe not, quod nota; for the king cannot take but by matter of record. Br. Feoffment de terre, pl. 69. cites 29 H. 8.

8. If a *deed* be *inrolled in London*, it binds as a fine at common law, but not as a fine with proclamations; and livery of ſeiſin is not requiſite upon ſuch deed; and it is diſcontinuance without livery; [170] and becauſe the cuſtom there is ſaved by diverſe acts of parliaments, it ſhall bind as a fine. Br. Fines, pl. 110. cites 31 H. 8.

9. Gift of *land, rectory, and tythes* in fee and no livery made, the tythes do not paſs; though words of grant will paſs them without livery. Mo. 496. Arg. cites Paſc. 24 Eliz. Boſome's caſe.

10. *Leſſee for years leaſes for life* without livery; the term ſhall paſs. Mo. 423. Paſch. 37 Eliz. Buckler v. Harvey.

11. A. is *leſſee at will*, leſſor leaſes to A. *for years*, remainder to B. in fee; it is good though no livery be made; for * *poſſeſſion countervails livery*. D. 269. b. Marg. pl. 20. cites Paſch. 38 Eliz. C. B. Cooper v. Calambil.

So a *gift in tail, &c. to* the leſſee at will, or *tenant at ſufferance*, is good without livery of ſeiſin, becauſe of the poſſeſſion which countervails livery, per Walmſley and Beamond J. Noy 56. Cooper v. Columbell. —— cites D. 61. —— * D. 145. b. pl. 65. Paſch. 3 & 4 P. and M. Litchfield (Bp.) v. Fiſher.

12. Grant by deed of *all my trees growing within my manor of D.* to A. and his heirs; A. ſhall have inheritance in them without livery and ſeiſin. 11 Rep. 49. b. Mich. 12 Jac. in Liford's caſe.

13. *Inheritance in land* may be granted without livery, though the land itſelf cannot, as *veſturam terræ* per Morton, J. cites 17. E. 4. 6. and Fitzh. Præcipe 55. And Windham, J. ſaid, that ſo may *trees*, which are an inheritance in the land. Lev. 171. Trin. 17 Car. 2. in caſe of Jemmot v. Cooly.

14. A. ſeiſed in fee of a *truſt eſtate*, and having two daughters B. and C. conveyed the ſame to B. and her heirs by deed in nature of a feoffment without livery and ſeiſin; and held that the truſt paſſed though the deed was not executed by livery, and that it was ſufficient to declare the ſame, which as the law then ſtood might be declared by parol. N. Ch. R. 86. Cranburn v. Dalmahoy.

15. Where grants are made for life or lives *in purſuance of a power*, livery and ſeiſin is not neceſſary: becauſe it is only the execution of an authority. *As* in caſe of leaſes for 3 lives made by bare

bare tenant for life who has ſuch power; and ſo of a ſale of land by executors by virtue of the will. 12 Mod. 201. per Holt Ch. J. in delivering the opinion of the Court. Trin. 10 W. 3. in the caſe of Saunders v. Owen.

(B. 2) What amounts to a Feoffment.

Leaſe * *for years, and a releaſe* after to leſſee *in fee is*, in a manner, agreed to be a Feoffment, per Fitzh. Contra to Ingham.

1. *Leaſe and releaſe* countervailes a feoffment, Br. Feoffment de terres, pl. 5. cites 44 E. 3. 3.——Leaſe for years and releaſe is good feoffment, becauſe franktenement paſſes by the releaſe, per Culpepper ſaid to have been ſo adjudged, per Belknap. But Culpepper ſaid, if it was of a *grant of a reverſion after the death of tenant for life*, it would be otherwiſe, as he thought. 11 H. 4. 33. a. b.—Br. Feoffment de terres, pl. 10. S. C. adds, that it would be otherwiſe, if it be *with warranty*.

But it ſeems that leaſe *for life, and releaſe in fee, countervails* a feoffment, but is not a feoffment in fact; for the fee and franktenement do not go *uno flatu* as in caſu ſupra. Br. Feoffment de terres, pl. 30. cites 31 Aſſ. 25.——In formedon, the *tenant in dower grants his eſtate to W. N.* and after he in *reverſion releaſes to him in fee*; this is no feoffment, and yet this countervails feoffment; but if the iſſue be taken, if the heir enfeoffed him, this is no feoffment; quod caveat placitand. Br. Feoffment de terre, pl. 44. cites 5 E. 4. 5.——* Ibid. pl. 58. cites 21 H. 6. 8. Per Paſton. Co. Litt. 207. a.

For Franktenement will not paſs by a releaſe. Ibid. pl. 58. cites 21 H. 6. 8. Per Paſton.

2. *Releaſe to diſſeiſor* is extinguiſhment of the action and right, and not a feoffment. Br. Feoffment de terres, pl. 10. cites 11 H. 4. 33. per Hankford. And per Thirning, feoffment is, where there is a tranſmutation of poſſeſſion from one to another, which there is not upon a releaſe by diſſeiſee to diſſeiſor. Ibid.

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3. A. made a feoffment to the uſe of himſelf in tail, *remainder to B.* his ſon *in tail*. A. died. *B.* entered, and by indenture *bargained and ſold* (without any words of dedi & conceſſi) the lands to the uſe of J. S. *in fee*, and the indenture was a letter of attorney to make *livery* which was made accordingly. J. S. by the ſaid indenture covenanted, that if B. before ſuch a day paid 40 *s.* then J. S. and his heirs would ſtand ſeiſed, &c. to the uſe of B. and his heirs; and *if B. did not pay*, &c. *then if the ſaid J. S. did not pay to the ſaid B.* within four days after, 10 *l.* that *J. S. and his heirs ſhould thenceforth be ſeiſed to the uſe of the ſaid B. and his heirs*, &c. and B. covenanted further, to make ſuch further aſſurance, as the counſel of B. ſhould adviſe; *both failed of payment*; *B. levied a fine to J. S. without any conſideration*; it was adjudged a good feoffment well executed by the livery, notwithſtanding the words of bargain and ſale only, and that the covenant to be ſeiſed to the *new uſes conditionally* upon payment and non-payment being in one and the ſame deed, ſhould raiſe the uſe upon the contingency according to the limitation of it. Trin. 26 Eliz. B. R. Le. 25. Benicombe v. Parker.

4. Where one, who hath a *freehold in poſſeſſion*, levies a fine *come ceo*, &c. this enures as a *feoffment with livery on record*; but where

where he hath but a *reverſion or remainder*, it enures *only as a grant* thereof without tort preſumed or done to the poſſeſſion of a ſtranger, who hath the freehold. Arg. Mo. fol. 629.

5. A. ſeiſed in fee *enfeoffed B. his ſon in fee, to the uſe of the ſaid A. for life*, and after to the uſe of *B. in fee*; and after this to the intent that A. ſhould be able to make a leaſe to B. for 60 years; B. without any writing feoffavit dictum A. de tenementis prædictis habend. eidem A. & hæredibus ſuis. The court held the feoffment good, and in this is implied, that A. ſhall have the land to him and his heirs for the uſe intended. And. 51. pl. 126. Lancaſtel v. Aller. D. 358. pl. 48 S. C. Bendl. 288. pl. 288. Paſch. 17 El. S. C.

6. A *bargain and ſale* was made to J. S. and his heirs by deed indented but not inrolled, and the bargainor *made livery* of the land, ſecundum formam chartæ, &c. This was held a good feoffment. 2. And. 68. Denton's caſe. But *feoffment inrolled without livery* is not of any force to make the land to paſs; but the inrolment may *eſtop* the feoffor to ſay not his deed. Agreed per omnes. Poph. 8. Gibbons v. Maltyard and Martin.——Trin. 26 Eliz. B. R. S. P. Le. 25. Benicomb v. Parker.

(B. 3) Void; what ſhall be ſaid a void Feoffment.

1. 1 *R.* 2. 9. *Every gift of feoffment of lands made by fraud, or maintenance ſhall be void, and the diſſeiſee (notwithſtanding ſuch alienation) ſhall recover againſt the firſt diſſeiſor both his lands and double damages; provided he commence his ſuit within a year after the diſſeiſin, and that ſuch feoffor be then pernor of the profits.* The *preamble recites*, that many people, having right and juſt title to lands and tenements, are wrongfully delayed of their rights and actions, by gifts and feoffments made, &c. and alſo recites that many diſſeiſe others, and made feoffment to perſons unknown, &c. And ordains and enacts, that the diſſeiſees ſhall have their recoveries againſt the diſſeiſors who are pernors of the profits, (which is as much as to ſay, that they are ceſties que uſe,) ſo that they commence their ſuit within a year after the diſſeiſin done. And ſo the preamble declares, that the miſchiefs, which the makers of the act intended to remedy, was to thoſe who had right and juſt title, or were diſſeiſed; and the purview gives the *remedy only to diſſeiſees*, and *ſo it muſt be a diſſeiſin in fact*, and after this uſe made; in which caſe remedy is given to ſuch diſſeiſee againſt ceſty que uſe, and a recovery againſt him ſhall bind him and the feoffees; and ſo this act makes no other but ceſty que uſe able to loſe the land of the feoffees in a feint action brought againſt him. Pl. C. 3. b. Baſſet and Morgan v. Manxell, alias Manxell's caſe.——By this ſtatute, feoffments made to great men for maintenance, are declared *void*; but this is *as to* * *ſtrangers*, but *not between the feoffer and feoffee*. Br. Feoffment de terre, pl. 1. cites 28 H. 8. 23. per Fitzherbert. ——S. P. and that ſtrangers ſhall have action againſt the pernor of the profits. Ibid. pl. 19. cites it as held by Fitz-James Ch. J. and Engenfield J. and divers others.——And ſuch feoffment would not make a *remitter* in prejudice of a third perſon, as it ſeems. Ibid.——* Co. Litt. 369.——Hawk. pl. C. 263. ſ. 3.

2. Where *baron and feme being ceſty que uſe in right of his wife*, make a feoffment, and the *baron dies*; this feoffment is not void ab initio, but is now determined. Br. Feoffment de terres, pl. 1. cites 27 H. 8. 23. Per Fitzh. [172]

3. A feoffment *by a feme of a jointure* made by her firſt baron in poſſeſſion, or in uſe, is void by the ſtatute of 11 H. 7. *as to the heir*, but *not as to all.* Per Fitzh. Br. Feoffment de terres, pl. 1. cites 27 H. 8. 23.

(B. 4) Good.

(B. 4) Good. In what Caſes a Feoffment may be good, where a Grant is not good.

1. If a grant be *made to B. by the name of Knight*, where *B. is no Knight*, it is a void grant. But contra of ſuch deed of feoffment, by reaſon of the *livery* of ſeiſin. Per Rolf and the beſt opinion. Br. Grants, pl. 50. cites 4. H. 6. 1.

[See Grant (D).]

(C) *Of what Things* it may be made.

[1. A Feoffment cannot be made *of incorporate things*; becauſe no livery can be of them. Co. Litt. 49.]

Contra. It may be of an advowſon, *by livery the door of the church.* Inf. (Y) pl. 1. cites 43 E. 3. 1. b.——See (Y) pl. 3. DANNEL v. HODGSON.——S. P. Br. Grants, pl. 18. cites 43 E. 3. 1. It may be. Br. Feoffment de terres, pl. 49. cites 20 E. 4. 15. per Fairfax.——Arg. Bridgm. 95.

[2. A feoffment cannot be made *of an advowſon in groſs*; becauſe no livery can be of it. Contra 11 H. 6. 4.]

Br. Feoffment de terres, pl. 79. cites 5. H. 7. 9. accordingly. But cites 21 H. 6. Contra.

[3. A feoffment and livery may be made *in an upper chamber*; for a man may have an inheritance in it, and it is corporeal. Co. Lit. 48. b.]

4. Feoffment by *tenant in common* is good *of his moiety, though undivided*, and not in ſeveralty. Br. Feoffment de terres, pl. 75.

5. No livery can be made of *a running water*, becauſe it is fugitive. Secus of *water in a ſtanding pool.* 4 Le. 238. pl. 385. Mich. 6 Jac. B. R. Anon.

6. Livery cannot be of a *reverſion.* Arg. Bridgm. 96.

(C. 2) What amounts to a Livery upon the Land, or in Law.

9 Rep. 137. b. 138. Thorough-good's Caſe.

1. If *words* may amount to a livery within view, much more it ſhall upon the land, as *I am content you ſhall enjoy this land*, &c. *according to the deed, &c.* Co. Litt. 48. a.

Cro. E. 482. Sharp v. Sharp.—— 9 Rep. 137. b. THOROUGHGOOD'S caſe.——Per Popham. Ch. J. Popli. 49. in caſe of Collard v. Collard.

2. *But* bare *delivering the deed upon the land* amounts to no livery of the land; for it has another operation, (viz.) to take effect as a deed. But if he deliver the deed on the land *in name of ſeiſin of all the lands contained in the deed*; this is a good livery. Co. Litt. 48. a.

3. *So*

3. *So* delivery *of any thing* upon the land in the name of seisin of that land, *though it be nothing concerning the land*, as a ring of gold, is good. Co. Litt. 48. a. says that it had been so resolved by all the judges.

But this by the feudists is called, *investitura impropria*. Spelm.

Glos. Verb. Feofare.—9 Rep. 138. Thoroughgood's case.

4. *Exchange* amounts to a livery. Co. Litt. 51. b.

5. If a feoffment be *of diverse lands, and an house*, in which the feoffor dwells, and *delivers the feoffment in the house, but says nothing of the land*; yet it is good for all. For they having an *intent* to give and take livery it is a good feoffment; for they assembled there for that purpose. Cro. E. 142. Tr. 31 Eliz. C. B. Mills v. Snowball.—Ow. 44. S. C. 'Tis good livery if feoffor intended to make livery.—But Le. 207. states this case thus; if a feoffment be of a *house*, and the *deed is delivered in the house* without other circumstance, the same does not amount to a livery of seisin. But if he *does any act, by which the intent* of feoffor appears, that the feoffee should have livery of seisin; as *if the parties go of purpose to the place* intended to pass, to the intent the deed may be delivered in that kind; it amounts to a livery. Le. 207. Mills v. Snowball.

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Where 2 tenants in common, of a house and land, make partition within the house, of the house and land by parol without deed, it was held that though it might have been good upon the land, because it would have amounted to a livery in law; yet not being found that the land was *within view*, it could not amount to a *livery in law*. Cro. E. 95. Pasch. 30 Eliz. Docton v. Priest.

6. If A. makes a deed of feoffment of land, and delivers the deed, and says no more but, *take and enjoy* the land, or *take the land according to the deed*, or such words which amount to a livery, when he delivers the deed nothing passeth; for the law requires more ceremony than the delivery of the deed on the land. Cro. J. 80. Vaughan v. Holdes.

So where the feoffor said, *I am content you shall have this house* according to the deed to you made. This is not a good livery; for there is no intent expressed, either by words or circumstances, to make livery. But rather import an assent and promise to do a future act. Ley. 3. Hill. 6 Jac. Maund's case.

[See (T).]

(D) Feoffment. By what *Name* a Feoffment may be made *of the Thing*.

[1. *A House* may pass by a deed of feoffment, which makes mention only of a *curtelage*. 13 H. 4. 10. 6. Dubitatur.]

[2. A feoffment may be of a *manor* by the name of *a knight's fee*. 17 *E.* 3. 8. *b.*]

[3. If a man *seised of a manor leases parcel of the demesnes for life*, and after *makes feoffment of the manor* to which the lessee, and the tenants of the manor *attorn*. *The reversion* of this land so leased for life, shall pass by this; because it is parcel of the manor. Mich. 15 Ja. B. R. between *Boxe* and *Palmer* per Houghton.]

Fol. 2.

[4. If a *manor* be *known only by the name of Sarret*, and he, who

is ſeiſed of this manor, makes deed of *feoffment by the name of Sercit*, and delivers *ſeiſin ſecundum formam chartæ*; the manor ſhall paſs by it. For the making delivery ſecundum formam chartæ, refers to the eſtate, and not to the name. M. 40 and 41 El. B. R. 26. By 2. between Ewer and Heidon.]

See Grant (P. 2)

[5. If a man by deed *grants veſturam* to another and his heirs, and *makes livery ſecundum formam chartæ* he ſhall have by this veſturam terræ, viz. *the corn, graſs, underwood, ſweepage*, and ſuch like, and he ſhall have action * quare clauſum fregit. Co. Litt. 4. *b*.

* See Treſpaſs (H).

See Grant (P. 2)—It paſſes not the *ſoil*, for the livery cannot enlarge the Grant.

[6. *But* in this caſe he ſhall not have *the ſoile* by this grant; becauſe he has by this but a particular right in the land. For by this he ſhall not have *the houſes, timber-trees, mines and other real things, parcel of the inheritance*. Co. Litt. 4. b.]

Co. Litt. 4. b.

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See Grant (P. 2)

[7. *So* it is of grant of *herbage of land*, the *ſoile* ſhall not paſs, but he ſhall have only a particular intereſt; but ſhall have * treſpaſs quare clauſum fregit. Co. Litt. 4. b.]

* See Treſpaſs (H) pl. 1.

[8. If a man by deed grants *ſeparalem piſchariam* in a river, and makes livery ſecundum formam chartæ, the *ſoile* ſhall not paſs by it, *nor the water*. For if the river becomes dry, the grantor may take the benefit of the ſoile. Co. Litt. 4. b.]

[9. *So* if a man grants *aquam ſuam*; the *ſoile* does not paſs, but the *fiſhery* within the water ſhall paſs. Co. Litt. 4. b.]

[10. *But* if a man by deed grants *the profits of his land*, and makes livery ſecundum formam chartæ, the *ſoile* ſhall paſs. Co. Litt. 4. b.]

[11. By the grant of *boilloury of ſalt*, the *ſoile* will paſs. Co. Litt. 4. b.]

And he may bring *aſſiſe of common of turbary*, and ſhall recover,

[12. If a man grants to another *to dig turves* in his land, and to carry them at his will and pleaſure, the *land* ſhall not paſs; becauſe he has granted only parcel of the profit. Co. Litt. 4. b.]

but he cannot bring aſſiſe of the ſoile. Br. Feoffment de terres, pl. 21. cites 5 Aſſ. 9.

13. Scire facias upon *a fine of certain lands*, the *tenant pleaded a feoffment* by the anceſtor of the plaintiff with warranty of the ſame land, *by name of the manor of D.* where in fact the land *is no manor*, and yet a good plea by judgment, by reaſon of the livery of ſeiſin of the ſame land. Br. Sci. fa. pl. 200. cites 22 *H.* 6. 39.

14. If a man has a *manor in the county of N.* and *land is held of the manor which lies in the county of S.* By grant of the manor with the appurtenances in the county of N. the *ſervices of the land in the other county ſhall paſs*; and by livery of the manor made in the one county, the ſervices of the land in the other county ſhall paſs. Br. Grants, pl. 32. cites 21 E. 3. 18.

Cro. E. 421. Mich. 37 & 38 Eliz. B. R. Welden v.

15. If a man has a *moveable eſtate* of inheritance *in* 13 *acres parcel of a meadow of* 80 *acres*, the charter of *feoffment ought to be generally of* 13 *acres, lying within the meadow* of 80 acres, without bounding or deſcribing of it in certainty; and *livery may be of the* 13 *acres allotted*

allotted to the feoffor for the year, secundum formam chartæ, and this is good livery to pass the content of 13 acres in what place soever it lies in that meadow. Co. Litt. 48. b. Bridgwater.—Mo. 302. S. C.

(E) What Persons may make [*Feoffment or*] Livery of Seisin, and to whom. [*In Respect of Incapacity in the Person.*]

[1. IF *infant* makes feoffment, and *makes livery himself*, it is a good feoffment until it be defeated. 42 E. 3. 12. b. 9 H. 6. 5.] It is only *voidable*. Br. Feoffment de terres, pl. 48. cites 18 E. 4. pl. 27.——Br. Coverture, pl. 1. cites 26 H. 8. 2.

[2. *And it is not material of what age the infant is* at the making of the feoffment; for whether he be within age of discretion, viz. of 5 or 7 years, or beyond the age of discretion, viz. 16 or more, his feoffment is not void. 9 H. 6. 6. b.]

[3. If a man *de non sanæ memoriæ makes* feoffment and *livery himself*, it is not void. Contra 9 H. 6. 6.] Br. Entry Cong. pl. 106. cites 7 H. 4. 12.——All his acts in pais are void, except his feoffments, and livery, and seisin, and those are only voidable. The reason is because of the respect the law gives to a feoffment on the account of its solemnity in the transmutation of a freehold. And the *writ de non compos mentis*, which says * *demisit*, must be understood of a feoffment or a fine. Those being the ancient and only conveyances at that time. Per Holt, Hill. 9 W. 3. B. R. 2 Salk. 427. in case of Thompson v. Leach.

*[175]

[4. *But* if he makes livery *by attorney*, it is void. 7 H. 4. 5. b. 12.] See Faits (A) pl. 5.—Br. Feoffment de terre, pl. 8. cites 7. H. 4. 5.——Ibid. pl. 9. cites 7 H. 4. 12.——Ibid. pl. 48. cites 18 E. 4. 27.

[5. If a man makes feoffment *by duress*, it is not void. Contra 9 H. 6. 5. b.] It is only voidable. Br. Feoffment de terres, pl. 48. cites 18 E. 4. 27.

[6. If *baron and feme* are *jointenants*, and *baron makes* feoffment and *livery*, *the feme being upon the land, and disagreeing to it*, yet it is good. 21 E. 3. 6. b.] *But* though a married woman be *seised in her own right* with her husband, yet *livery* and seisin made *by her alone, without the agreement of her husband*, is void; insomuch that her husband and she may have an assise, notwithstanding such livery of seisin, if the husband be seised of the freehold in the right of his wife; *but* in such case, if he was *seised in his own right*, then, notwithstanding such livery of seisin made by the wife, he shall have an assise in his own name, &c. Perk. s. 186.

[7. If 4 *join* in a feoffment, whereof *one only is seised of the land*, yet it is a good feoffment. 42 E. 3. 12. b.] Br. Feoffment de terres, pl. 4. cites S. C.

[8. If *infant seised* of land, *joins* in feoffment *with a stranger, who has nothing in it*, yet it is a good feoffment. 42 E. 3. 12. b.]

9. Feoffment by one *deaf and dumb* is not good; for if he *makes livery himself* it is voidable, as it seems; like feoffment of an infant, or one non sanæ memoriæ. If it be by letter of *attorney*, it seems a *disseisin*. Quære. Br. Feoffment de terre, pl. 7. cites 2 H. 4. 8. See Faits (A).

10. He,

10. He, who is outlawed *in action perſonal*, and office is found, that he was ſeiſed of ſuch land the day of the outlawry, *may make feoffment* of his land well enough; *for the king is not ſeiſed.* Br. Office Devant, &c. pl. 2. cites 9 H. 6. 20.

11. The *king cannot be infeoffed without deed inrolled*; for *no livery can be made to him.* Br. Office devant, &c. pl. 41. cites 5 E. 4. 8.

12. There are *ſome* perſons, who *may make livery* of ſeiſin *in their own right, and alſo as ſervants to others:* and *ſome cannot* make livery of ſeiſin *in their own right, but as ſervants* unto others they may. And *ſome may* make livery of ſeiſin *by themſelves in their own right unto ſome perſons*, and unto others they cannot; and *ſome ſhall make* livery of ſeiſin, *and take by the ſame livery*, &c. Perk. S. 183.

13. *All ſuch perſons, as may grant by themſelves, may make livery* of ſeiſin *themſelves*, viz. in their own right, and as ſervants unto others, in the ſame manner and form, as they may grant, &c. Mutatis mutandis, &c. Perk. S. 184.

14. If a man *enfeoffs a married woman, and makes letter of attorney unto the huſband to make livery* of ſeiſin according to the deed, and he makes livery of ſeiſin accordingly, it is a good feoffment; for the *huſband is but a means* to convey the freehold to the wife; for by this act done, no freehold doth paſs from the perſon, &c. Perk. S. 199.

15. Livery *to a corporation* is not good, unleſs it be executed *by letter of attorney.* Admitted 14 Jac. B. R. Cro. J. 411. in caſe of Ipſwich bailiffs v. Martin and Parker.

[See (R. 2)]

(E. 2) What Perſon may make Livery, and to whom; *In Reſpect of Eſtate.*

1. If a man leaſes land for life, and the *leſſee* thereof *enfeoffs a ſtranger*, and makes a *letter of attorney unto his leſſor* to make livery
[176] of ſeiſin accordingly, *and he makes livery*; in this caſe it hath been ſaid by ſome perſons, that the leſſor might enter upon the feoffee for a forfeiture, notwithſtanding the livery of ſeiſin made by himſelf; for they ſay that the *feoffee took nothing* by him; for the leſſor had nothing to do upon the land, if not to ſee whether waſt were done, and to diſtrain for his rent and ſervices, if they were behind. Perk. S. 200.

2. If *A. and B. jointenants in fee, leaſe to C. for life*, and *C. grants his eſtate to B.* ſome think that this ſhall enure by way of ſurrender; becauſe every of the leſſors is ſeiſed of the whole, and of the whole reverſion; and the *grant* of the eſtate *of the particular tenant cannot take effect by way of grant, without livery of ſeiſin*; and the grantee cannot take livery of ſeiſin of the ſame land; becauſe he

he hath the reverſion in fee of the whole land in him immediate to the ſame particular eſtate, and in his own right. Perk. ſ. 82.

3. *Diſſeiſſor* cannot infeoff *diſſeiſee* by matter in fact; becauſe the entry of diſſeiſee is lawful upon him, &c. Perk. S. 197.

4. If *feoffment* be made to the uſe of W. N. *for life, and after,* to the uſe of *J. S. and his heirs,* there ceſty que uſe in remainder or reverſion may ſell the remainder or reverſion in the life of W. N. but he cannot make feoffment till after his death. Br. Feoffments al. Uſes, pl. 44. cites 25 H. 8.

5. A. grants *leaſe to commence at Mich.* to B. *remainder in fee* C. Though A. makes livery and ſeiſin to B. yet the livery and ſeiſin, and the remainder ſhall be *void,* becauſe he has no preſent eſtate to which the livery may be annexed, nor on which it can reſt in the mean time. Arg. Pl. C. 156. Paſch. 3 Mar. 1. in caſe of Throgmorton v. Tracy—cites Litt. 12.—See And. 8. Okeden v. Sands.

6. A. leaſes *to B. for years,* the remainder *to the right heirs of the ſaid B.* and makes livery; the remainder is void; becauſe there is not any perſon in eſſe, who can take by the livery preſently; and *every livery ought to have its operation preſently; but* where a leaſe is made *to B. for life,* the remainder *to his right heirs;* there he has a fee executed; and it ſhall not be in abeyance; for there he takes the freehold by the livery. per Dyer and Manwood. Mich. 19 Eliz. 4. Le. 21. pl. 67. Anon.

7. *Ceſty que uſe* before the ſtatute of 27 H. 8. of divers lands *by ſeveral conveyances,* the uſe of ſome being raiſed upon recovery, of ſome upon fine, and of ſome upon feoffment; and he *made a feoffment* of all theſe lands by deed, *with a letter of attorney* to make livery; the attorney entered into part of the land, and made livery in the name of the whole; and it was agreed by all the juſtices, that the lands paſſed, notwithſtanding in other's poſſeſſion, viz. other feoffees. Cited by Dyer. 20 Eliz. C. B. Le. 265. in Bracebridge's caſe, as Kellet's caſe. Bendl. 12. pl. 10. S. C. —And. 28. pl. 66. S. C.

8. *Feme* was *deviſee for* 30 *years of the occupation and profits of a term, if ſhe ſhould ſo long live a widow,* and after her widowhood, the reſidue of the term in the leaſe to go to B. his ſon. The feme entered, and afterwards *reverſioner* by indenture *dedit, conceſſit,* &c. totum illud tenementum, &c. *to the feme and her heirs.* It was reſolved, that a *leſſee for years in poſſeſſion* may take a feoffment, although it be by deed, *and may take livery after the delivery of the deed,* although the leſſee may take the deed by way of *confirmation,* and then the livery is but *ſurpluſage* and void. Trin. 28 Eliz. C. B. Ow. 6, 7. Haverington's caſe. This caſe is in other books called by the name of HAMINGTON v. RIDER, and HAMINGTON v. RICHARDS, and RUDYARD v. HANNINGTON, but the point ſomething varying, they are not here cited.

9. *Diſſeiſee* cannot make feoffment, though to the diſſeiſor by agreement. Goldſb. 25. in pl. 6. Trin. 28 Eliz. * S. P. per Anderſon. Owen 1. Leonard v. Stephens.

10. A. leſſee for years, *remainder to B. in tail,* remainder over. *A. infeoffed J. S. and made a letter of attorney to W. R.* to enter [177] Cro. E. 480. and

Mo. 431. S. C. but not S. P. Hill. 38 Eliz.

into the lands and ſeal the feoffment, and deliver it in his name, *to the uſe of B. and his heirs.* B. made letter of attorney to C. to enter in his name, who entered accordingly. This was held a good feoffment, though *both A. and* the *attorney were diſſeiſors.* For it is good between the feoffor and the feoffee. For the remainder man by the feoffment, and entry, is remitted, and the term gone, the freehold having come to it. Gouldſb. 92. Trin. 30 Eliz. Mounſon v. Weſt.

11. If *leſſee for* 10 *years, makes a leaſe for* 1 *year to reverſioner*; there he in reverſion, who has the land for a year, may make a feoffment to the leſſee for 10 years; and it is good, per Clench. 41 Eliz. Trin. B. R. Ow. 66. in caſe of Knotts v. Everſtead.

12. *A. leſſee for years, remainder to B. for life, remainder to C.* and *C. enfeoffed A. by deed, and made livery.* The conveyance was held void; for it could not work by livery to the tenant for years, who *was in poſſeſſion before.* Arg. Vent. 360. Hill. 33 and 34 Car. 2. in caſe of Moor v. Pitt.

* Perk. S. 193.—It is void. Br. Feoffment de terres, pl. 48. cites 18 E. 4. 27.—It hath been ſaid, that if 2 jointenants are in fee, and *one leaſes to a ſtranger for years, the remainder for life, in taile, or fee to his companion, and livery is made to the leſſee for years*; that this remainder is good; but yet it ſeems not good; becauſe it had not been good, if livery had not been made to the leſſee for years; ſo it appeareth, that the remainder ſhall paſs by the livery; and one jointenant cannot make livery to his companion, &c. Ideo. Quære. Perk. S. 197.

13. [*Some* perſons *may make* livery *to ſome, who cannot* do it *to others*, who yet may take by livery from others. *As*] if one * *jointenant* makes feoffment *to the other*; this cannot be a good deed at common law; for he cannot make livery and ſeiſin, becauſe the other is jointly ſeiſed with him. Yet this deed ſhall enure by way of confirmation, and muſt be ſo pleaded; and not literally as the deed is worded. 4 Mod. 150. Mich. 4 W. and M. B. R. in caſe of Barker and al. v. Lade.

14. *But* if 2 *coparceners* are, one of them may enfeoff the other of her part, or portion. Perk. S. 193.

[See (A. 4) pl. 1.——Non-Compos (C).]

(F) What Name [*a Man*] may make Feoffment [*by*].

Fol. 3.

[1. *W. Porter* may make feoffment *by the name* of *W. Fammiſworth.* 14 H. 4. 35. b.

[See Faits (B).——Grants (B).]

(G) To what Perſon (*),—[*In Reſpect of Eſtate* (†)]—[*and what is Name ſufficient of Feoffee* (‡)].

[1. † ONE *coparcener* may make feoffment *to the other*. 17 *E.* 3. 47. *b.*] If ſhe does it by *dedi & conceſſi*, it ſhall *enure* by *confirmation* without livery; for it countervailes remiſi & confirmavi. Br. Confirmation, pl. 18. cites 10 E. 4. 3. per Littleton.

[2. † One *jointenant* cannot make feoffment *to the other*; becauſe he is ſeiſed of all before. Contra 32 E. 3. Age. admitted per Shard.] S. P. But ſuch feoffment will enure *by confirmation*. Br. Confirmation, pl. 11. cites 22 H. 6. 42, 43. per Shard.

[3. ‡ A feoffment may be made to an *abbot, or prior*, by the name of abbot or prior *of ſuch a place*, &c. without naming them by their names of baptiſm. 39 E. 3. 13. b.] [178]

[4. ‡ The *ſame law* is *of a mayor, or dean*. 39 *E.* 3. 13. *b.*]

[5. ‡ If deed of feoffment be made *to J. S.* and letter of *attorney to make livery to J. S. capellano*, he cannot make livery to J. S. unleſs he be a chaplain. 4 H. 6. 1. *b.*] Br. Grants, pl. 50. cites 4 H. 6. 1.

6. * Livery cannot be made to the *king*; for he cannot be enfeoffed, but by deed inrolled of record. Br. Prerog. pl. 66. cites 5 E. 4. 7.

(H) By what Name the Feoffment may be made to the Feoffee. Name of Feoffee. [*Miſnamed*].

[1. A feoffment *to J. S. militi*, is good, *though he be not a knight*; becauſe it paſſes by the livery. 4 H. 6. 1. b.] Br. Miſnomer, pl. 38. cites S. C.

[2. A feoffment may be made *to Julian, by name* of *Gilder or Gill.* 29 Aſſ. 16.]

[3. If a feoffment be made *to J. and A. his wife*, where his *wife's name is M.* ſhe ſhall take nothing by this feoffment. 3 *Aſſiſe* 4. *But quære.*]

[See **Grants** (D).]

(I) What Thing is neceſſary to perfect the Livery. Feoffment by Livery within the View.

[1. IF a deed of feoffment be delivered, and livery within the view made, yet it is *not a good* feoffment, if the *feoffee does not enter* into the land; for it is not executed before entry. 38 *E.* 3. 11. b. admitted 38 Aſſ. 2. Co. Litt. 48. b.]

D. 233. Marg. pl. 10. Vent. 186. Arg. Br. Feoffment de terre, pl. 70.

[2. When a livery is made within the view, if the *feoffor, or feoffee, dies before entry* of the feoffee, it is void. Co. Litt. 48. b.]

[3. If a man makes a charter of feoffment, and makes livery within the view; and the *feoffee dares not enter for fear of death, but claims it*; this shall be good execution of the livery, and shall vest the franktenement in him. Co. Litt. 48. b.]

Br. Feoffment de terre, pl. 11. cites S. B.— Perk. S. 214. cites 38 E. 3. 5.

4. In assise, it was found by verdict, that A. was seised in fee, and made a deed of *feoffment to M. and her heirs*; and before livery *A. marries M.* and *at the church door, extra terram, shewed her the land which was in another county*, and *delivered her the deed, and said* that he would that *she shall have the land secundum formam chartæ*; and *were married*, and *after* they *entered*; and the baron, in the life time of M. his wife, claimed nothing, but in right of M. his wife; and M. died; and after the baron devised the land to J. S. in fee, and died; and the issue of M. brought assise against the devisee; and upon this matter he recovered by judgment; for the shewing of the land and their entry was taken instead of a livery, and the baron in his life did not disagree to it; and the *devise was not* taken for a *disagreement*; and it is said in the time of H. 8. that expres mention shall be made in the pleading, that the land was within the view. Br. Feoffment de terre, pl. 57. cites 38 E. 3. 11.

[179] 5. Though the livery be made within view, yet the lease shall be pleaded to be made where the land is; for it is no livery nor lease till the *entry of lessee*, per Dyer and Weston justices. D. 233. Marg. pl. 10. Mich. 6 and 7 Eliz. Aprice v. Rogers,—or Sir Walter Dennis's case.

(K) What shall be said an *Execution*, of the Livery.

For there is no alteration of the estate consequent upon the intermarriage. Arg. Vent. 186.

[1. IF a man makes, and delivers a feoffment *to a feme at the door of the monastery*, and makes *livery to her within the view*, and after *takes her to wife*, and after *they both go from the house to the same land*; *and the baron never after claimed any thing* in the land, *but in right of the feme.* This is an execution of the livery. For by this he agrees to the entry of the feme; or his entry shall be an entry for the feme. 38 E. 3. • 12. Adjudged 38 Ass. 2. Adjudger.]

He shewed her the land after he had delivered her the deed, and said he willed that she should have that land according to the form of the deed; after marriage she entered, and he never disagreed or claimed, but in her right. The wife died. The Baron devised the land. But though the *land lay in another county*, yet in assise the heir recovered against the devisee. Br. Feoffment de terre, pl. 11. cites • 28 E. 3. 12.

• This should be 38 E. 3. 11. b. 12.

Mod 91. S. C. Parsons v. Perns.— 2. Lev.

2. *A. and B. femes jointenants in fee*; *A. made* a charter of feoffment to *J. S.* and livery within view, and bid him enter; and after, before it was executed, *married him.* Resolved that this livery

very was well executed after marriage; for an intereſt paſſed by the livery within view, which cannot be countermanded. Hill. 23 and 24 Car. 2. B. R. Vent. 186. Parſons v. Perus. 34. Parſons v. Pierce.

(K. 2) Livery to one, where it will ſerve for others.

1. If a man *enfeoffs* 4 *by deed*, and makes livery *to the one in the name of all*, this is a good feoffment to all; but if a man enfeoffs 4 *without deed*, and makes livery to the one in name of all; there it veſts nothing but in him, that takes by the livery, per Choke, quod nota diverſity, quod nullus negavit. Br. Feoffment de terre, pl. 16. cites 15 E. 4. 18. pl. 72. S. P. cites temp. H. 8. Ibid. pl. 47. cites 18 E. 4. 12. S. P. Br. Eſtates, pl. 81.

2. Livery is not good to a mayor and commonalty, or other *corporation*, without deed to receive it by an attorney; but per Keble a feoffment made to them, *and to another* is good without deed, if *the other takes the livery*; but Huſſey contra; for they ſhall be tenants in common by their ſeveral capacities; for which they ought to have *ſeveral liveries* of the ſeiſin. Br. Feoffment de terre, pl. 41. cites 7 H. 7. 9.

3. If a feoffment is made *to* 2, *habend. one moiety to one, and the other moiety to the other*; this operates as ſeveral conveyances, and not as one; for *there muſt be* 2 *liveries*, becauſe there are ſeveral freeholds and livery to one ſecundum formam chartæ will not enure to the other. per Holt. Ch. J. Wms's Rep. 18, 19. Hill. 1700. in caſe of Fiſher v. Wigg.

(L) What Poſſeſſion, or Eſtate, will *hinder* the Livery.

[1. IF a ſtatute merchant be extended, if feoffment be made by reverſioner and livery, the *tenant by the ſtatute continuing* in poſſeſſion, it is void. 7 H. 4. 19. b].

[2. *So* if reverſioner makes feoffment and livery without ouſting of the *leſſee for years in poſſeſſion*, it is a void feoffment. 11 H. 4. 71. 19 H. 6. 56. 2 Aſſ. 1. adjudged. 5 Aſſ. 8. adjudged. Co. Litt. 48. b. D. 29 H. 8. 33. 13. Contra 29 Aſſ. 60.] Fol. 4. Perk. S. 220. D. 33. pl. 13.—S. P. if the leſſee was neither ouſted nor attorned. Br. Feoffment, pl. 60. cites 2 Aſſ. 1.

[3. *So* if a man be ſeiſed of a *manor in leaſe for years*, and makes *feoffment of this and of another* manor whereof he is ſeiſed *in his hands in the ſame county*, and makes *livery in that not in leaſe, in the name of both*, without ouſting the termor of the other manor; this manor ſhall not paſs by it. 11 H. 4. 71.] [180]

[4. If a man has 2 *leſſees by ſeveral leaſes* of land *in one county*, and makes feoffment of all, and makes *livery upon the land of one* D. 18. pl. 106.—So in caſe of a

leaſe of 2. houſes in the ſeveral poſſeſſion; of B. and C. and a letter of attorney to make livery; if B. and C. are tenants for years or life, the delivery of the 2d houſe is void; but if B. and C. are tenants at will, the delivery is good for both. Paſch. 32 Eliz. B. R. Cro. E. 181. Williams v. Aſh et Aſh.

of the leſſees, ouſting him *in the name of the whole*; nothing paſſes of the other leaſe. D. 28 H. 8. 18. 106.]

[5. *But* in the ſaid caſe otherwiſe it is of a *tenant at will*; becauſe this determines the will, and both paſs. D. 28 H. 8. 18. 106.]

Carth. 110. Hill. 2 W. and M. B. R. Swift v. Heath.

[6. If *leſſee for life* be, the *reverſion over*; and he in reverſion makes feoffment and livery, without ouſting of the leſſee; this is a void feoffment. 5 Aſſ. 11. adjudged. 2 E. 3. 31. adjudged. As if he makes feoffment and livery, a *feme covert leſſee for life continuing in poſſeſſion*; it is void. 5 Aſſ. 11. adjudged.]

Br. Feoffment, pl. 80. cites 8 E. 1. and Fitzh. Aſſiſe. 418.

[7. If he in reverſion or remainder makes feoffment and livery, *in the abſence of the leſſee* for life or years, who never attorn or aſſent to it after, yet this is a good feoffment. D. 17 El. 340.]

——D. 340. pl. 49. per Manwood and Dyer, who aſſented to a caſe in point cited by Mounſon as the Lady Umpton's caſe.——*Reverſioner in tail*, expectant on the death of tenant for life, made a feoffment to leſſee for years, *by conſent of tenant for life*. This is no diſcontinuance, becauſe he had no freehold. Carth. 110. Hill. 2 Jac. 2. B. R. Swift v. Heath.

[8. If *leſſee for years*, the *remainder for life*, are; and he in *reverſion in fee makes feoffment* and livery *to leſſee for years*; though this acceptance of the feoffment, cannot enure as a ſurrender for the eſtate for life in remainder; yet it ſhall enure as a grant of his eſtate for the time of the feoffor, or at leaſt a licence to him to make livery, and ſo a good feoffment. P. 40 El. B. R. between Eedes and Knotsford. But Mich. 40 and 41 El. B. R. this was adjudged to the contrary.]

[9. If a man makes a charter of feoffment *of* 2 *acres, whereof one is a leaſe for years to an infant, and, of the other, he is ſeiſed in demeſne*; but the *feoffor is* tutor or *guardian to the infant, by which he is poſſeſſed of this acre alſo*, and makes *livery in the acre in demeſne, in the name of both*; this is good to paſs both. H. 8 *Ja.* in the Exchequer, per Cur.]

Mo. 250. pl. 397. S. C. Paſch. 22 El. Heywood v. Bettiſworth.——*Br. Feoffment de terre, pl. 22 cites 5 Aſſ. 11.

[10. If a man *leaſes a houſe and divers cloſes* in one county, to B. for years, and after makes a deed of feoffment of all to C. and makes *livery* of ſeiſin *in the cloſes, the leſſee or his* * *wife, or ſervants then being in the houſe*, the livery is void in toto; for the leſſee cannot be upon every parcel of the land to him demiſed, for the continuance of his poſſeſſion in it, and therefore his being upon any part of the thing demiſed is ſufficient to continue his poſſeſſion in the whole. Co. Litt. 48. b. Co. 2. Bettiſworth 31 *b.* Adjudged. vide D. 28 H. 8. 18. 107.]

A *boy* of the leſſee's being *upon the land* at the time of the livery, makes it void. Br. Feoffment de terre, pl. 66. cites 8 E. 1. and pl. 80. cites S. C.——When a meſſuage is demiſed with land, the *meſſuage is the principal, and the land but acceſſary*; and without doubt the poſſeſſion of the houſe is good poſſeſſion of the land demiſed therewith. 2 Rep. 31. b. Paſch. 22 Eliz. C. B. S. C.

D. 18. b. pl. 107. Trin. 28 H. 8. Br. Feoffment de terre, pl. 66. cites 8 E. 1. Br. Aſſiſe, pl. 452. cites S. C.

[11. *But* if the leſſee be *abſent*, and has not any wife or ſervants in poſſeſſion, *though he has cattle upon the land*, yet if the leſſor makes livery of ſeiſin of the land, it is good. Co. Litt. 48. b.]

—Br. Feoffment, pl. 82. cites S. C.

Br. Aſſiſe. pl. 418. cites S. C.——By ſome, if *goods* of leſſee are on the land, it does hinder livery. Mo. 11. pl. 42. Quære.

[12. If *leſſee for years leaſes parcel* of the land *for a certain time*, and after the leſſor makes a deed of feoffment, and makes *livery in this parcel*, which is *in the poſſeſſion of the 2d. leſſee*, putting him out of poſſeſſion. This is good livery, tho' the firſt leſſee was in poſſeſſion of the reſidue. For by his leaſe he has divided the poſſeſſion of it from the reſidue. 2 Rep. 32. Bettiſworth's caſe.]

[13. But *otherwiſe* it would be, if he had *leaſed* this parcel *at will*. 2 Rep. 32. Bettiſworth's caſe.]

[15. If a man *leaſes a houſe for years*, and after makes feoffment with letter of attorney, and the *attorney comes to the houſe to make livery in the abſence of the leſſee, and commands the ſervant of the leſſee to come out* of the houſe, who does ſo, *and in his preſence makes livery*; and immediately the *maſter returns*, to whom the attorney notifies the livery, to which *the termor agrees, ſaving his term*; this is a good livery and feoffment. D. 20 El. 362. 22. But if the *ſervant continues in the houſe, and the attorney makes livery by his aſſent* it is void; for the ſervant cannot put the maſter out of poſſeſſion, he himſelf continuing in poſſeſſion. Tr. 7 Ja. B. per 2.]

There is no pl. 14.

Fol. 5.

S. C. And. 130. Darrel v. Stukely.

[16. If he in reverſion makes feoffment and livery in a houſe in leaſe for life or years, the *termor being at market, and his wife and children being in the houſe*; this does not paſs. D. 28 H. 8. 18. 107.]

If wife of leſſee for years aſſents to livery of the houſe, in the abſence of the huſband, though the *ſervants and children be, and continue in the houſe*, it is a good livery. Quære if the wife aſſents, but continues in the houſe? but if a man commits his houſe to his ſervants, and *one aſſents* to the livery, and goes out; if *the reſt continue there*, and livery is made, it is no good livery of ſeiſin. Godb. 158. pl. 215. Mich. 6 Jac. B. R. Anon.

[17. If a man makes a *leaſe for life*, and after makes a deed of feoffment of it, and makes livery *upon the land, by the aſſent of the leſſee, and in his preſence*, this is a good livery; for the aſſent of the leſſee ſhall be a leaſe at will, or a ſurrender for the time. Tr. 40 El. 6. per Cur. between Sheppard and Gray.]

[18. If *the king be leſſee for years*, the reverſion in fee to J. S. and J. S. enters upon the land, and makes feoffment, this is a void livery; becauſe *he cannot put the king out of poſſeſſion*. Hill. 9 Ja. B.]

[19. If *the king, leſſee for* 40 *years, makes leaſe for* 20 *years*; and after he in reverſion enters upon the leſſee for 20 years, and makes feoffment, this is a good livery; for this future intereſt of the king cannot preſerve the poſſeſſion of the leſſee, but that he may be ouſted. Hil. 9 Ja. in the Exchequer.——adjudged between Wickham and Wood.]

So in the caſe of a common perſon, if the feoffor makes livery with ſufferance of the *under-leſſee*, it is good without attornment of the firſt leſſee. Br. Feoffment de terres, pl. 68. cites 28 H. 8.

[20. If *leſſee for life* be, the *reverſion in fee to J. S. who dies, his heir being to ſue livery* for this reverſion, and *after leſſee for life, before livery ſued makes feoffment* of the land; this is a good feoff-

ment and the reverſion diſcontinued by it, notwithſtanding the intereſt of the king. P. 43 El. between Charlton and Starkey, cited H. 9 Ja. B.]

[21. If *baron and feme* are *ſeiſed* of land *in fee*, and the *baron makes feoffment, the feme continuing upon the land*; yet this does not hinder the livery; but it is a good feoffment. 21 Aſſ. 25.]

* Orig. [Diſagreement.]

[22. *So* if when the baron makes the livery, *the feme continues upon the land, and claims in of her eſtate*, * diſagreeing to the livery; yet this is good feoffment. 21 Aſſ. 25. adjudged.]

[23. If *land deſcends* to J. S. who *enters into part* of the land, and not into the reſidue; and after makes feoffment of the whole, and makes *livery only in that* into which he had entered *in the name of the whole*, yet all ſhall paſs. M. 13 Ja. B. R. adjudged upon evidence, between Bridgman and Charlton.]

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Roll. R. 260. S. C.

[24. If tenant in tail makes feoffment in fee to the uſe of himſelf in fee; and after leaſes for years and dies, by which the iſſue is remitted before entry, and the eſtate of leſſee changed into a *tenancy at ſufferance*; and after the iſſue makes deed of feoffment of this land, into which he has not entered, and of other land which is deſcended to him, and into which he has entered, and makes *livery in that into which he has entered in the name of the whole*; all ſhall paſs, though the tenant at ſufferance was in poſſeſſion of parcel. M. 13 Ja. B. R. adjudged upon evidence between Bridgman and Charlton.]

[25. If it be *found by office, that A. was ſeiſed* in fee of land *held of the queen* in ſocage, and *died without heir*, by which it *eſcheated* to the queen; whereby the lands are ſeiſed into the hands of the queen. Upon which *B. comes, and ſays that he is next heir to A. and traverſes the office*; and upon this iſſue is joined, and *pending the iſſue, B. makes* a deed of *feoffment with letter of attorney* to C. to make livery, and after the *iſſue is found for B.* viz. that he is next heir to A. and upon this judgment is given, that *the hands of the queen be amoved*, and after C. the *attorney makes livery* according to the warrant of attorney *, and *after an amoveas manum is awarded and executed*. This is a good livery; for now by the judgment againſt the queen, the poſſeſſion of the queen was utterly defeated and diſaffirmed, and the heir reſtored to the right of the poſſeſſion; ſo that he may enter at his pleaſure. New Entries, 197. 1. adjudged between Terry and Brown and others.]

* Fol. 6.

[[25] If a man *ſeiſed* in fee *of an orchard*, makes a feoffment of it, and goes into the orchard, and *cuts a turf and twigg, and delivers* it in the name of ſeiſin to the feoffee *over a wall* of the ſame orchard, the feoffee then being in other land not being [mentioned] in the feoffment; this is a void livery. P. 2 Ja. B. adjudged.]

[26. If a man be *diſſeiſed of one acre, and is ſeiſed in fee of another acre*, and makes feoffment of both, and makes *livery in this of which he is ſeiſed in fee in the name of both*; yet nothing of the other acre whereof he is diſſeiſed, ſhall paſs. D. 28 H. 8. 18. 106. where diſſeiſor had made *leaſe at will* of this acre.]

[27. If *leſſee for life of one acre makes feoffment of this and of other land, whereof he is ſeiſed in fee*, and makes *livery in this, whereof he is ſeiſed in fee, in name of the whole*; all ſhall paſs. 9 H. 7. 25. b.]

[28. If

[28. If *leſſee for years* of one acre makes feoffment of this, and of other acre whereof he is ſeiſed in fee, and makes livery in this, whereof he is ſeiſed in fee, in the name of the whole; yet the other acre does not paſs. 9 H. 7. 25. b.]

[29. If *ceſty que uſe within* [the ſtatute of] *R. 3. makes leaſe for years*, and after *during the term, makes feoffment* of the land, and makes *livery in other land in the name of the whole*; nothing paſſes of this land in leaſe; becauſe he hath nothing in uſe nor in poſſeſſion there. D. 36. H. 8. 58. 4.]

30. *Baron ſeiſed in jure uxoris made leaſe for years*, and *died*; *the feme enfeoffed J. S.* but the *termor was not ouſted*, and after, the *feme releaſed to the termor, &c.* and yet the feoffee recovered the aſſiſe; for the *leaſe was void by the death of the baron* and the *feoffment* of the feme, which *was an entry*; quod nota; and therefore the releaſe void. Br. Feoffment de terre, pl. 61. cites 7. Aſſ. F. 19.

31. In aſſiſe it was found that the *father of the plaintiff*, whoſe heir he was, *gave all* the tenements that he had in D. to the tenant, *except the chamber in which he lay ſick, and after the ſeiſin gives the chamber, and removed himſelf into the hall, and then died*; and good by the opinion of the Court, and ſaid that he entered into the hall by ſufferance of the tenant, without claiming any thing there to his uſe, by which the feoffment was awarded good, and the plaintiff barred of it, nota and ſo it ſeems here, that a man cannot make livery of the chamber in which he lies, * quod non videtur lex. Br. Feoffment de terre, pl. 24. cites Aſſ. 6. [183]

* Perk. S. 211. acc. cites 11. Aſſ. 6. 17. Aſſ. 61.——If a man *lying ſick within a manor*, ſells the manor to a ſtranger, and ſays unto him, that he *will that he ſhall take ſeiſin preſently, and commands all his ſervants to be attendants upon him, as their lord* and maſter, and thereupon the *vendee takes ſeiſin, and* perhaps giveth unto the ſervants 20 s. to drink, and the tenants of the maſter attorn unto him, and the vendee *goes from the manor* about his buſineſs, *and the feoffor dies upon the ſame* manor; yet it is a good livery of ſeiſin, according to the words, of the eſtate, &c. Perk. S. 212. cites 43. Aſſ. P. 20. Br. Feoffment, pl. 35. cites S. C.

32. If the diſſeiſor enfeoff the diſſeiſee and two others, all accrues to the diſſeiſee; for *his entry was lawful, and he remitted before the livery*, and ſo the livery void; contra if the entry had not been lawful. Br. Feoffment de terre, pl. 99. cites 29. Aſſ.

33. Feoffment made *during the cuſtody of the king by reaſon of ward*, &c. was void. Br. Feoffment, pl. 63. cites 50. Aſſ. 2.

34. If a feoffment be made of a houſe or land by deed, and the *feoffor, in coming to the houſe or land with the feoffee and others*, &c. *reads the deed* of feoffment, *and afterwards* goes into the houſe or land, and *delivers ſeiſin accordingly*, it is good, notwithſtanding that the *feoffor remains upon the land, or in the houſe all the time, and takes the profits at the ſufferance of the feoffee*. Perk. S. 210.

35. If a man *enters into my lands by wrongful title, and I being there, he enfeoffs a ſtranger* thereof, *and delivers ſeiſin unto him*, it is void; for he cannot give ſeiſin before he himſelf hath ſeiſin, and he had not ſeiſin at the time of livery of ſeiſin; for the *law will adjudge the poſſeſſion in me, who have a right* unto the poſſeſſion; becauſe I am preſent at the time of the delivery of ſeiſin. Perk. §. 219.

36. If

36. If *husband and wife purchase land jointly in fee*, and the possession being executed in them accordingly, and afterwards the *husband enfeoffs a stranger in fee*, and the *wife* says that she *will not agree* thereunto, *nor go off the land*, but continues there at the time of the livery of seisin; notwithstanding the same, all the land passes by the feoffment. Perk. S. 223. cites H. 21. E. 3. 6.

For the feme could not contradict the livery of the baron. And in assise brought by the heir of the feme after the death of the baron, the plaintiff was nonsuited. Br. Entre Cong. pl. 28. cites S. C. and says it seems a perfect discontinuance, and that the heir of the feme shall have *cui in vita*, and not assise.

So of dean and chapter. Perk. S. 220.

37. *But* if *mayor and commonalty* be *jointly seised* of any land *in fee*, and the *mayor* against the will of the commonalty *enfeoffs a stranger* of the same land, the *commonalty being upon the land*, when livery of seisin is made; nothing passes by this feoffment, &c. Perk. S. 224. cites T. 12 E. 3. 3, 4.

38. If a *lease for years* be made *to A. remainder to B. in fee*, in tail, or for life. If *A. enters before the livery*, it is good; but the *remainder is void*, Co. Litt. S. 60. a. Pag. 49. a. ——— Arg. Pl. C. 156. in the case of Throgmorton v. Tracy.

39. A *termor for* 1000 *years made* a deed of *feoffment*, by *dedi concessi & feoffavi*, and a *letter of attorney* to make livery, and after, the *attorney delivered seisin, the lessor being present upon the land, not contradicting it.* Quære, if the land passes by the feoffment, so that the lessor may enter for a forfeiture, or that the term passes first by the words, dedi & concessi terram before livery? &c. As Wray thought prima facie, but Dyer e contra; but by both, the livery by attorney is good enough, and the presence of the lessor upon the land is no impediment to the feoffment. D. 362. b. pl. 20. Pasch. 20 Eliz. Anon.

40. A. seised of a manor *leases part*, and then gives, grants, bargains, and sells the manor, and makes livery in that part in possession, [184] in the name of the whole *manor*; nothing passes but what was in his possession, and the reversion of such part, as was in lease, shall not pass without *attornment*; but if the *deed be enrolled* after, then the whole passeth; and the reversion being settled by the inrolment, the attornment, coming afterwards, has no relation, per Wray Ch. J. Mich. 25 and 26 Eliz. B. R. Le. 6. Stoneley v. Bracebridge.

If *lessee for years enfeoffs a stranger*, the *lessor being upon the land*; yet the land shall pass by the feoffment; but perhaps, if he continues upon the land, claiming the same after the feoffment, this countervails an entry for a forfeiture. And the reason why it passes by such feoffment, is, because the *lessor had nothing to do to meddle with the possession* of the land, *during the term*: But he may come and see, whether waste be done, or to distrein for his rent if it be behind, &c. Perk. S. 222.

41. *Lessor and lessee being on the land*, the law judges the possession in him that has the right to it, and that is, the lessee; and livery ought always to be given of the possession, and the * *presence of the lessor*, who has nothing to do there, cannot disturb it; but the presence of the lessee will hinder livery by the lessor. Pasch. 36 Eliz. B. R. Cro. E. 322. Read and Morpeth v. Errington.

(M) In what Cases Livery may be made within the View.

[1. IF a man be disseised: if *disseisee dares not to enter* the land, he may come as near to the land, as he dare for fear of death, and make his *continual claim*, and then make livery of it within the view; for this claim *settles the actual possession in him.* 38. Ass. 23.]

So if a man delivers me a deed of feoffment, and shews me the land a few off, and I agree and accept the deed, and durst not enter for fear of death; it is a good possession to have assise. Quære inde. Br. Assise, pl. 350. cites S. C.——Br. Feoffment, pl. 32. S. C. without any quære.

[2. If a man makes a deed of feoffment, with a letter of attorney to J. S. to make livery, *the attorney cannot* make livery within the view; for his warrant is to be intended of an actual livery, and not of a livery in law. Co. Litt. 52. b. cites it to be resolved. P. 3 El. B. in Tamham's case.]

S. P. per Brown and Weston J. D. 233. Marg. pl. 10. Mich. 6 and 7 Eliz. Apprice v. Rogers alias Sir Walter Dennis's case.

3. A *corporation* cannot execute a feoffment by livery within view. D. 233. pl. 11. Mich. 6 and 7 Eliz. Apprice v. Rogers, alias Sir Walter Dennis's case.

(N) In what Cases Feoffment may be made by Livery within View. To whom.

[1. IF *A. leases for years to B.* the *remainder to C. in fee*, and makes livery *to B.* within the view; this livery is void; for *none can take by force of a livery within the view, but he who takes the franktenement himself.* Co. Litt. 49. b.]

(O) In what Place. [185]

[1. IF a *man be in one county within the view of land in another county*, he may well make livery within the view of it. 38 E. 3. 11. b. adjudged Co. Litt. 48. b.]

S. P. If the *feoffee enters* Br. Feoffment de terre, pl. 11. cites 28 E. 3. 12.——But feoffee ought to execute it, and *take possession presently*, or the livery will not avail him; because a franktenement cannot be in abeyance. Mo. 85. Pasch. 7 Eliz. C. B. in the case of Bullock v. Burdet.

[2. Livery within the view is good, though there is * *not any charter of feoffment of it.* Co. Litt. 48. b.]

* But the law is altered in this point. See 29 Car. 2. 3.

(P) How,

(P) How, and in what Manner, Livery of Seiſin within the View may be made, [*or on the Land*, &c.].

* Fol. 7.

S. P. per Popham Ch. J. Poph. 49. in caſe of Collard v. Collard.

[1. 9 Rep. 137. Thoroughgood's caſe. A man makes charter of feoffment, and within the view of his lands, ſaies to the party, *ſee you the land; enter into* * *it and enjoy it according to the effect of this charter*; and the *feoffee enters*, this amounts to a good livery and ſeiſin of the land. But otherwiſe it would be, if he had been out of the view of the land at the ſpeaking of the words. 18 H. 6. 16. b. 6 Rep. Sharp's caſe. Co. Litt. 48. A man *bails the charter* of feoffment, *and ſays* to the feoffee, *God give you joy of it*; this is adjudged a good feoffment; yet no livery was made, and it does not appear that it was within view. 41 E. 3. 17. b. But it ſeems, it is to be intended, that it is a livery within the view, but it appears there that the feoffor was not upon the land. 41 Aſſ. 10. adjudged. Co. Litt. 48.]

Co. Lit. 48. a. Br. Feoffment de terres, pl. 62.

Perk. S. 213.

[2. If a man within the view of land *delivers a charter* of feoffment of it to the feoffee, and ſaith, *I will that you have the tenements which you ſee there, the which are comprized in this charter according to the purport of the charter*, and *ſhews the land*; this is a good livery within the view. 38 E. 3. 11. b. 12. adjudged. 38 Aſſ. 2. adjudged. Co. Litt. 48.]

[3. If a man delivers a deed of feoffment to the feoffee within the view, and *ſhews the land to him without ſaying any more, and the feoffee enters, and feoffor agrees to this entry*; yet it ſeems that it is not a good feoffment. Contra 38 E. 3. 12. per Mowbray.]

[4. If *A. enfeoffs B.* his ſon in fee, and after *B.* comes within the view, and *ſays to A.* that *where he had given to him the land, as fully as he had given it to him, he vouchſafes it in him*, [he gives it him again], and after, *A. enters*; this is not good livery within the view. Contra 39 Aſſ. 12. adjudged. But quere.]

Perk. S. 212. cites S. C.

[5. If a man *lying ſick upon certain land, of which he is ſeiſed in fee*, and agrees to make a feoffment of the land to another, and *ſays* to him, that *he vouchſafes, that he ſhall take ſeiſin immediately, and commands all his ſervants, that they take the feoffee as their lord, and maſter*; this is good livery within the view. 43 Aſſ. 20.]

Cro. E. 344. S. C. in B. R. Mo. 687. S. C.

[6. If a man ſeiſed in fee, *in conſideration of the marriage of his ſon with another, comes upon the land, and ſays* to him theſe words, *ſtand forth Euſtace*, (which was his name) *I do here give this land to thee and thy heirs*; this is good livery, (it ſeems that this is an actual livery). M. 37. El. in the Exchequer Chamber, per Cur. between Callard and Callard.]

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Poph. 47. S. C.—Mo. 687. S. C.—2 And. 64.

[7. *But* if he had ſaid, *ſtand forth Euſtace, I do here, reſerving an eſtate to me and my wife for our lives, give thee this land* [*and*] *to thy heirs.* This ſhall not be a livery, and ſo by conſequence a feoffment to the uſe of himſelf and his wife for life, the remainder

to

to Euſtace, though Euſtace cannot have any eſtate without ſuch operation; becauſe he *makes the reſervation firſt*, and ſo good, and his intent does not appear to paſs it by way of feoffment to uſe. M. 37 El. Exchequer Chamber, between Callard and Callard, adjudged, and the judgment before given in B. R. reverſed accordingly.]

Twiſden J. held, that though this had been by deed, yet no uſe would have ariſen; becauſe ſuch a reſervation could not be; for all the operation of the deed would have been hindred, and obſtructed by it. Sid. 82. Trin. 14 Car. 2. B. R. in the caſe of Foſter v. Foſter.——cites 38 H. 6. 38.

[8. If it *appears, that a man intended to make an actual livery*, this ſhall *never amount to a livery in law*. P. 2 Ja. B. agreed. D. 28 H. 8. 18. 107. If he makes *livery in the houſe*, and this *being in leaſe [is] void, it ſhall not paſs a cloſe then in the poſſeſſion of the feoffor*. Dubitatur.]

[9. If A. ſeiſed of a houſe, comes into the houſe, and ſays to B. *I here demiſe unto you my houſe, as long as I live, paying 20 l. per ann. &c.* This is not any livery, but only a limitation of the eſtate, and therefore nothing paſſes, but an eſtate at will. 6 *Rep.* 26. per Cur. Sharpe's Caſe. Co. Litt. 48.]

For to every livery is requiſite, either an act, which the law adjudges livery, or apt words amounting to it. 6 Rep. 26. Paſch. 42 Eliz. C. B. Sharp's caſe, alias Sharpe v. Swan.

[10. If a man *delivers a charter* of feoffment *upon the land*, to the feoffee, *in name of ſeiſin of the land contained* in the deed; this is good livery. Co. Litt. 48.]

A *feoffment* was made *of a houſe and land* which, was within the view of the houſe, and no livery made, but only the *deed* of feoffment *delivered as his deed in the houſe*; and this was adjudged no livery for the land; and per Popham, nor for the houſe, without *mentioning that he ſhould take the houſe*. Mo. 458. pl. 632. Mich. 38 and 39 Eliz. B. R. Sharpe v. Swaine.——9 Rep. 137. b. Thoroughgood's caſe.

[11. The *delivery of any thing upon the land, in name of ſeiſin of the land*, though it nothing concerns the land, as a *gold ring*, is good livery. Co. Litt. 48. and there cites 50 E. 3. Rot. Parliamenti, numero 30. to be reſolved by all the judges.]

9 Rep. 137. b. Thoroughgood's caſe.

(P. 2) Livery within the View Countermanded. By what Act.

1. *A. and B. ſomes, jointenants in fee*; *A. made* a charter of *feoffment to J. S.* and livery within view, *and bid him enter*, and after, before it was executed, *married him*. Reſolved, that this livery was well executed after marriage; for an intereſt paſſed by the livery within view, which cannot be countermanded. Hill. 23 & 24 Car. 2. B. R. Vent. 186. Parſons v. Perus.

Mod. 91. S. C. Parſons v. Perus.—2 Lev. 34. Parſons v. Peirce.

Fol. 8. (Q) [Livery.] By Letter of Attorney. How it is to be executed.

[1. IF the deed of *feoffment be to J.* [*S.*] *and the letter of attorney to J. S. Capellano*; he cannot deliver ſeiſin to J. S. unleſs he be a chaplain. 4 H. 6. 1. b.]

Some hold the livery ſo made to be void. Cc. Litt. 258. a. b.—Br. Feoffment de terre, pl. 27. cites 26 Aſſ. 39. that Thorpe held it good, but Mowbray the contrary. Perk. ſ. 192. S. P. and that it has been held a diſſeiſin; but adds a quære, becauſe the attorney has done all the commandment of his maſter and more.

[2. If *a deed* of feoffment, with letter of attorney to make livery, *be ſimple, and the attorney makes livery upon condition*, yet it is good execution of the letter of attorney, in as much as he has * performed all which he was commanded, and more. (But the condition is void) 26 Aſſ. 39. Agreed.]

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Br. Feoffment pl. 27. S. C. and that Thorpe held it good. but Mowbray contra.—Br. Conditions, pl. 108. cites S. C. that Skipwith held it good, but Mowbray contra.

[3. If a *deed* of feoffment, and letter of attorney to make livery *be ſimple, and after the feoffor commands the attorney to make livery upon a certain condition*, and he does it accordingly; it ſeems this is not a good feoffment, but a diſſeiſin to the feoffor. For it ſeems that it is a *revocation* of the firſt letter of attorney, and then this cannot create a new power to make the feoffment without deed. Dubitatur 26 Aſſ. 39.]

But if he makes livery unto one only, and *not in the name of both*, nor according to the deed, it ſeems this is a diſſeiſin to the feoffor; becauſe he has diſobeyed the commandment of his maſter. See Perk. ſ. 188.——Feoffment to two, with letter of attorney to make livery; *one dies.*—— Livery may be *made to ſurvivor*, per Anderſon. Mo. 280, 281. Mich. 31 and 32 Eliz. C. B. Battey v. Trevillion.

[4. If a man makes a *deed* of feoffment *to two*, with a letter of attorney to J. S. to make livery, and the attorney makes *livery to one of them in the name of both.* This is a good livery; for it is an actual livery to both. Tr. 1651. Intratur Tr. 1650. Rot. 1768.]

5. If the attorney *does the command of his maſter, and more*, yet it ſhall be good for that, which hath reference to his commandment, and void for the reſt, unleſs in ſpecial caſes. Perk. ſ. 189.

6. *As if* the warrant of attorney be *to make livery unto one* man, and the attorney *make livery unto two*; it is good to him to whom the warrant doth extend, and void unto the other. Perk. ſ. 189.

7. And *ſo* is it, if the warrant of attorney be *to make livery of Black Acre*, and the attorney *makes livery of White Acre and Black Acre*; in this caſe all is not void; for it is good for Black Acre, becauſe the attorney hath done all the commandment of his maſter, and more. Perk. ſ. 189.

8. If a warrant of attorney be made to make livery of ſeiſin *unto two*, and *one of them die* before the livery of ſeiſin made, *and the attorney make livery* of ſeiſin, *according unto the deed, unto the other* feoffee who is living, it is good unto him for all the land. Perk. ſ. 192. cites 22 Aſſ. 9.

9. The

9. The attorney *muſt purſue his warrant*, otherwiſe he does not deliver ſeiſin by force of the deed. Co. Lit. 52. a.

10. If letter of attorney be to deliver ſeiſin *upon condition*, and the attorney *delivers it abſolutely*, it is void. And ſo ſome hold, if the warrant be abſolute, and he delivers it on condition, it is void. Co. Litt. 258. a. b.———Co. Litt. ſ. 359.

11. If letter of attorney be *to three jointly and ſeverally* to make livery; one only may make livery, or all three may; but two cannot. Br. Jointenant, pl. 1. cites 27 H. 8. 6.

12. *But* in ſuch caſe it was doubted, if livery *made by two, the other being preſent, and ſaying or doing nothing*, be good livery. It was agreed, if the third had been abſent, it had not been good. Paſch. 38 H. 8. D. 62. pl. 34. Pennington v. Morſe.

13. Letter of attorney to A. B. and C. *conjunctim vel diviſim in omnia & ſingula*, &c. each by themſelves, in ſeveral parts of the lands, and at ſeveral times made livery, and good. Le. 192. Mich. 31 and 32 Eliz. C. B. Petty v. Trevillian.——4 Le. 195. S. C. And. 245. Betty v. Trevillian. S. C.—Mo. 278. S. C. Battey v. Trevillian. S. C. cited Mo. 516.

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14. When letter of attorney is made to four *conjunctim & diviſim*, and one executes livery in one part. By this act the authority is not abſolutely executed or determined, but that they conjunctim & diviſim may after proceed to give livery in the other parts entirely, or by piecemeal, and livery is well executed *by one in one parcel, and by other in other parcel.* Mo. 280. Mich. 31 and 32 Eliz. C. B. Battey v. Trevillion.———And. 264. S. C.

15. Feoffment of 20 acres with letter of attorney to make livery. If 1 acre or 19 acres are *evicted* by lawful entry or action after the letter of attorney was made.——Yet the attorney may make livery in that which remains. Per Anderſon Ch. J. Mo. 280. ut ſup. If a man makes letter of attorney to make livery to *W.* or to *S.* and he *make livery to* either of them, it is good; *but* if he makes livery *to both*, it is void; for it is contrary to his warrant. Br. Feoffment de terre, pl. 83. cites 11 H. 7. 13. per Davers and Huſſey. ———S. P. Br. Grants, pl. 172. ſays, that this ſeems to be intended, where he makes one deed of feoffment to W. and another to S. And yet he makes a quære, if livery by attorney be not good by the letter of attorney without deed of feoffment; for the feoffor himſelf may make livery by parol without deed.

16. If he makes *general livery* of all *where all cannot paſs*, by reaſon of the eviction, yet it ſhall be good for that which may paſs. Mo. 280. ut ſup.

17. *Feoffment of two acres, whereof one is in leaſe for years*, with letter of attorney to make livery thereof, and ſays not, (or of any part thereof); yet may the attorney make livery in the acre in poſſeſſion alone; and if he makes livery *in the acre in poſſeſſion only*, in the name of both; this ſhall be good of the acre in poſſeſſion, though it cannot be of that in reverſion, becauſe it is in leaſe. Per Anderſon Ch. J. Mo. 280. ut ſup.——Poph. 103. Slaning's caſe.

18. If a letter of attorney be *made to enter into all, or any part of lands in the name of the whole*, and to make livery; the attorney may enter into any part, though in the poſſeſſion of *ſeveral tenants*, and make

make *livery severally* of the several tenements apart that he enters into the poſſeſſion of. Per Hale Ch. Baron and tot. Cur. Mich. 14. Car. 2. in Scacc. Hard. 314. Friend v. Drury.

S. C. cited Arg. 2 Mod. 78. Paſch. 28 Car. 2. in caſe of NORRIS v. TRIST; but ſerjeant Maynard replied, that

19. A. ſeiſed of 2 *acres*, makes feoffment of both, and *letter of attorney to enter into both, and deliver ſeiſin* of both according to the form, &c. of the deed. The attorney *enters into one only*, and delivers ſeiſin ſecundum formam chartæ; this livery is good, though he ſaid not in the name of both; for when he delivered ſeiſin of one *ſecundum formam chartæ*, it is tantamount, and implies a livery of both. Co. Litt. 52.

my Ld Coke erred much in this, and that it is not law; but if the *authority* be *general*, as *to make livery and ſeiſin*, and he (enters into or) takes poſſeſſion of one, and then makes livery of more ſecundum formam chartæ, it is good; and ſaid that this is the difference taken in the books. 5 E. 3. 65. 3 E. 3. 32. 27 H. 8. 6.

20. A deed was made to *three*, *habend. to two for their lives*, remainder *to the third for life*, and there was a *letter of attorney to make livery to the two*, but inſtead of making livery to the two, he *made livery to all three*. The whole Court held the livery good, and the Chief Juſtice ſaid, that whatever the ancient opinions were about purſuing authorities with great exactneſs and nicety, yet this matter of livery upon *indorſements of writings* was always *favourably expounded* of later times, *unleſs* where it plainly appeared that it was *not purſued at all*. *As* if a letter of attorney be made *to three jointly and ſeverally*, *two cannot execute* it, becauſe they are not the parties delegated; for they do not agree with the authority, and judgment was given accordingly. 2 Mod. 78, 79. Paſch. 28 Car. 2. C. B. Norris v. Triſt.

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(R) Feoffment by Letter of Attorney.

[1. A Feoffment *may be made* by attorney. 11 H. 4. 71. 26 Aſſ. 39.]

E. P. per Manwood Dal. 95. pl. 23.

[2. *So* it may be *received* by attorney. 11 H. 4. 71.]

[3. A *ſtranger cannot* make feoffment *of my land by my aſſent*; for it is not my feoffment. 40 Aſſ. 38.]

[4. A feoffment and livery cannot be made by an attorney of the feoffor *by parol* without deed. Co. Litt. 48. b. 52.]

[5. An attorney of the feoffee *by parol*, without letter of attorney by deed made to him *cannot take livery*. Co. Litt. 48. b. Mich. 11 Car. B. R. per Cur. upon evidence at the bar, between Palfreman and Grobie.]

[6. If *leaſe for years be made to A.* by deed or without deed, the *remainder in fee to B.* and *livery is made to A.* This is good, though he be but an attorney to take livery for him in remainder; for this enures only to him in remainder. Lit. 8. 60. Co. Litt. 49. b.]

Though livery cannot be made

[7. If a *leaſe* be made *to A. and B. for years* without deed, the *remainder in fee to C.* and *livery is made to A. in the abſence of B.* in

in the name of both; this is good livery to veſt the remainder in *C.* Co. Litt. 49. b.] to one in name of him, and of another, who is abſent, by which any eſtate of freehold ſhall paſs to him who is abſent, *without deed*, becauſe his eſtate is only to commence by the livery; yet when a leaſe is made to two for years without deed, the remainder for life, the *leſſees* immediately *have an intereſt in the land, before any livery made*. And therefore livery made to one, who has intereſt, in name of him and the other, ſuffices to this purpoſe. 5 Rep. 95. a. 39 Eliz. in the Exchequer, in Barwick's caſe.

[8. *But if a warrant* of attorney *be made to two to take livery jointly*, and livery is made to one of them, in the abſence of the other, in the name of both, it is void. Co. Litt. 49. b.] In caſe of a *leaſe for years to A. and B. remainder to C. for life*, a *diverſity* was taken by ſome *between two joint attornies*, who have expreſs authority to take livery and ſeiſin by deed, *and two joint leſſees*, who have power to receive livery for the benefit of another, by warrant in law; for *livery* made *to one attorney in name of both, is not good*; for he does not purſue his expreſs warrant; for himſelf only had not warrant; for they both make but one attorney. But in caſe of two joint leſſees, the livery made *to one leſſee in name of both*, is good; for they had an intereſt in the land before their entry, and the livery to one in name of both, makes an actual poſſeſſion in both, which is ſufficient to ſupport the remainder to C. And in the one caſe the livery is made to the *leſſees*, who *have intereſt*; and in the other, to him, who made the warrant of attorney by his attornies, who *have but a bare authority*. Trin. 39 Eliz. in Scacc. 5 Rep. 94. b. 95. a. in Barwick's caſe.——Co. Litt. 49. b.

[9. If *A. makes* a deed of *feoffment to B. and C.* with *letter of attorney* to make livery, and *he makes livery to B. in the abſence of C. in the name of both*, it is good. Co. Litt. 52.]

[10. If the land be *in leaſe*, if letter of attorney be made the better way is to *add this clauſe*, *Ac omnes alios inde expellendi*, otherwiſe it is a queſtion, if he may enter upon leſſee. D. 2 and 3. M. 131. * 11.] It is no good feoffment, becauſe it is a diſſeiſin to the leſſee, and not a lawful act, per 2 J. but 5 J. and the attorney, and ſolicitor general e contra, Paſch. 2 and 3. P. & M. D. 131. pl. 71.—It ſeems, that the giving the attorney power to make livery is ſufficient. See Mo. 91. pl. 226 Trin. 10 Eliz. per Dyer and Welch, who cited it as the E. of Warwick's caſe.——* It ſhould be 71.

[11. *But* if it has *not* this clauſe, it ſeems he may enter and make livery. D. 2 and 3 Ma. 71. Opinion. P. 31 El. 6. Rot. 514. between Carter and Cleypole adjudged, and this affirmed in writ of error. H. 32 El. Rot. 791. Co. Litt. 52 b. D. 17 El. 340. 49.]

[12. If a charter of feoffment be made, by deed indented, between A. and B. with *letter of attorney to C.* to make livery; though *C. be not any party* * *to the deed*, yet the warrant of attorney is good, and the eſtate ſhall paſs by this livery. B. R. between Dicker and Moland, Rot. adjudged per Cur. upon ſpecial verdict, in which the opinion of Coke is denied, contra Co. Litt. 52. b.] [190] * Fol. 9.

[13. *One attorney cannot make* letter of attorney to *another*, to make livery. 18 E. 4. 12. b. 19 H. 8. 10.]

[14. If the letter of *attorney be to deliver ſeiſin upon condition, and he delivers it without* condition; this is not good, but he is a diſſeiſor. 11 H. 4. 3.] Perk. ſ. 188.

[15. An attorney *cannot* make livery *within the view*; for his warrant is intendible in law, of an actual and expreſs livery, and not

of a livery in law. Co. Litt. 52. P. 3 El. B. reſolved Tarham's caſe.]

[16. If A. be *diſſeiſed of Black Acre and White Acre*, and a warrant of *attorney* is made *to enter into both* and make livery, and the attorney *enters into Black Acre only*, and makes livery *ſecundum formam chartæ*; there the livery is void, becauſe he does not purſue his warrant; for the eſtate of the diſſeiſor in White Acre cannot be deveſted without an entry. Co. Litt. 52.]

17. If a man makes 20 *ſeveral deeds* of feoffment *of one acre* of land, ſo that they *all accord in ſubſtance*, and delivers *ſeiſin upon all*, it is good. Held in Cam. Scacc. Br. Feoffment de terre, pl. 12. cites 7 H. 6. 44.

18. If a man makes letter of attorney to make livery *to W. or to S.* and he *makes livery to either* of them, it is good. *But* if he makes livery *to both*, it is void; for it is contrary to his warrant. And hence it ſeems, that the feoffment is good by the livery, *by the letter of attorney without deed of the feoffment*. Br. Feoffment de terre, pl. 83. cites 11 H. 7. 13.

Arg. 2 Roll. Rep. 274.

19. If letter of attorney to receive livery on a feoffment *miſrecites the feoffment*, the livery is void. Cro. E. 603. Hill. 40 Eliz. C. B. Marriot v. Smith.

(R. 2) Who may be Attorney to make Livery.

Monks, &c. and feme coverts may be attornies to make livery for a perſon able to make a feoffment, becauſe the feoffee in ſuch caſe is not in the land, by him that makes the livery of ſeiſin, but is in the land by the feoffor. But if they do not make ſuch livery of ſeiſin, according to their warrant of attorney: then in ſome caſes it is a diſſeiſin unto the feoffor, &c. Perk. ſ. 187.—Br. Feoffment de terre, pl. 48. cites 18 E. 4. 27.——Br. Coverture, &c. pl. 55. cites 21 E. 4. 18.——Br. Attorney, pl. 5. Perk. ſ. 199.

1. Few perſons are diſabled to be private attornies, to make livery of ſeiſin. For *monks*, *infants*, *feme coverts*, perſons *attainted*, *excommunicated*, *villeins*, *aliens*, &c. may be; and a feme may be attorney to deliver ſeiſin *to the huſband*, *and the huſband to the wife*, and he in *remainder to leſſee for life*. Co. Litt. 52.

2. If *a man*, *ſeized* of land *in the right of his wife*, *leaſe* the ſame land *for life*, *reſerving rent*, and makes a *letter of attorney unto the wife*, to make livery of ſeiſin, *and ſhe makes livery* of ſeiſin accordingly, and the huſband dies, and the wife accepts the rent, yet ſhe ſhall have cui in vita; for this acceptance cannot make the leaſe good, inſomuch as ſhe is a ſtranger unto the leſſee; for the leſſee took nothing by the wife, notwithſtanding that ſhe made livery of ſeiſin; for ſhe made that but *as ſervant* unto her huſband. Perk. ſ. 199. cites 26 H. 8.

And. 247. S. C.—— Mo. 280. the 4th reſolution in S. C. By name of Battey v. Trevillion.

3. If a letter of attorney be made to *leſſee* to make livery, and he makes it accordingly; yet this does not determine his intereſt in the land; for what he does, is as officer or ſervant to the leſſor. Mich. 31 and 32 Eliz. C. B. Le. 192. Petty v. Trevillian.

(S) Feoffment by Attorney. At what time it may be made.

[1. IF a man makes a deed of feoffment with letter of attorney to J. S. *to deliver ſeiſin after his death*, the attorney cannot deliver ſeiſin during his life, and if he dies he is a diſſeiſor. 40 Aſſ. 38. Curia. (yet he cannot make livery * after his death.)] If the *warrant* of attorney be *to make livery* of ſeiſin *after the death of a ſtranger*, and he make livery of ſeiſin in his life time, this is a diſſeiſin unto the feoffor, Perk. ſ. 188. cites 11 H. 4. 3. 40. Aſſ. 38.——Br. Feoffments, pl. 34. S. C.——* Ibid. S. P. per Brooke.——Agreed to be law. Holt's Rep. 463, 464——* Co. Litt. f. 66.

[2. If a man makes a deed of *leaſe for lives* rendering rent payable at 4 quarters of the year with letter of attorney to J. S. to make livery. J. S. *may make livery after 3 of the quarters paſt* well enough; for the *leſſor in the mean time continuing in poſſeſſion* has not any prejudice. P. 10 J. 6. adjudged between Walters, and the Dean and Chapter of Norwich.] Mo. 875. S. C.——2 Brownl. 161. S. C.

[3. If A. be *diſſeiſed* of land, and after makes a charter of feoffment to B. with letter of attorney to make livery, who doth it accordingly; this is a good feoffment, though he was *out of poſſeſſion* at the time of the charter made; for the authority given by the letter of attorney, was executory, and nothing paſſed by delivery of the deed, till livery made. Co. Litt. 48. b.] Co. Litt. 48. b. ſays, with letter of attorney *(to enter and take poſſeſſion and after)* to make livery *(ſecundum formam chartæ)*——And Neſſ. a. 845. pl. 7. takes in thoſe words, but without quoting the book. But there it is miſprinted (diſſeiſor for diſſeiſee) but he quotes 37 Eliz. BROWN v. TERRY, as is in the marg. of Co. Litt.—— The caſe was, land was ſeiſed for the Queen on an office wrongfully found, and the heir, after iſſue tried and judgment given againſt the Queen, made a feoffment; hanging this iſſue, and before the writ of amoveas manum executed, the attorney made livery according to the deed. Adjudged that the livery was good; for by the judgment the Queen's hands were immediately amoved, and he had authority to execute livery on the land. Cro. E. 523. Mich. 38 and 39 Eliz. C. B. Brown v. Terry.——S. C. cited 2 Bulſ. 303. Arg.

4. If *mayor and commonalty generally, without naming the proper name of the mayor, make a feoffment, and letter of attorney* to make livery, and the *mayor dies, and another* mayor *is elected*, and the *attorney makes livery*, this is good enough, per Moor Juſtice. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

5. Leaſe for 21 years, and a covenant after in the ſame deed, that after the expiring of the ſaid 21 years, the ſaid leſſees ſhall enjoy for term of their lives. *To make* this a *remainder for 3 lives*, the *delivery of the deed and the livery of ſeiſin muſt be at the ſame time*; but if leſſor firſt delivers the deed, and the attorney delivers ſeiſin after, the livery is void; for by this livery it cannot paſs as a remainder. 2 Eliz. C. B. And. 8. Okeden v. Sendy.——Mo. 14. S. C. Helier v. Okeden. Bendl. 85. S. C. See Co. Litt. 49. a. b.

6. Feoffment on *condition to re-infeoff baron and feme* and the heirs of their bodies. Feoffee makes gift in tail accordingly, and letter of attorney to make livery; *before livery executed baron dies*; yet the attorney may make *livery to the widow*, and ſhe ſhall take in

tail according to the gift, per Periam J. Mich. 31 and 32 Eliz. C. B. Mo. 280. Batty v. Trevillion.

7. The demiſe was to A. for life; *habend. a die indenturæ prædictæ*, the jury found that he demiſed the 10th June 44 Eliz. by indenture of the ſame date; it is a demiſe at that time, and the livery not being made by the attorney till the 23 July was void, per 3 J. And per Popham Ch. J. if the *deed had been delivered after the day of the date*, and then livery had been made by attorney, it had been well enough, and had been ſo adjudged. Cro. J. 153. Paſch. 5 Jac. B. R. Hennings v. Paucharden. —— Roll. 828. pl. 5. 6. S. C.

8. William **Lord Dacres** the father made a feoffment in fee *to his two ſons, upon condition*, that they ſhould *make a feoffment over to Thomas Dacres and* one *Middleton with a letter of attorney*; all the deeds were ready to be delivered; but *before the father had delivered the deed to his ſons, they* had *delivered their deed* of feoffment *to Thomas Dacres and Middleton, with a letter of attorney to B. G. to make livery*; afterwards the father delivered his deed, and then livery was made by virtue of the letter of attorney; adjudged that the livery was void; becauſe the ſons, at the time they made the feoffment, had nothing to paſs. Cited by Coke Ch. J. 2 Bulſt. 304. Hill. 12 Jac. in the caſe of Butler v. Finch, as Lord Dacres' caſe.

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Feoffment was made *habendum after Mich.* and the attorney made livery *after Mich.* yet it was held void, cited per

9. Leaſe for life to commence at Mich. and leſſor makes livery *after Mich.* it is good livery.—*So* if he makes letter of attorney to make livery after Mich.—*But* if he makes letter of attorney *to make livery generally*, and the attorney makes livery after Mich. This is a diſſeiſin to the leſſor. 2 Roll. R. 366. Hill. 17 Jac. B. R. Tiler's caſe.—And if leſſor or attorney had made livery before Mich. it had been void. Arg. 2 Roll. R. 109. cites 13 Jac.* Butler v. Finch.

Popham Cro. E. 585.—The *difference* is, where the livery is made *by the leſſor in perſon*, and where *by letter of attorney*, being in the ſame charter, *generally* made; but if the letter of attorney be *to make livery after Mich.* then in both caſes it is good enough; for there is *no intention, that the livery ſhould operate futurely*, but that livery ſhall be made, when it ſhould operate, and the eſtate ſhould be good preſently. Cro. J. 563. Hill. 17 Jac. B. R. Greenwood v. Tyler.——Dal. 111. Stileman v. Warren.——* 2 Bulſ. 302. S. C.

[See (U. 3)—Eſtate (B)]

(T) Livery. How it may be made.

[1. IF *diverſe parcels* of land *are contained* in a deed of feoffment, and the *feoffor delivers* ſeiſin of *one parcel according to the deed*, though he doth not ſay in the name of the whole, yet all the parcels paſs; becauſe the deed contains the whole. Co. Litt. 48. a.]

But it is otherwiſe, if the feoffor

[2. *So* if there are *diverſe feoffees* named in a deed, and *feoffor makes livery to one* of the feoffees *according to the deed*, without ſaying

saying in the name of the whole; yet the land shall pass to all. Co. Litt. 48. *a.*]

ment had been *by parol.* D. 14. pl. 71. Trin. 28 H. 8. Jopson v. Underdon.

[3. If A. be to make a feoffment to B. and C. *without deed, and he makes livery to B. in the absence of C. in the name of both*, this is void as to C. because a man, who is absent, cannot take a frank-tenement by livery, but by an attorney, lawfully authorized to receive livery by deed. Co. Litt. 49. b.]

Trin. 28 H. 8. D. 14. a. pl. 71. S. P. Jopson v. Underdon.

[4. *But* if a *charter* of feoffment be made *to A. and B. and livery is made* * *to A. in the absence of B. in the name of both*, this is good; because it is by deed. Co. Litt. 49. b.]

*Fol. 10.

5. The manner to deliver seisin of land by force of a feoffment is to *remove all persons off the land, and one* being *upon the land in the presence of all* the persons that are there, *to shew cause of their coming, and* if the feoffment be by deed, *to read the deed in English, and* the deed being read, the *feoffor to enter on the land and take a clod* of the same land, *and deliver the same, together with the deed*, unto the feoffee, *in the name of seisin* of the same land, to have, hold and enjoy, according unto the purport of the same deed, &c. Perk. s. 209. cites 39 Ass. * 12.

* The book seems miscited.

6. *So* shall it be done, *if livery* of seisin *be to be made by* a stranger, by force of a warrant of *attorney*, mutatis mutandis, &c. Perk. s. 210.

7. If there are *four feoffees*, and *one makes letter of attorney* to one R. to take livery in the name of the feoffee and the co-feoffees, according to the deed, and to do all other things for him and his feoffees, which * he might have done if he was personally present, and the *feoffor makes livery to the attorney* in name of that feoffee, and the other co-feoffees to their uses according to the deed; this is good to all. 2 And. 196. in the Court of Wards, Davy and Abbot.

Br. Feoffment de terre, pl. 67. cites Nothing passes but only to him, who made the letter of attorney.

8. Of *water in a standing pool*, livery ought to be with a dish of part of the water; but no livery can be of *running water.* Mich. 6 Jac. B. R. 4 Le. 238. pl. 385. Anon.

*[193]

9. Feoffment to *corporation and another person*, there ought to be *several liveries*, in respect of their several capacities which makes them tenants in common. Finch. 23. b.

10. Livery cannot be made to operate *in futuro.* Raym. 207. Mich. 22 Car. 2. B. R.

Dal. 111. 16 Eliz. Stileman v. Warren.——Roll. Rep. 423. Hill. 21 Jac. B. R. in the Serjeant's case.

11. A feoffment was made *habendum to A. and B. for life, remainder to C.* and livery was made to all three. Resolved it was good to two for their lives remainder to the third. 2 Mod. 79. Pasch. 28 Car. 2. C. B. Norris v. Trist.

(T. 2) Livery. At what Time to be made.

1. If a man makes a *leaſe for years to A. and B. remainder to C. for life*; in this caſe the leſſor *ought to make livery to A. and B. before their entry*; and by the livery to A. and B. C. ſhall take a preſent eſtate for life by way of remainder, by force of the livery made to the leſſees for years. And with this agrees * Littleton, lib. primo, fo. 12. b. 5 Rep. 94. b. Trin. 39 Eliz. in Scacc. agreed in Barwick's caſe.

* Litt. ſ. 60.

A leaſe for life to commence at Mich. and leſſor makes livery *after Mich.* it is good livery, Hill. 17 Jac. B. R. 2 Roll. R. 366. Tiler's caſe.—But if leſſor had made livery before Mich. it had been void. Arg. 2 Roll. R. 169. cites 13 Jac. * Butler v. Finch.——Dal. 111. 16 Eliz. Stileman v. Warren.——* 2 Bulſ. 302. S. C.——See (S) pl. 9. and the notes thereon.

2. Livery made *after the day, not working futurely*, is good enough. Hill. 15 Jac. B. R. Cro. J. 458. Smith v. Bole.

3. Feoffment *habendum a die datus*; if the ſeiſin be not made at the laſt inſtant of the day, it is not good, per Roll. Ch. J. Sti. 189. Hill. 1649. in caſe of Watts v. Dix.

(U) Livery. How it may be made, Secundum formam Chartæ, [*as to the Name and Thing.*]

See (U. 2)

[1. IF a man makes a *charter* by which he grants the land *in fee and delivers ſeiſin for life, ſecundum formam chartæ*, the fee ſhall paſs; for this ſhall be taken moſt ſtrong againſt the feoffor; for by the ſaid words, ſecundum formam chartæ, are intended according to the *quantity and quality of the effectual eſtate in the deed.* Co. Litt. 48.]

[2. If a man *leaſe for years* by deed, and delivers ſeiſin according to the form and effect of the deed; yet he has but an eſtate for years, and the livery is void. Co. Litt. 48. b.]

5 Rep. 94. b. 11 Rep. 78. Cro. E. 254. S. C. S. C. cited Hob. 171.

[3. If *A.* by deed *gives land to B.* to have *after the death of A. to B. and his heirs*, this is void; becauſe he cannot create a particular eſtate in himſelf, and if livery be made according to the form and effect of the deed, this is void; becauſe it *refers to a deed which is void* in law. Mich. 33 and 34 Eliz. B. R. adjudged between Hogg and Croſs, cited Co. Litt. 48. b.]

[194]

D. 281. a. pl. 19.

[4. If a man *covenants to make a feoffment of the value of* 50 *marks land* to J. S. and after, *makes feoffment of land of a far greater value without aſſigning where the* 50 *marks land ſhall be.* This is void, for the *uncertainty*, and no more ſhall paſs than the place, where the livery was made, P. 13 Ja. B. R. per Cur. between Woodhouſe and Futter.]

[5. *So* in the ſame caſe the feoffor *cannot after the livery aſſign* 50 *marks of land*, to make ſo much to paſs by the ſaid livery, in as much

much as it does not paſs at firſt, P. 13 Ja. B. R. per Cur. between Woodhouſe and Futter.]

[6. *But* otherwiſe it would be, if he *had aſſigned* where the 50 marks land ſhould be, *before the livery* made. P. 13 Ja. B. R. per Cur. between Woodhouſe and Futter.]

[7. *So* it ſeems it would be, if he had aſſigned it *upon the livery made*; for then the aſſignment is *uno flatu* with the livery, contra P. 13 Ja. B. R.]

[8. If a man *covenants to make a feoffment of all his land, whereof* 50 *marks value ſhall be to ſuch a uſe, and the other to other uſe*, &c, and after makes the feoffment of all accordingly, *without aſſigning* the 50 marks value, he cannot after aſſign it. P. 13 Ja. B. R. between Woodhouſe and Futter.]

[9. If a man has a *moveable eſtate* of inheritance *in* 13 *acres parcel of a manor*, they will paſs *by name of the manor*. Co. Litt. 48. b.]

[10. If a man has a *moveable eſtate* of inheritance *in* 13 *acres parcel of a meadow of* 80 *acres*, the charter of *feoffment ought to be generally of* 13 *acres lying within the meadow* of 80 acres generally without bounding, or deſcribing of it in certainty and *livery may be of the* 13 *acres allotted to the feoffor for a year* ſecundum formam chartæ; and this is good livery to paſs the content of 13 acres in what place ſoever it lies. Co. Litt. 48. b.]

This is to be underſtood if the 13 acres are in groſs and not parcel of a manor. Co. Litt. 48. b.

[11. If a *manor* be ſeparated, and *divided* between two, ſo that the *one has one part one year, and the other part the next year*, and ſo the other, and ſo they have moveable franktenements; in this caſe, livery ought to be made in the manor. Co. Litt. 48. b.]

[12. *But* where *two manors* are ſeparated, and divided, *alternis vicibus*; there the charter of *feoffment ought to be made in both, and livery in this manor* whereof he is ſeiſed in any one year, ſecundum formam chartæ, *and the next year in the other*, ſecundum formam chartæ *; for there are two diſtinct manors and ſeveral eſtates in them. Co. Litt. 48. b.]

* Fol. 11.

[[13] 12. If *A. ſeiſed of* 100 *acres* of land in fee *enfeoffs B. of* 18 of the ſaid 100 acres *verſus auſtrum*, or verſus orientem, and *makes livery*; this is good; for this is certain at the time of the feoffment. D. 11 El. * 181. 19. 23 El. 372. 10.]

* This ſhould be 281.

[[14] 6. *But* if A. ſeiſed of 100 acres in fee, enfeoffs B. of 18 of the ſaid 100 acres *habendum ſibi & hæredibus ſuis ad electionem ipſius B. & hæredum ſuorum quandocunque eis placeret*, and makes livery accordingly, this is a void feoffment for the uncertainty, where the 18 acres ſhall be among the 100 acres; for the franktenement of the 18 acres ought to paſs abſque aliquo temporis intervallo, from the feoffor to the feoffee; for a livery cannot operate in futuro. D. 11 El. * 218. 17. 18. 19. adjudged.]

In this caſe the *feoffee died before election*, and the judgment according to And. 11. ſeems to be grounded only upon the *election by the heir*; and Anderſon puts a quære, if the feoffee himſelf might have made election, or not, and the livery take effect by ſuch election and Hob. 174. cites it ſo, as that the election of the feoffee himſelf makes the grant good. See And. 11. and 12. BULLOCK'S CASE, cited 2 Rep. 36. b. f.——And. 11. Bullock v. Burdet.——Mo. 81. S. C.——Bendl. 148.——* This ſhould be 281.

15 *Deed* of feoffment is *dated at Mich. next*, and *livery made now* ſecundum formam chartæ. The freehold is in the feoffee preſently. Mo. 85. 86. Paſch. 7 Eliz. in caſe of Bullock v. Burdet.

[195] 16. Where the *deed is void*, livery ſecundum formam chartæ is void alſo. Co. Litt. 48. b.—Cro. E. 603. Hill. 40 Eliz. C. B. Mariot v. Smith.

30 E. 3. 31. b. 2 Buls. 302. Butler v. Fincher.—Roll. R. 229. S. C.

Roll. R. 229. S. C. 17. A leaſe for life is *made* 25 *March*, *habendum a die datus*, with letter of attorney in the deed to make livery ſecundum formam chartæ, the attorney *makes livery the* 26*th*, this is not good. 2 Buls. 302. Hill. 12 Jac. B. R. Butler v. Fincher.

18. Though a grant of land to A. and B. habendum *one moiety to one, and the other to the other*, makes a tenancy in common; yet they are diſtinct conveyances, though it be really one deed, and livery *to the one*, ſecundum formam chartæ, will not avail the other, per Holt Ch. J. 12 Mod. Mich. 301. 11 W. 3. in caſe of Fiſher v. Wigg.

(U. 2) Secundum formam Chartæ. Where the *Deed containes more or leſs* than Seiſin is delivered of.

1. If a man be enfeoffed by deed *of two acres*, *to have* and to hold *three acres*, *and livery* of ſeiſin is made to him, acording to the deed, *in the two acres*; the third acre, of which there was no ſpeech in the premiſſes of the deed, ſhall not paſs by the deed: *but if livery* of ſeiſin *be made in this acre*, then it ſhall paſs by the livery of ſeiſin, &c. Perk. S. 165.

2. If livery be made *to one of the feoffees* according to the deed, it paſſes the land to all, ſo of the ſeiſin of one parcel; but the beſt way is to ſay in the name of the whole, or of all the feoffees. Co. Litt. 48. a.

S. P. if it be for life expreſsly, and alſo according to the deed; becauſe in this caſe being made ſecundum formam chartæ, the livery has a *reference* to the deed. But if feoffor delivers ſeiſin for life in ſuch caſe, and not ſecundum formam chartæ, the feoffee ſhall hold but for life. Co. Litt. 222. b.

3. *If a man makes a charter in fee, and makes livery for life*, ſecundum formam chartæ, it paſſes the whole fee ſimple. Co. Litt. 48.

S. P. and *ſo vice verſa*. Co. Litt. 258. a. b.

4. If a deed contains no *condition*, but livery does, the land paſſes not by the deed. Litt S. 359.

5. If the livery be *larger than the agreement*, ſome hold, that the eſtate ſhall be according to the agreement. Co. Litt. 222. b.

(U. 3) Livery.

(U. 3) Livery. Secundum formam Chartæ, *at what Time* it may be.

1. Leaſe for lives to commence *a die datus* was reſolved good; becauſe livery was executed after the day of the date. But if before, it ſhould not. Mo. 637. Mellow v. May.—See 1 Roll. 828. 50. S. P.

But where the *date was* the 30 July, 21 *Eliz.* and the *livery was* 23 *Eliz.* ſecundum formam chartæ; the livery *ſo long after* will not help the leaſe, which was habend. a die datus. Cro. E. 873. Hill. 44 Eliz C. B. Mellows v. May.——*So* if the attorney makes livery *the ſame day*, ſecundum formam chartæ, it is void. Cro. Car. 388. Mich. 10 Car. B. R. Bull v. Wyatt. ——*But* ſuch livery *muſt be* made *the next day* if it be to be made ſecundum formam chartæ; for that is forma chartæ, per Doderidge J. 2 Buls. 306. Hill. 12 Jac. in caſe of Butler v. Fincher.

(X) Livery. How it may be, where *of Parcel in* the *Name of the Whole*.

[1. IF a man makes feoffment of *land in diverſe places in the ſame county*, and makes livery in the land *in one place in name of all*, the whole ſhall paſs. Perkins S. 226.] Perk. f. 226. cites 9 H. 7. 25.

[2. If a man makes a deed of feoffment of *land in two counties*, and makes livery of the land *in one county in the name of the whole*; yet the land which is in the other county ſhall not paſs by it. 22 H. 6. 10. b. Doctor and Student 100. b. Perkins 227. Contra 26 Aſſ. 40.] [196] Br. Entre Cong. pl. 35. cites 22 H. 6. 10.

[3. If *divers parcels* of land be contained in a deed of feoffment, and the *feoffor delivers ſeiſin of one parcel according to the deed*, though he *does not ſay in the name of the whole*, yet all the parcels paſs, becauſe the deed contains all. Co. Litt. 48.]

4. If a man is *ſeiſed of two acres, the one in fee and the other for life*, if he makes *feoffment of both* acres, and makes *livery in the acre of fee in name of both* the acres, this is a good livery, and both the acres ſhall paſs. Br. Feoffment de terre, pl. 42. cites 9 H. 7. 25.

5. *But if he had* two acres, *the one in fee, and the other for years*, and makes livery in the fee acre in the name of both; *the acre for years ſhall not paſs.* Ibid.

6. If a man be *diſſeiſed of two acres* of land *in one county*, and he *enters into one* of the acres, *claiming the ſaid acre only*, and *makes a deed of feoffment of both acres unto a ſtranger, and makes livery* of ſeiſin according to the deed *in the acre into which he entered*; it is ſaid, that both acres ſhall paſs unto the feoffee, becauſe this claim is nothing to the purpoſe; for he had right of entry before, &c. and both acres are in one county; ſo as his entry into one acre ſhall be entry into both acres, notwithſtanding the claim, &c. againſt which it may be ſaid, that the acre, into which the feoffor did not enter, ſhall not paſs by the feoffment; for when a man is out of poſſeſſion of

* Perk. f. 233. S. P. —*So* of an entry into one acre of *two acres purchaſed* in fee *by a villein*, and the lord claimed not the other acre, but after-

wards infeoffed a ſtranger of both acres, and made livery in the acre, which he entered into, ſecundum formam chartæ; yet the acre into which he did not enter, ſhould not paſs by the feoffment. Perk. f. 234. ——— So where one has *title to enter into two acres for a condition broken*, &c. or for an alienation in *mortmain*, &c. Mutatis mutandis. Ibid. f. 235. ——— † It ſeems it ſhould be Paſch. 9 H. 7. 25.

of a * *thing ſeverable*, he is at liberty to continue his poſſeſſion in it, in which part he will, and ſhall not be compelled to re-continue his poſſeſſion unto all in deſpight of him. Perk. S. 232. cites † P. 9. 7. 25.

Bendl. 12. pl. 10. S. C. D. 283. pl. 30. Paſch. 11 Eliz. S. P. Anon. ——— Ibid. 337. b. pl. 37. Trin. 16 Eliz. Anon.

7. *A. ſeiſed of* 3 *acres, by ſeveral feoffments, enfeoffed B. C. and D. of the ſaid acres*, viz. each of them *of one acre to the uſe of A.* &c. A. before the ſtatute of 27 H. 8. by a deed of feoffment, and a letter of attorney enfeoffed J. S. of the ſaid 3 acres, and the attorney entered into one of the ſaid acres, and delivered ſeiſin to J. S. in the name of that and the 2 other acres; and by this the 3 acres paſſed by the ſtatute of 1 R. 3. as was adjudged in B. R. after argument by the court. But how it paſſed, viz. by grant or feoffment quære, &c. nota the ſtatute. Paſch. 25 H. 8. And. 28. pl. 66. Kellet's caſe.

8. A man hath *two leſſees for years by ſeveral leaſes of lands in a common*, and made a feoffment of all his land within the ſame county, and made *livery upon the land*; *one of the termors* ouſted him in name of all; nothing of the other leaſe paſſes by the feoffment, inaſmuch as the other termor hath an intereſt, and remains upon the land. *But* it is otherwiſe of *a tenant at will*; for there both lands ſhall paſs, inaſmuch as it is a determination of his will. D. 18. pl. 106. Trin. 28 H. 8. Anon.

9. *But* note by Knightley, that if I be *ſeiſed of land, and another is tenant at will to another man of land, to which I have a right to enter*; in this caſe though I make *feoffment of all*; *and livery* of ſeiſin *in that part of which I am ſeiſed in name of all*; nothing paſſes of my land, of which the other is tenant at will to a ſtranger; inaſmuch as it is no determination of the will of the ſtranger. So note a *diverſity* where he is my leſſee at will, and where he is leſſee at will of another. D. 18. b. pl. 106. Trin. 28 H. 8. Anon.

Br. Feoffment de terre, pl. 77. cites S. C.

10. If a man *ſeiſed of one acre* of land *in poſſeſſion, and of another in uſe*, had *made* a deed of *feoffment of both, and livery in the acre in poſſeſſion* * *in the name of both*, the land in uſe ſhould not paſs; *contrary*, if the livery was *in the land in uſe*, by reaſon of the ſtatute, &c. Br. Feoffments al. uſes, pl. 55. cites 37 H. 8.

*[197]

(Y) In what Caſes Feoffment may be without Deed. Of What Thing.

(C) Pl. 2.

[1. FEOFFMENT may be of an *advowſon by livery of the door of the church* without deed. 43 E. 3. 1. *b.*]

[2. A feoffment may be *with attornment of a manor*, without deed, and the ſervices will paſs by letter of attorney. 3 Rep. 29. Butler and Baker's caſe. * 20 H. 9. 7.]

* This ſhould be 20 H. 6. 7. a.

3. Letter

3. Letter of attorney to deliver poſſeſſion, if there *is no deed of feoffment*, is void. Per Frowick Ch. J. Kelw. 51. Trin. 18 H. 7.

4. The queſtion of a caſe drawn was, whether the *advowſon* in queſtion did paſs by the livery made *in the view of the church*, without deed or not, (the *church being full of an incumbent*,) and reſolved by the Lord Ch. J. of the King's Bench, and juſtice Manwood, to whom the ſame was referred, that the advowſon could not paſs by that livery. Cary's Rep. 74. cites 18 and 19 Eliz. Pannel v. Hodgſon, alias Hodſon.

5. The *father enfeoffs the ſon to the uſe of the father himſelf, for* term of his *life, and after* his deceaſe, then to the uſe *of the ſon and his heirs*; and after the father and ſon, (upon communication that the father ſhould re-have the land in fee) came together to the land and upon the land by parol, without any deed, the *ſon delivered ſeiſin* of the land *to the father*, habendum ſibi & hæredibus ſuis, &c. if this be a good feoffment or not, quære? it being found by ſpecial verdict in eject. firm. And by the opinion of the court it is a good feoffment, and that in law this acceptance of livery implies two effects, viz. *firſt, a ſurrender, and after a feoffment*; as a ſurrender to the grantee of a reverſion amounts to an attornment and ſurrender. D. 358. pl. 48. Paſch. 19 Eliz. Anon.——Ibid. Marg. cites it as ſo held M. 28 Eliz. in Leonard's caſe. Bendl. 288. Paſch. 17 El. S. P. Langaſtell v. Aller.

6. Livery and feoffment without deed, by way of *mortgage*, was good. Mo. 144. Mich. 25 and 26 Eliz. Ivers Keale's caſe.

7. Livery of ſeiſin (contrary to the opinion of Coke Ch. J.) may be *received without* deed, as a ſtranger may take livery *to the uſe of J. S.* and after J. S. agrees to it, it is good. 2 Sid. 61. per Glyn Ch. J. Hill. 1657. B. R. in caſe of Blunt and Clerk.

8. 29 *Car.* 2. 3. Puts an end to all feoffments, &c. without deed, in writing and ſigned by the parties, or their agents authorized by writing ſo as to have any greater effect than as *eſtates at will.*

(Z) By Letter of Attorney. Revocation. What Act (*) or Thing ſhall be Revocation.

* Orig. is (un)

[1. IF a man makes a deed of feoffment with letter of attorney to make livery, he may *before execution* of the livery revoke it. 34 H. 6. 14. Per Choke.] 5 Rep. 90 b.

[2. If a man makes charter of feoffment with letter of attorney to deliver ſeiſin and *before livery made*, by malady *he becomes paraliticke*, ſo that he is * *mute* at the time, when livery is made, but *by all ſigns*, which a man could perceive, *he agreed* to the delivery of the ſeiſin; this is a good feoffment, and no revocation of the letter of attorney. 25. Aſſ. 4. adjudged.] †[198]

* Orig. (nuit) Br. Feoffment, pl. 26. cites S. C.—— *But if a*

letter of attorney to make livery of ſeiſin is made of certain land, by a man of unſound memory, and the *charter* of feoffment of the ſame land *was made before, when he was* † *of good memory*, and then *livery* of ſeiſin is *made by force of the letter of attorney, without other aſſent of the* feoffor, and the *feoffor dies.*

Now

Now his *heir may enter* upon the feoffee; but the feoffor himſelf in his life cannot enter. Perk. 10. 11. ſ. 23. cites 17 Aſſ. pl. 17. ——— Perk. ſ. 22.

[3. If the *feoffor dies* before livery made by the attorney, the letter of attorney is revoked in law, becauſe the land is deſcended by his death to his heir. Co. Litt. 52. b.]

[[3.] *So* if the *feoffor dies* before livery be made by the attorney, the letter of attorney is revoked in law, becauſe livery cannot be made to his * heir, for then he ſhall take by purchaſe, where he was named by way of limitation. Co. Litt. 52. b.]

* Fol. 12.

[4. If a *corporation aggregate*, as mayor and commonalty, dean and chapter, or ſuch like, make a charter of feoffment, with letter of attorney to make livery and *before livery made*, *the mayor or dean dies*, yet the letter of attorney is not revoked becauſe the corporation never dies. Co. Litt. 52. b.]

[5. *But* otherwiſe it is of a *ſole corporation*, as a biſhop, parſon, &c. Co. Litt. 52. b.]

[6. If a man makes a deed of feoffment of *land in two vills*, with letter of attorney to make livery, and *before livery made by the attorney*, *the feoffor himſelf makes livery of the land in one vill*, this is a countermand of the letter of attorney, ſo that the attorney cannot make livery in the other vill. per Tanfield. H. 8 Ja. in the Exchequer, between Smith and Jennynſon.]

[7. If a man makes charter of feoffment *of two acres*, *whereof the one is in leaſe for years*, *and the other in demeſne*, and makes letter of attorney to make livery, and after the *feoffor himſelf makes livery in the acre in demeſne in name of the whole*, though the other acre, which is in leaſe, cannot paſs by it, yet the letter of attorney is revoked for this acre; for it appears, that ſo was the intent of the feoffor. H. 8 Ja. in the Exchequer, per Cur.]

8. A *fine* paſſed *between the grant and the livery*, is *no countermand*. Dal. 111. 16 Eliz. Stileman v. Warren.

9. Though there be a letter of attorney to deliver ſeiſin, yet if before ſeiſin delivered by virtue thereof, the feoffor *gives authority*, *ore tenus* to the attorney to make livery, he may give ſeiſin by virtue of the authority ore tenus, notwithſtanding the letter of attorney; but then, (as in caſe the letter of attorney was in any wiſe defective,) the attorney muſt ſwear he did it by virtue of the authority ore tenus; for if he did it by virtue of the letter of attorney the other authority will not avail the delivery. Paſch. 24 Car. B. R. Allen. 53. Bamfield v. Brown. —— It was ſaid he could not deliver it by virtue of both authorities; quod quære. Ibid.

(A. a) Who may make Livery by Attorney.

1. IF an *infant* makes livery by attorney, it is void, contra if he makes livery in proper perſon; for there it is only voidable. Br. Feoffment de terre, pl. 48. cites 18 E. 4. 27.

2. Vid. (Z) pl. 2. from which caſe Ld. Brooke concludes, that it ſeems, that a *man dumb*, who has reaſon to perceive by ſigns, may make

make feoffment. Br. Feoffment, pl. 26. [and in that case the livery was by attorney.]

3. A *disseisee* may make a feoffment. But when he makes a letter of attorney to one to make livery, where he himself *has no estate*, it is not good; for he has neither jus in re, nor ad rem. per Doderidge J. 2 Bulst. 305. Hill. 12 Jac. in case of Butler v. Fincher. If a man be *disseised*, and makes a deed of feoffment, and a *letter of attorney, to enter, and take possession, and after to make livery secundum formam chartæ*; this is a good feoffment albeit he* was out of possession, at the time of the charter made; for the authority given by the letter of attorney is executory, and nothing passes by the delivery of the deed, 'till livery of seisin be made. And in ancient letters of attorney, power is given to others to take possession for the feoffor. Co. Litt. 48. b. (d).

[* 199]

4. *Tenant for life with power to make leases* cannot make livery by his attorney; so where *executors* have *power to sell*; but where they have interest they may. Arg. 2 Roll. R. 393. cites 9 Rep. Combes's case. 9 Rep. 77. a. in Combes's case.

5. *Cesty que use*, having power to make feoffment, may make livery by attorney. Arg. 2 Roll. R. 394. cites 9 H. 7. 26. Br. Feoffment to uses, pl. 28. cites S. C. and that it was held by all the justices, that cesty que use might make livery by himself, but not by attorney, for that the statute is taken strictly. But Brooke makes a quære, for he says, it is held otherwise at this day.

(B. a) What passes by the Livery, by Relation.

1. ASSISE by R. F. where it was found that *M. leased* the tenements *to the plaintiff for* 11 *years, and* in surety of it, *made a charter* upon condition, *that if he was disturbed of his term, that he should have the tenements in fee*; which *charter was delivered to* C. to *keep and to deliver according to the condition, and delivered seisin upon this charter*, and that *M. sold within the term*, and for the disturbance, F. *delivered the charter to the plaintiff*, and livery of seisin was upon the one charter and the other, viz. upon the sale also, as it seems, by which it was awarded, that the plaintiff recover; the reason seems to be, inasmuch as the *seisin was delivered upon the charter to the termor*; for otherwise the condition had come too late, as appears in the case of PLESINGTON, 6 R. 2. tit. Quid juris clamat in Fitzh. 20. Br. Conditions, pl. 101. cites 10 Ass. 15.

2. A. makes a *feoffment to B. of* 17 *acres to be taken at the election of B. or his heirs, out of* 1000 *acres* as they please. By the death of B. the election determines. *Quære* if B. might have made election? for if he might, then the seventeen acres pass by the livery, which it seems they cannot; for it was not then known, which were the acres; but the livery, being the act of the feoffor, shall have its effect and operation by the election of the feoffee, or else it is good for nothing. Pasch. 7 Eliz. And. 11. Bullock v. Burdot. D. 280. pl. 17. S. C. Mo. 81. S.C. Bendl. 148. 2 Rep. 36. b.

3. If *infant* make a feoffment, or lease for life, to commence *in futuro*, and *at full age makes livery*; this is a good feoffment. Arg. 2 Roll. R. 109. seems admitted; but the reporter makes a *quære* of feme covert; for her deed is void. Trin. 17 Jac. B. R.

(C. a) Who

(C. a) Who may take by the Livery.

1. IF *J. S. be enfeoffed* to have and *to hold to J. S. and T. K.* and livery of ſeiſin is made unto *J. S.* according to the deed, it is void unto T. K. Perk. ſ. 164.

2. *But if livery* of ſeiſin had been made unto *T. K.* according to the deed; then he takes by the livery of ſeiſin, and not by the deed. Perk. ſ. 164.

3. *Some may make livery of ſeiſin, and take by the ſame livery*; but then they do *not make livery* in their own rights *or* otherwiſe they do *not take* by the livery of ſeiſin *in their own right*, unleſs in ſpecial caſes, &c. Perk. ſ. 198.

[200] 4. *Therefore* if land be *leaſed for life unto J. S.* the *remainder unto T. K. in fee.* And a *letter of attorney is made unto T. K.* to make livery of ſeiſin unto the leſſee accordingly; in this caſe he takes by the ſame livery of ſeiſin, which he himſelf made, but not of his own grant; for he made the ſame *as ſervant* to the grantor. Perk. ſ. 198.

Br. Attorney, pl. 5.

5. If a man *enfeoffs two* by deed, and makes a *letter of attorney unto one of them* to make livery of ſeiſin, and he makes livery of ſeiſin *according to the deed* to his companion, he himſelf, who makes the livery of ſeiſin, ſhall take by the ſame livery of ſeiſin, becauſe he ſhall be *in by the feoffor*, and not by himſelf, &c. Perk. ſ. 199.

6. If a man makes a deed of *feoffment* of his own land unto *himſelf and unto a ſtranger*, and *makes livery* of ſeiſin *unto the ſtranger according to the deed*, all ſhall paſs unto the ſtranger and nothing to himſelf; for that he cannot give unto himſelf, as this caſe is, &c. Perk. ſ. 203.

7. If a feoffment be made to *a monk profeſſed, and to a ſtranger*, by deed, and *livery* of ſeiſin *is made to the ſtranger* according to the deed, all paſſeth to the ſtranger. *But* if livery and ſeiſin be *made to the monk* according to the deed, and not to the ſtranger, nothing ſhall paſs thereby. Perk. ſ. 204.

8. Unto divers reſpects a *man may take by livery* of ſeiſin, *which he made his own right*; *but* then he *ſhall not take in his own right*, unleſs in ſpecial caſes. Perk. ſ. 205.

9. *And therefore* if *dean and chapter* are, and *one of the chapter is ſole ſeized in fee in his own right* of lands, and thereof by deed *enfeoffs the dean and chapter*, and makes livery of ſeiſin according to the deed; in this caſe the feoffor giveth and taketh by the ſame gift in divers reſpects. Perk. ſ. 205. cites 22 H. 6. 43.

10. *And ſo* ſhall it be *of mayor and commonalty*; if one of the commonalty be ſeiſed of land in his own right, and thereof enfeoffs the mayor and commonalty. Perk. ſ. 205.

11. Such *perſons* as are *in poſſeſſion* of land for *years or life, &c. cannot take* livery of ſeiſin of the ſame land. Perk. ſ. 205.

12. In

12. In feoffment to the *dean and chapter* they *cannot take but by letter of attorney under ſeal.* per Brook juſtice, Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

13. A. lord of the manor of D. by indenture between him of the one part, and J. S. his *copyhold tenant in fee*, and R. S. ſon and heir apparent of J. S. of the other part, in conſideration of 100 l. paid by J. S. enfeoffed, releaſed and confirmed, &c. to J. S. the ſaid land habend' to J. S. and R. S. and their heirs, and covenanted that all aſſurances ſhould be to the uſe of J. S. and R. S. and livery was made ſecundum formam chartæ; reſolved, that J. S. only took, by the livery, and R. S. took nothing thereby; but R. S. took, by the limitation of the uſe in the habendum, as jointenant with J. S. and by the ſtatute of uſes of 27 H. 8. was jointly ſeized of the intereſt, and poſſeſſion with J. S. Ley. 13. Trin. 7 Jac. Sammes's caſe.

(D. a) What Thing, or Eſtate ſhall be ſaid to *paſs* by the Livery.

1. IF a man makes feoffment of his manor, in which he hath a warren, the *warren ſhall not paſs.* Br. Feoffment de terre, pl. 81.

2. If a man makes a deed of *feoffment* of his own land *to himſelf and unto a ſtranger*, and *makes livery* of ſeiſin *unto the ſtranger according to the deed*, all ſhall paſs unto the ſtranger, and nothing unto himſelf, as this caſe is, &c. Perk. ſ. 203.

3. If *two jointenants* are in fee, and *one* of them *enfeoffs a ſtranger of the whole* againſt the will of his companion being upon the land; by this feoffment nothing, but the *moiety*, paſſeth. Cauſa patet. Perk. ſ. 220.

4. By livery of ſeiſin in one county, the lands and tenements in another will not paſs; yet if the *ſcite of the manor of D. be in the county of Eſſex, and parcel of the ſame manor doth extend into* the county of *Middleſex*, and a *feoffment* be made *of the manor of D.* and *livery* of ſeiſin *is made of the ſcite* of the manor, *which lies in* the county of *Eſſex*; by this livery of ſeiſin, the parcel of the manor, which lies in Middleſex ſhall paſs, becauſe it is parcel of the thing, viz. the manor, of which the feoffment was made, the which manor is but as one thing to ſuch purpoſe, &c. Perk. ſ. 227. [201]

But if a *feoffment* be made *of the manor of Dale in Dale*, which manor *extends into Dale and Sale*, and *livery* of ſeiſin *is made* accordingly *in Dale*; by this feoffment nothing paſſes but that which is in Dale; becauſe the feoffment is not of more, but of that which is in Dale, and the livery of ſeiſin is made in Dale, and not elſewhere, &c. Perk. ſ. 228. cites T. 9 E. 4. 17.

5. A. ſeized of a houſe for life made a feoffment of it, and letter of attorney to deliver ſeiſin ſecundum formam chartæ; *before livery tenant for life purchaſed the fee*, and after livery was made. Per Cur. all paſſes.——But if the feoffment had been of all his lands in D. and the letter of attorney accordingly;—and before livery the feoffor had many lands there.—If he purchaſed one acre after;—the

the livery ſhould not extend to that acre, becauſe the authority was ſatisfied by the other acre. 3 Le. 73. pl. 112. Hill. 20 Eliz. C. B. Anon.

6. Feoffment was of a *manor, to which an advowſon was appendant*, and livery was made; though the *tenants did not attorn*, yet the advowſon paſſed as appendant to the demeſnes. D. 70. b. pl. 41. Marg. ſays that it was ſo ruled 32 Eliz. in C. B. in Hamlington's caſe, and ſays that it was alſo agreed 30 Eliz. in the ſame court. Ibid.

7. Doderidge J. cited a caſe, where it is held, that if one make *two ſeveral deeds, one purporting* an eſtate in *fee, and the other an eſtate tail*, and thoſe are made to one and the ſame perſon, and he brings both in his hands upon the land, and makes *delivery of both* deeds *with the land*; by this both deeds ſhall take effect, and by them eſtate tail, and alſo eſtate in fee ſimple paſſes. Paſch. 16 Jac. B. R. 2 Roll. R. 23. in caſe of Thurman v. Cooper.

(D. a. 2) What Eſtate ſhall be ſaid to paſs by the Livery; without the Words, Heirs, or Succeſſors.

1. IF lands be given *to a mayor and commonalty for their lives*, by intendment they have an eſtate not determinable. *So* if a feoffment be made of lands unto a *dean and chapter* without ſpeech of their ſucceſſors. Perk. ſ. 240. cites T. 22 E. 4. 38.

But if land be given unto me by deed to have and *to hold to me in fee*, without ſpeaking of my heirs, and livery of ſeiſin be made unto me according to the purport of the deed; by this feoffment I have an eſtate but for the term of my life, &c. Perk. ſ. 243. cites T. 20 H. 6. 46.

2. If my *feoffee in fee* of an acre of land *re-infeoffs* me *of the ſame acre by deed, reciting* in the ſame deed, *that I have enfeoffed* him of an acre of land, to have and *to hold to him and his heirs*; *and ſaith* farther in the ſame deed, *that as fully as I have given the lands unto him, he doth give me them back again*, and delivers to me the deed as his deed, and ſeiſin of the land according to the deed; in this caſe it ſeems, that I have an eſtate of inheritance in this land, notwithſtanding that it is not given unto me and my heirs, becauſe that my eſtate doth rely upon an eſtate of inheritance, recited within the ſame deed, tamen quære. Perk. ſ. 241. cites T. 11 H. 4. 84. & 39 Aſſ. p. 12.

[202] (D. a. 3) Paſſes; what, by the Feoffment or Livery.

1. A man ſeiſed of a *manor with advowſon appendant*, made a feoffment *de tertia parte manerii*. The advowſon does not paſs, nor any part of it. Br. Incidents, pl. 30. cites 6 E. 3. Fitzh. tit. Quare Imp. 40. per Parne.

(E. a) Pleadings

(E. a) Pleadings.

1. IN aſſiſe, where the deed of feoffment is *pleaded in bar, nient compriſe is no plea*, but *ſhall ſay that riens paſſa*, &c. Stouf. where a thing of record, as fine, &c. is pleaded, there nient compriſe is no plea, but in caſe of a feoffment, he ſhall ſay that riens paſſa, nevertheleſs, after Perſey aſſented to the Averment, quære. Br. Compriſe, &c. pl. 12. cites 29 Aſſ. 56.

2. *Formedon in reverter*, the tenant ſaid, *that the donor enfeoffed the donees in fee*, &c. judgment ſi actio; and this is no plea, per Cur', if he does *not traverſe the gift in tail.* By which he ſaid, that after the gift, the donor enfeoffed the donees in fee; and no plea, per Cur', without *ſaying, that after the gift the donor was ſeiſed in fee, and enfeoffed the donees in fee*; wherefore he ſaid accordingly, and the demandant imparled, and yet this is in effect only in confirmation. Br. Barre, pl. 4. cites 2 H. 6. 15. S. P. per Cur. Br. Pleadings, pl. 5. cites S. C. and 27 H. 8. 4.

3. *In ward*, the defendant pleaded a feoffment by which the *tenant anceſtor of the heir enfeoffed N. P. in fee, whoſe eſtate he hath*; and per tot Cur' this is no plea without a *traverſe, that he did not die his tenant, or* that he did *not die ſeiſed*; nevertheleſs as it ſeems, he ſhall traverſe, that he did not die in his homage. Br. Barre, pl. 37. cites 4 H. 6. 29.

4. *And* in *eſcheat* becauſe his tenant died ſeiſed without an heir, it is no plea, *that the tenant enfeoffed N. whoſe eſtate he hath*, without a *traverſe that he did not die ſeiſed*, per Martin, which the Court agreed. And ſo ſee, that where the plea is contrary to the ſuppoſal of the writ, it is no plea without traverſing the point of the writ. Quod nota. Br. Barre, pl. 37. cites 4 H. 6. 29.

5. *And* in *aſſiſe*, the tenant pleaded a *deed of feoffment by the plaintiff to J. N. whoſe eſtate he hath*; it is a good plea; and yet if he pleads the *feoffment of the plaintiff to him*, this is no plea, per Paſton, which Martin agreed; and ſo ſee there a difference is taken between a feoffment pleaded *by que eſtate, and* a feoffment *made immediately to him who pleads it*, note the diverſity. Br. Barre, pl. 37. cites 4 H. 6. 29.

6. In præcipe quod reddat, if the *defendant pleads feoffment of the father of the demandant, whoſe heir he is ſimply and without any condition*, it was held by Babb. and Paſton, that theſe words (without condition) are void, and the effect of the plea is no more, but the feoffment; and the *demandant ſhall alledge the condition of his part to confeſs and avoid* it, and then the *tenant by rejoinder ſhall anſwer to the condition.* Br. Pleadings, pl. 8. cites 9 H. 6. 59.

7. In treſpaſs, the defendant ſaid, that it was his franktenement, &c. the *plaintiff ſaid, that before the defendant had any thing, A. was ſeiſed in fee, and enfeoffed B. who enfeoffed C. who enfeoffed F. who enfeoffed the plaintiff*, and the defendant entered, upon whom the plaintiff re-entered and brought the action; and was compelled by the Court to *omit all the feoffments, except the feoffment of F. to him*;

for this is ſufficient, and he *may give the other in evidence.* Br. Pleadings, pl. 23. cites 19 H. 6. 30.

[203] Pleading a feoffment in fee upon condition *without deed and reentry* is good, if the other party *confeſſes the action.* 5 Rep. 40. b. in DORMER'S CASE. cites 7 H. 6. 7. b.

8. Where a man pleads feoffment, the other may ſay, that it was *upon condition, without traverſe*; for it may be intended one and the ſame feoffment. Br. Traverſe per, &c. pl. 382. cites 32 H. 6. 4.

9. Entry in the quibus, the *tenant ſaid, that J. S. was ſeiſed in fee, to whom J. D. releaſed by his deed all his right,* &c. *and J. S. enfeoffed H. in fee, whoſe eſtate the tenant has,* and gave colour. Billing prayed to be diſcharged of the releaſe, and that it be not entred; for *poſſeſſion, nor right is alledged in J. D. who releaſed,* and yet it was an entry; for it may be that J. D. was ſeiſed in fee, and releaſed, and then this made title to the tenant; and per Priſot the releaſe may make iſſue. Br. Pleadings, pl. 54. cites 38 H. 6. 5.

10. If feoffment be *made* by livery *by letter of attorney*, it ſhall be *pleaded generally*; and he ſhall not ſay, that the livery was by attorney. Br. Licences, pl. 11. cites 10 E. 4. 4.

S. P. Br. Confeſs and avoid, pl. 58. cites 18 E. 4. 25. —*But* it is a good avoidance *of a leaſe for years* to ſay, that the leſſor had nothing in the land at the time of the demiſe; *for there is no livery.* Br. Feoffment de terre, pl. 46. cites 10 E. 4. 8.

11. In treſpaſs, it is no plea in avoidance of *a feoffment* to ſay, that the feoffor *had nothing in the land at the time* of the feoffment; *for it paſſes by livery*; therefore *he ſhall ſay that ne enfeoffa pas.* Br. Feoffment de terre, pl. 46. cites 10 E. 4. 8.

The feoffee cannot plead a feoffment from the ſurvivor of the whole; becauſe each of them gave but his part. Co. Lit. 186. a.—S. P. per Holt Ch. J. Williams's Rep. 17. cites S. C.—* Br. Feoffment de terre, pl. 65. cites S. C.———Br. Jointenants, pl. 64. cites S. C.———Br. Pleadings, pl. 105. cites S. C.

12. Feoffment *by A. B. and C. to J. S.* and *J. S. pleads that B. and C. were ſeiſed and enfeoffed him,* &c. [It ſeems to be intended that A. was dead.] If this feoffment be traverſed, it ſhall be found againſt him. For the feoffment is *one joint act by all three.* * 14 E. 4. 1. b. pl. the laſt, per Littleton.

S. C. cited Cro. C. 506. Trin. 14 Car. B. R. in caſe of Man v. the Biſhop of Briſtol.———Br. Feoffment de terre, pl. 65. cites S. C. ———Br. Jointenants, pl. 64. cites S. C.———Br. Pleadings, pl. 105. cites S. C.

13. *But* if *J. S. make a feoffment to A. B. and C.* and *B. and C. die*, ſo that A. has the whole by ſurvivorſhip, in ſuch caſe A. may plead the feoffment to himſelf only. 1 E. 4. 1. b. per Littleton.

14. If a man be *bound to make a feoffment of the manor of D.* and *pleads, that he made a feoffment,* he *ſhall ſhew where the manor is*; for it cannot be done, but upon the land. Br. Pleadings, pl. 31. cites 15 E. 4. 14.

15. There is a *diverſity* between the pleading of *void* feoffments, or ſuch as are *voidable only*; as a feoffment by one *jointenant to his companion, or by feme covert,* or monk is void, and the party may *ſay ne enfeoffa pas*; but *otherwiſe* of a feoffment *by infant,* or one in priſon. 18 E. 4. 29. a. per Littleton.

16. *In*

16. *In aſſiſe*, if the *tenant pleads feoffment* made to *him of the ſaid land*, and *the deed is of all his lands in B. which deſcended to the feoffor of the part of the father*, and does *not aver, that theſe lands were deſcended to him of the part of the father*, yet it is good; becauſe he *ſaid that he enfeoffed him de prædictis terris in querela ſpecificatis*; by all the juſtices and ſerjeants. Br. Pleadings, pl. 66. cites 1 H. 7. 28.

17. *So* in aſſiſe againſt *J. S.* and he *pleads a feoffment made to him by deed* and *the deed is J. N.* and yet good; for he *may be known by two ſurnames*; but the pleading is the better, if he pleads *per nomen*, &c. For where he pleads a deed to *J. S.* and ſhews deed made to *W. S.* [it is not good]; for he cannot be known by *two proper names*; per all the juſtices and ſerjeants. Br. Pleadings, pl. 66. cites 1 H. 7. 28.

So where he pleads it of *manor of B.* and ſhews *deed of the manor of S.* per all the juſtices and ſerjeants. Br. Pleadings, pl. 66. cites 1 H. 7. 28.

18. Where a man *pleads, that a ſtranger was ſeiſed and enfeoffed him*, he need not, in any caſe whatſoever ſay, *that it was to his own uſe*; for prima facie, it ſhall be ſo *intended*, 'till the contrary be ſhewn. 5 H. 7. 33. a. per Brian. [204]

19. In pleading of a feoffment, leaſe, &c. by ceſty que uſe, he *need not* [*ſay*], *that he at the time, &c. was of full age, ſound memory*, &c. but *this ſhall come by the other party*. Br. Pleadings, pl. 171. cites 16 H. 7. 2.

20. In treſpaſs the defendant *ſaid, that A. and B. were ſeiſed in fee to the uſe of the plaintiff*, and that the *plaintiff ſold the land to him*, &c. and admitted good, notwithſtanding that he does *not ſhew who enfeoffed A. and B.* to the uſe of the plaintiff; quod nota bene inde. Br. Pleadings, pl. 43. cites 21 H. 7. 6.

21. In *dower*; if the tenant pleads diſſeiſin by the baron, and the *feme pleads feoffment by J. N. to the baron, who after enfeoffed the tenant, and after diſſeiſed him*, ſhe *ſhall ſay that the feoffment of J. and the ſeiſin of the baron, were during the coverture*. Br. Pleadings, pl. 147. cites 26 H. 8.

22. *Mention* ſhall be made in the pleading, that the *land was within view*. Br. Feoffment de terres, pl. 57.

23. If A. pleads a feoffment in fee, he muſt conclude, *virtute cujus prædict. A. fuit ſeiſitus*, &c. and this holdeth not only in caſe of *lands*, which lie in livery, but alſo of *rents, advowſons, commons*, &c. and other things, that lie in grant, whereof he hath an eſtate for life, or inheritance. Co. Litt. 201. a.

24. When a man pleads a leaſe for life, or any higher eſtate, which paſſes by livery, he is not to plead any *entry*; for he is in actual ſeiſin by the livery itſelf. Co. Litt. 201. a.

25. In pleading a demiſe for life after the death of two former lives, the indenture was pleaded by a teſtatum only, viz. quod per quandam indenturam, *teſtantur quod demiſerunt*, and *no livery of ſeiſin was ſhewn*; and it was held ill. D. 117. b. 118. Paſch. 2 and 3 P. and M. Jones v. Weaver, alias Sentloe's caſe.

Such pleading of a feoffment by *teſtatum eſt* is not good, but it ſhould be alleged directly, quod feoffavit. Arg. 2 Roll. R. 110. in caſe of BUTTIFANT v. HOLMAN cites 21 E. 4 44. 22 E. 4. Brief, 380. 22 H. 6. 3. 4 E. 4. 5. 28 H. 6. 29.—*But* it was argued e contra, that it had been reſolved, Mich. 31 and 32 Eliz. that where the pleading the feoffment *is only* by

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y way of *inducement*, it is good by teſtatum; as where the action is only to recover damages, as in covenant, as the principal caſe was, and adjudged accordingly. 2 Roll. R. 110. Trin. 17 Jac. B. R. Buttifant v. Holman.

In a plea of the feoffment of a manor, *livery and attornment are implied.* Co. Lit. 303. b. (t.)— Vid. the next caſe.

26. In treſpaſs for taking his ox, the defendant juſtified as ſervant of A. and that he took it as a heriot, by reaſon of a cuſtom within the manor to pay a *heriot* on the death of every tenant dying ſeiſed of a meſſuage, and that J. N. enfeoffed W. R. and W. S. of the manor, to the uſe of A. The plaintiff demurred, becauſe the defendant entitles A. as a purchaſor, viz. by feoffment, *and ſhews not the attornment of the deceaſed tenant, whoſe ſervices are demanded*, and that he cannot otherwiſe entitle him to the ſervices of that particular tenant; and though a feoffment of a manor may be pleaded, and that by force thereof he was ſeiſed of that manor without ſhewing the attornment of the tenant, (for that is neceſſarily intended, as livery without pleading it,) yet *in this caſe of a particular tenant*, he ought expreſsly to ſhew his attornment. But the Court held that there was no difference, and the *attornment may well be intended*, and if he did not attorn, the other ought to have pleaded it. And all agreed, that by the feoffment of the manor the ſervices paſſed not without an expreſs attornment, but that may be well intended, *if the contrary be not ſhewn.* Cro. E. 400. Trin. 37 Eliz. B. R. Ferrers v. Wignall.

27. Executor brought *debt for arrearages of rents, as well copyhold as free, belonging to the manor of D.* whereof his teſtator died ſeiſed, and for rents due at the teſtator's death, the action was brought upon the ſtat. 32 H. 8. It was held, that it lies not for the copyhold rents, within the ſtatutes; nor for the free rent, becauſe the plaintiff had *not declared that defendant attorned to teſtator*; and though in pleading it is ſufficient to alledge *feoffment of a manor without pleading* livery, or *attornment of the tenants*, yet when the rent of any freeholder comes in debate, it behoves both the owner of the manor, or his executor, who demands it, to *convey privity* between the tenant and the lord, which ought to be by attornment; for the rents and ſervices do not veſt without attornment. Quod nota. Yelv. 135. Mich. 6 Jac. B. R. Appleton v. Doily.

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* When a feoffment is pleaded, it is not

28. A man pleads **feoffavit*, *dedit*, or *dimiſit*, for life. This implies livery; for without livery, it is no feoffment, gift, or demiſe. Trin. 7 Jac. 8 Rep. 82. b. in Vinyor's caſe.

uſual to plead livery and ſeiſin thereof, becauſe it is to be admitted. Hill. 3 Car. C. B. Cro. C. 101. in caſe of Peto v. Pemberton.——S. P. Cro. J. 636. Paſch. 20 Jac. B. R. Smith v. Melten —S. P. admitted. Mich. 6 Jac. B. R. Yelv. 135. in caſe of Appleton v. Doily.—— Livery ſhall be intended. Becauſe he who made the livery ſhall be intended to be upon the land, and to execute it. Admitted Arg. Pl. C. 149. b.—— *Mention* ſhall be made in the pleading that the *land was within view.* Br. Feoffment de terres, pl. 57.

29. Upon a demurrer in debt for rent, it was objected, that the plaintiffs, being a *corporation, intitle themſelves by feoffment, and ſhew not livery to be executed by letter of attorney*; for that they may not take unleſs by letter of attorney. *Sed non allocatur*; for all neceſſary circumſtances ſhall be *intended* to be executed, as well as in a feoffment pleaded to other perſons. Wherefore it was adjudged for

for the plaintiffs. Cro. J. 411. Mich. 14 Jac. B. R. Ipſwich (bailiffs, &c.) v. Martin and Parker.

30. It was pleaded that Sir Thomas Parret was ſeiſed in fee, and enfeoffed two truſtees to ſuch uſes, virtute cujus, they were ſeiſed; yet, becauſe it was ſaid, *feoffavit inde*, it was adjudged ill, and *virtute cujus* did not help it. Cr. J. 588. Mich. 18 Jac. B. R. Dowſewell v. Reynolds.

31. If a *feme ſole* makes a feoffment, and *livery within view*, and directs him to enter, and after *marries the feoffee before his actual entry*, yet an intereſt paſſes by ſuch livery, and the marriage is no countermand, and when he enters it has a ſtrong retroſpect to the livery, and ſhall be *pleaded as a feoffment when ſhe was ſole*. Vent. 186. Hill. 23 and 24 Car. 2. B. R. Parſons v. Perus.

(E. a. 2) Pleadings, Traverſe.

1. IN avowry, the *plaintiff pleaded feoffment* of twenty acres *by T. lord of the manor, before the ſtatute, to hold by leſs ſervices by deed, which he ſhewed*; and the *other ſaid that R. was ſeiſed before this, and enfeoffed W. to hold as in the avowry, abſque hoc, that T. any thing had* in the manor *at the time of the feoffment made* of the 20 acres; this traverſe is as well, as if he had ſaid, *abſque hoc that T. enfeoffed N.* &c. Br. Traverſe per, &c. pl. 106. cites 22 H. 6. 50. S. P. Br. Avowry, pl. 60. cites S. C. per Port, and Newton.

(F. a) Livery *preſumed* at Law, *or ſupplied* in Equity.

1. IF a man *ſell lands in two counties* for money, and *makes livery in one only*, he ſhall be compelled in conſcience to perfect the aſſurances by another livery; for the contract faileth in a *circumſtance, or ceremony*. Cary's Rep. 24. cites Doct. and Stud. 37.

2. Where one would have avoided a conveyance for *want of livery*, the grantee, on a bill by him, was relieved, Toth. 104. cites Mich. or Hill. 9 Jac. Conqueſt v. Newdigate. Toth. 105. S. P. cites Hill. 16 Jac. Moreton v. Briggs.——Ibid. 116. S. P. cites Mich. 2 Car. Barrow v. Barrow.—Ibid. 117. cites Mich. 13 Car. Row v. Cheſwick.

3. The perſon *died before the livery* and ſeiſin, and before the aſſurance perfected; yet it was ordered to be perfected. Toth. 237. cites Paſch. 7 Car. Higham v. Ladd. So there were 3 *coparceners*, and *one ſold* his land for a valuable conſideration, and died before execution of the deed; it was decreed againſt the defendant. Toth. 106. cites Mich. 14 Car. Paul v. Wilkins.

4. After a leſſee for life had been *twenty-five years in poſſeſſion*, and leſſor would avoid the leaſe for want of livery, *chancery preſumes* livery, and decreed the leſſee ſhould hold out during the continuance of his life; though after long poſſeſſion courts at [206] Toth. 116. S. C. 14 June. 11 Jac. By-

den. v. Loveden. at law will presume livery. Vern. 196. cites 11 Car. 1. Biden v. Loveday.

So after estate of freehold determined, livery shall be intended, and need not be pleaded by the reversioner. Pl. C. 149. Throgmorton v. Tracy.

5. If, at the assises, a deed of feoffment be given in evidence to be made *forty years past*, but it cannot be proved, that *livery* was made; yet *if possession has gone all the time according to the deed*, it is good *evidence* to the jury, and I will direct them to find a livery; for it shall be intended; but if the jury find all this specially, we cannot adjudge this to be a good feoffment without livery; per Coke Ch. J. Roll. Rep. 132. Hill. 12 Car. B. R. in case of Isaak. v. Clerk. p. 149.

S. P. Arg. Hill. 7 Annæ G. Equ. R. 14.

6. A feoffment was made by way of *mortgage*, but *no livery and seisin*.—Bill was brought by executors of mortgagee to supply the defect, and to be relieved against judgments suffered by the heir of the mortgagor. And decreed accordingly, and that the judgments ought not to incumber the mortgaged premisses, until the mortgage-money be all paid, especially since the mortgagor had covenanted for *further assurance*, Mich. 25 Car. 2. Fin. R. 28. Burgh v. Francis and al.

Fin. R. 174. S. C. and that at any trial at law to be brought by E. (the plaintiff) F. the defendant should admit livery and seisin, and that this decree was affirmed on a rehearing.

7. A. tenant in tail, by settlement on marriage of B. his son, with M. made a feoffment to the use of himself for life, remainder to B. for life, remainder to first, &c. sons by M. this deed was indorsed generally (viz. *livery* made to J. S. appointed by W. R. the feoffee thereto) B. and M. had C. D. E. the plaintiff, and F. the defendant, and six other sons. A. levied a fine to W. then his eldest son to the use of A. and his heirs; W. dies; A. conveyed the land to F. and died; [C. and D. the two elder sons died, as it seems, and without issue] F. entered, supposing that livery was not well given. Lord Keeper decreed, 1. that the *letter of attorney* should be *supplied, and livery admitted*; *though* it was *objected, that this was in effect to decree a discontinuance*, which is a wrong and unlawful act, *and* that it was 2. *to assist a remainder-man in tail* in a third remainder, (for he was the third son) *against a legal fine of* his father *tenant in tail*, and whose fine was a bar to him in law; and also against the acceptance of the fine by W. who joined with A. who had power by the recovery to have barred the estate of the plaintiff. But to this last the Ld Keeper said, the grandfather might have the conveyance, made by himself, in his own hands: and it is apparently so; for he recites in that deed, that he was tenant in tail, and he recites not the feoffment made by himself. Mich. 26 Car. 2. 1 Chan. Cases, 240. Bokenham v. Bokenham.

8. Lands were conveyed by feoffment, as a *marriage settlement*, on the wife, but no livery was made; the husband died, and by his will left to the wife more, than she would have by the settlement, and gave the lands to A. and B. Decreed that A. and B. execute conveyances to her for life, and deliver the possession to her. Fin. R. 388. Trin. 30 Car. 2. Marlow v. Maxie and al.

Though generally a defect in a voluntary

9. Where the deed, under which the plaintiff claimed, appeared to be fairly executed by the defendant's father, and that there was no defect therein, save only the form of livery and seisin, and made

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on ſuch valuable *conſideration* as *marriage*; *decreed* the *defendant to execute livery* and ſeiſin in the ſame deed, and make farther aſſurance of the ſaid premiſſes to the plaintiff and his heirs, and the plaintiff is decreed to enjoy the ſame againſt the defendant. 33 Car. 2. 2 Ch. Rep. 218. Thompſon v. Atfield.

conveyance ſhall not be ſupplied, and made good here, yet if a man voluntarily

makes a *ſettlement, at a proviſion* for his *children*, and for their maintenance; ſuch a voluntary conveyance ſhall be ſupplied and made good here. Vern. 40. Paſch. 1682. Thompſon v. Atfield.

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10. A. made a *feoffment* in fee, *by way of mortgage*, of ſeveral houſes in London, for ſecuring the payment of 400*l.* and intereſt; and being likewiſe indebted to ſeveral other perſons by bonds, he died before the money due on the mortgage was paid. After his death, the *bond creditors* demanded their reſpective debts of his heir, who had nothing to pay them, but the equity of redemption of this mortgage. A creditor undertook to ſatisfy the mortgage, which he did, in order to let himſelf into the eſtate, and hold it, until his bond-debt was paid; but having diſcovered that there was *no livery and ſeiſin* endorſed on the feoffment, he brought an action of debt againſt the heir upon the bond of his anceſtor, and got judgment: but before execution, the ſeal was opened on purpoſe for a ſubpœna, which was taken out and a bill filed to help this defective conveyance, which was ſupplied accordingly, and the mortgagee had his money. N. Ch. R. 183. cites the caſe of Burgh v. Francis.

Fin. R. 28. S. C. Mich. 25 Car. 2. and that though the heir of the mortgagor, after diſcovering the defect of livery, ſuffered judgments to be obtained by ſeveral bond-creditors, in order to prevent the mortgagee's having his money, yet the heir was decreed to convey a perfect eſtate of inheritance, ſubject to redemption on payment of the principal, and intereſt due on the ſaid defective deed: and a perpetual injunction for quiet poſſeſſion againſt the heir, and all other defendants; and to ſtay all proceedings at law.——————S. C. cited by Mr. Vernon. Arg. Wms's Rep. 279. as firſt heard, by Ld. K. Bridgman, and decreed by him, and after affirmed by Ld. Nottingham.

11. A deed of *lands in two different counties*, by way of feoffment and *livery* and ſeiſin, was *indorſed of the lands in one county only*, but nothing mentioned of any livery of the lands in the other county. But decreed that by reaſon of the *poſſeſſion and great length of time*, (being upwards of 70 years before) equity will ſuppoſe and ſupply it. And ſaid, that it would have been much ſtronger on the other ſide, had the livery been *indorſed of the lands in one county, in the name of both*; for that would have implied, that none was of the other, and that one was deſigned for both. Sel. Ch. Caſes, 81. Mich. 1730. Jackſon v. Jackſon.

In this caſe it was inſiſted, that, as to the poſſeſſion and length of time, the intendment endeavoured to be made out from thence can have no weight, becauſe the ſame *perſons, that enjoyed the lands under the deed, were alſo heirs at law, and as ſuch muſt have enjoyed them otherwiſe*, though there had been no ſuch deed; yet Lord Chancellor declared, that, was he to try this matter [at law], he ſhould preſume, and ſo direct, that livery was executed as to all the lands, according to the deed, after this length of time; but however, that this court would aid a defect of this kind. Gibb. 146. Mich. 4 Geo. 2. S. C.

(G. a) Equity. Miſtakes.

1. WHERE *more lands paſſed* in a feoffment, *than were intended*, it was holpen in equity, notwithſtanding it was *after a verdict and judgment* at law, ſuppoſing ſome *circumvention*. Toth. 186. cites Eborall v. Hunt.

(A) Ferae Naturae.

*Orig. (four ſavage.)

1. FOR pidgeons, fiſh killed, nor other ſavage beaſts found in *their range, a man ought not to ſuffer death, unleſs they were *feloniouſly ſtole out of a houſe*, &c. Br. Corone, pl. 92. cites 22 Aſſ. 95.

2. If a man breaks a pidgeon-houſe, and *takes young pidgeons feloniouſly*, which can neither go nor fly, this is felony; for the property is in the owner of the pidgeon-houſe; becauſe they *cannot go*
[208] *nor fly*, therefore he may take them at his pleaſure. *Contrary* of taking *of old pidgeons*; for a man has not property in them; for they are not ameſnable at will. Br. Corone, pl. 163. cites 18 E. 4. 8.

3. And taking of *fiſh out of a trunk in a pond*, is felony; *contrary* if they are taken *out of a river*. Ibid.

4. So of *young goſ-hawks* in my park, *which cannot go nor fly*; this is felony; contrary of old goſ-hawks. Ibid.

5. *Larceny* cannot be committed of things feræ naturæ, while *at their natural liberty*; but if they are *made fit for food, and reduced to tameneſs*, and known by the taker to be ſo, it may be larceny to take them. And ſo he thinks, it may be of wild pidgeons in a dove-houſe ſhut up, or hares, or deer in a houſe, or even in a park incloſed in ſuch a manner, that the owner may take them whenever he pleaſes without the leaſt danger of their eſcaping. 1 Hawk. Pl. C. 94. cap. 33. ſ. 26.

(B) Pleadings in Treſpaſs, for taking Things Feræ Naturæ.

1. TRESPASS quare vi & armis *damam ſuam cepit*, &c. and becauſe he did *not ſay* damam ſuam *domitam, nor that the taking was in park nor warren*, therefore the writ was abated by award. Br. Brief, pl. 63. cites 43 E. 3. 24.

2. Treſpaſs, quare *clauſum fregit, and four young goſ-hawks* in their neſts, being of the price of 4 *l.* ibidem *cepit & aſportavit*. Per Moyle, he *ſhall ſay, they were reclaimed*; as of four *deer, he ſhall ſay domeſtick*; *otherwiſe there is no property*, and then an action does not lie. But per Aſcue and Newton the writ is good; and ſo it is, that his 4 deer ibidem inventas cepit, &c. and ſo of a writ, quare clauſum fregit, and four herns taken, &c. Br. Treſpaſs, pl. 162. cites 22 H. 6. 59.

3. *But if it be quod talia cepit*, &c. *and does not ſay quod clauſum fregit, & cepit*; then the writ does not lie; quod curia conceſſit. And ſo note, that if it be in his cloſe, or in his ſoil, or in his park, or warren, writ lies, and not otherwiſe. Br. Treſpaſs, pl. 162. cites 22 H. 6. 59.

(A) Ferry.

1. A Ferry *is in reſpect of the landing place*, and not of the water; the water may be to one, and the ferry to another; as it is of ferries on the Thames, where the ferry in ſome place belongs to the archbiſhop of Canterbury, where the mayor of London has the intereſt in the water; and in every ferry the land of both ſides of the water ought to be to the owner of the ferry, or otherwiſe he cannot land on the other part. 13 Apr. 23 Eliz. in Scacc. Savil. 11. Inhabitants of Ipſwich v. Brown.

C. Savil. 14. *And* every ferry *ought to have* expert and *able ferrymen*, and to have *preſent paſſage, and reaſonable payment* for the paſſages. And it is requiſite to have one who has property in the ferry, and not to allow every fiſherman to carry, and recarry at their pleaſure, for diverſe inconveniencies; and eſpecially when a place is between the diviſions of two counties, any felon may be conveyed from one county to another, ſecretly, without any notice.

2. A ferryman, if it be on ſalt water, ought to be *privileged* from being preſſed as a ſoldier or otherwiſe. Savil. 11 and 14. ut ſup.

3. Owner of a ferry cannot *ſuppreſs* that, and put up a *bridge* in its place without licence, and *ad quod damnum*, per Holt Ch. J. Paſch. 3 W. and M. Show. 243. 257. Pain v. Patridge.

Carth. 193. S. C. 1 Salk. 12. S. C.

4. If a ferry be granted at this day, he that *accepts ſuch grant* is bound to keep a boat for the public good, per Holt Ch. J. Show. 257. in the caſe of Paine v. Partridge.

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5. Cuſtom for the *inhabitants to be diſcharged of toll*, may have a reaſonable beginning by agreement; as that the inhabitants of the town might be at the charge of procuring the grant, and in conſideration thereof, one man to find the boat and take toll; but the inhabitants to pay none, per Holt Ch. J. Show. 257. ut ſup.

6. A common ferry was for all paſſengers paying toll, but the inhabitants of A. were *toll free*. An inhabitant of A. may bring an *action for taking toll*, but not for not *keeping up the ferry*; becauſe the former is a private right, but the latter a public. 1 Salk. 12. Trin. 3 W. 3. Paine v. Patridge.

But he cannot maintain an action for not paſſing; for ſo, any other ſubject might bring an action, which would be endleſs; but the taking toll was a ſpecial damage, and *without ſpecial damage*, he *can only inlict, or bring information*. 1 Salk. 12. Pain v. Partridge.

(A) Feudall Barony.

1. FEUDALL baronies were, when the king, in the creation of baronies, gave rents and *lands to hold of him for the defence of the realm*. Per Holt Ch. J. There is no feudal barony remaining

Feudall barons held a certain territory of

land, per baroniam, wherein

maining at this time, except *Arundell.* 1 Salk. 253. Ld. Gerard v. Lady Gerard.

there was a caſtle, whereunto all the inhabitants in time of war reſorted; and theſe were called the *capita baronia*; and there was no dower of them, becauſe they were for defence. No ſuch have been *granted ſince K. 2d's time.* Mich. 7 W. 3. B. R. 12 Mod. 84. Ld. Gerard's caſe.

(A) Fictions.

1. ALL fictions of law are *to certain reſpects and purpoſes*, and *extend only to certain perſons*; as the law ſuppoſes the *vouchee* to be tenant of the land, where in rei veritate he is not, but this is as to the demandant himſelf, and to enable him to do things as to the demandant, and which the demandant may do to him; and therefore a fine levied by vouchee to the demandant, or fine or releaſe from the demandant to the vouchee is good; but fine levied by vouchee to a *ſtranger*, or leaſe made to him by a ſtranger is void, per Coke. Mich. 33 and 34 Eliz. B. R. 3 Rep. 29. b. in Butler and Baker's caſe.

2. The *king* is not to be anſwered, bound nor defeated by fictions; and therefore he would not have been bound in his reverſion, or remainder by a feigned recompence upon a common recovery, or warranty collateral, without true and actual aſſets, &c. Hob. 339. in caſe of SHEFFIELD and RATCLIFFE, cites 6 E. 5. 56. and 1 Rep. 43. Altonwood's caſe.

3. Thoſe things are *properly* fictions of law, *that have no real eſſence in their own body, but are ſo acknowledged and accepted* in law *for ſome eſpecial purpoſe.* Hob. 222. cites Co. Litt. 265. b.

4. Fiction *is never admitted where* truth may work; as where ceſty que uſe and his feoffee join in a feoffment, it ſhall be the feoffment of the feoffee. Hill. 15 Jac. Hob. 311. in caſe of Wright v. Gerard.

[210] 5. The law never ſhall make any fiction but for *neceſſity*, and to *avoid a miſchief*, per Coke 3 Rep. 30. in caſe of Butler v. Baker——ibid. 36. per Doderidge J. 2 Roll. R. 502. in caſe of Sheffield v. Radcliff——Jo. 73. S. C. and to avoid *abſurdity*, and preſerve the right of a ſtranger. Per Doderidge J. Paſch. 1 Car. in Cam. Scacc.

The law often makes fictions *for preſervation of right*, per Gould. J. 12. Mod. 290.

6. There are *five ſorts* of fictions in law, *abeyance*, *remitter*, *relation*, *preſumption*, and *repreſentation*, per Doderidge J. Jo. 73.

Co. Litt. f. 224. 150.

7. *In fictione juris ſemper ſubſiſtit æquitas.* 11 Rep. 51. Liford's caſe.——it muſt do prejudice to none, per Doderidge J. 2 Roll. R. 502.——it is to prevent miſchief. Jo. 427. Hill. 14 Car. in the caſe of Harper v. Derby (Burgeſſes).

8. Fictions

8. Fictions of law muſt not be of a thing *impoſſible*; for the law imitates nature, per Doderidge J. 2 Roll. R. 502. in the caſe of Radcliff v. Sheffield.

9. You ſhall never make a man ſubject to the *penalty of a ſtatute* upon a fiction of law. Arg. Godb. 388. cites 11 Rep. 51.

10. No *eſcape* can *amount to a capital offence*, unleſs the crime, for which the party was committed, were actually ſuch at the time of the eſcape; for it is not ſufficient that it *become ſuch afterwards* from the beginning by a fiction of law; as where one is committed for having given a dangerous wound, and eſcapes, after which the party dies. 2 Hawk. Pl. C. 135. ſ. 25.

Figures.

1. IN *aſſumpſit* in an inferiour court, the *time of the promiſe alledged* was in figures, and upon error brought, judgment was reverſed for this cauſe. Sid. 40. Paſch. 13 Car. B. R. Ducket v. Bland. Keb. 19. S. C. by the name of Buſhel v. Bland.

2. It was moved to quaſh an *indictment*, becauſe the year of our Lord in the caption was in figures. But per Hale Ch. J. the year of the king is enough. Mod. 78. pl. 40. Mich. 22 Car. 2. Anon.

3. In *debt for rent*, the *ſum demanded* was in figures, and not in words; upon a writ of error brought, the court held it was a material exception, and reverſed the judgment, unleſs cauſe, &c. Hill. 23 Car. Sti. 88. Hobſon v. Heywood.

4. *Roman* figures are good in *pleading*, but otherwiſe of Engliſh figures. 2 Lev. 102. Paſch. 26 Car. 2. B. R. Hawkins v. Mills. 3 Keb. 301. S. C.— Vent. 256. ſeems to be S. C.——If an *indictment* ſets forth the ſtile of the day or *year*, in any figures but *Roman*, it is inſufficient. 2 Hawk. Pl. C. 255. ſ. 129.

5. In indeb. aſſump. *pro opere & labore*, it was excepted, becauſe the ſum was in figures, ſed non allocatur, for there were (XII) *Latin figures*, which is well enough; otherwiſe, if there had been (12) *Engliſh figures*; and it would have been *otherwiſe*, if they were in figures *in an inferiour court*, and therefore it was adjudged for the plaintiff. This was in a writ of enquiry. Skin. 409. Hill. 5 W. & M. B. R. Hebbert v. Corſthorp.

6. 6 *Geo.* 2. 14. *Allows the expreſſing numbers by figures in all writs, &c. pleadings, rules, orders and indictments, &c. in courts of juſtice, as have been commonly uſed in the ſaid courts, notwithſtanding any thing in the* 4 *Geo.* 2. 26.

File.

(A) Of putting upon the File, and taking off.

1. A *Cauſe* was *between father and ſon*, and there having been great heat, and *indecent reflections* on both ſides, in bill and anſwer, and the matter being *ended* this vacation *by compromiſe*; upon motion this day made in court by Mr. Porter, the bill and anſwer were taken off the file by conſent. Mich. 1683. Vern. 189. Tremaine v. Tremaine.

2. *Information* filed, *without recognizance* entered into by the party, is ill, but the Court cannot take it off the file; when once a thing is on the file, it *cannot be taken off without an act of parliament*; no, *not by conſent of parties*; as in the caſe of Dr. WIDDRINGTON on a mandamus, the college made a very ſcandalous return, and which he and the college agreed; and then they moved to take the return off the file, but the Court refuſed it, ſaying, it could not be done without an act of parliament; only they *ordered a vacat* to be entered thereupon; that in this caſe the method may be, to enter the irregularity on the roll, with a ceſſit proceſſus ſuperinde. Sed Cur. adviſare vult. 12 Mod. 155. Mich. 9 W. 3. the King v. Lambert.

3. If a *bill againſt an attorney*, be filed *irregularly* it may be taken off the file. per Cur. 12 Mod. 164. Hill. 9 W. 3. in caſe of Broadwaite v. Blackerby and Perkins.

[See **Report** (A)]

Fol. 13.

Fine.

(A) The Antiquity of Fines.

[1. A Fine is pleaded to be levied 2 *E.* 1. *but not pleaded as a fine, becauſe* he had *no chirograph* of it. 20 H. 6. 3.]

[2. 7 *E.* 1. Rot. Clauſarum Membrana 5. in dorſo a fine levied *between the king and Bigod* Earl of Norfolk in ſuch form, as at this day, &c. hæc eſt finalis concordia, &c. 8 E. 1. Membrana 11. Fine *upon releaſe of an advowſon.*]

2 Inſt. 511. [3. 18 *E.* 1. Libro parliamentorum, among the reaſons of the judgment there given, it is ſaid, *Nec in regno iſto provideatur, vel ſit aliqua ſecuritas major ſeu ſolempnior, per quam aliquis vel aliqua ſtatum certiorem habere poſſit, vel ad ſtatum ſuum verificandum aliquod*

quod ſolennius teſtimonium producere quam finem in curia domini regis levatum; qui quidem finis ſic vocatur, eo quod finis & conſummatio omnium placitorum eſſe debet, & hac de cauſa providebatur.]

4. It is certain, that fines were frequent *before the conqueſt.* 2 Inſt. 511.——Catlin cited ſome fines before the conqueſt, touch the poſſeſſions of the abbot of Crowland. Pl. C. 369.

(A. 2.) The Original of Fines. [212]

1. The ancient manner of conveyancing was of two ſorts, either by fine or feoffment. The fine was *in the lord's court*, and by this they *paſſed all feudal right*, which was *in poſſeſſion*; and there are inſtances as low as the time of *H.* 2. and *E.* 2. of fines in the court of the lord: and they were *called fines*, *becauſe* a fine was paid to the lord for ſuch agreement, for that it transferred the feudal right held of the lord. G. Treat. Ten. 93. cites Madox 15.

2. *But* though in ſuch courts, they paſſed all the right the tenant had in poſſeſſion; yet the *right of action could not be transferred*, becauſe that would encourage maintenance; therefore, what ever ſuch grantee could ſeiſe paſſed by this feudal conveyance. But the right of diſtreſs and of action did not paſs without attornment. G. Treat. Ten. 93.

3. The *feoffment conveyed* the feudal poſſeſſion, *coram paribus* out of court; for it was neceſſary to convey ſometimes before the court was held, and then the poſſeſſion was delivered over *coram paribus*; but as there were two conveyances of *copyhold*, one in the lord's court, and the other to the cuſtomary tenants; ſo in *freehold*, where the immediate grant was to the feoffee, and not to the lord, as in the copyhold; yet there were two ſorts of conveyances, one by fine in open court, the other by feoffment coram paribus; the right only paſſed by fine, becauſe the poſſeſſion being in the grantee, they might well ſtay till the next court to transfer the right; but *where the poſſeſſion was to be parted with*, or ſervice to be done, or money paid, there the *uſual way was coram paribus*, that the feoffee might not loſe the profits in the mean time, or the poſſeſſion be delivered before the contract could be compleated. G. Treat. Ten. 93, 94.

4. *Thus it ſtood till ſome time after the conqueſt*; but the after kings endeavouring to retrench the privilege of the great lords, they firſt in *Magna Charta*, and after by the ſtatute of *quia emptores terrarum*, began to admit of alienations without fine to the lord; and the acts of court-baron were only eſteemed to create *notoriety among the tenants* of the manor. From hence grants in the lord's courts were omitted, and the *attornments in pais* were the only notorieties of ſuch grants, no fine being paid to the lord; and the king's courts creating a notoriety all over the land, the uſual way was to make the grant in the king's court, in this manner: they uſed to ſuppoſe

that

that the parties had covenanted to alien; and all writs of covenant, (as being an action of public concern to the juſtice of the kingdom,) were ſuable only in the king's court; and by conſequence this covenant to alien was ſuable there; and that court being poſſeſſed of the matter as an adverſary cauſe, they were admitted to make all manner of agreements, touching ſuch ſuit depending; and theſe agreements being amicably made by way of compoſition before the king's court, it became the juſtice of the king's court to ſee them performed; and therefore a ſcire facias iſſued to execute the fine, and a quid juris clamat to the tenant. G. Treat. Ten. 94, 95.

(A. 3) Fine. How and in what Manner to be levied.

Though this act *is repealed*, yet it may ſerve in many reſpects to explain the ſtatute of 4 H. 7. and 32 H. 8. 2 Inſt. 218.

1. 18 *E.* 1. *ſtat.* 4. *ſ.* 1. Enacts that, *when the* writ original *is delivered in the preſence of the parties before juſtices, a pleader ſhall ſay thus: ſir juſtice, conge de accorder.*

S. 2. *And the juſtice ſhall ſay to him, what ſaith Sir R. and ſhall name one of the parties.*

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S. 3. *Then, when they be agreed of the ſum of money that muſt be given to the king, the juſtice ſhall ſay, Cry the peace.*

S. 4. *And after the pleader ſhall ſay, inſomuch as peace is licenſed thus unto you W. S. and A. his wife, that here be, do acknowledge the manor of B. with the appurtenances contained in the writ, to be the right of our * Lord the king, which he hath of their gift.*

* So are the ſtatutes at large, both of Keble and Raſtal, but this ſeems a miſtake and that it ſhould be R. as the name of a common perſon, and ſo is 2 Inſt. 510.

S. 5. *To have and to hold to him and his heirs, of the ſaid W. and A. and the heirs of A. as in demeſnes, rents, ſeigniories, courts, pleas, purchaſes, wards, marriages, reliefs, eſcheats, wills, advowſons of churches, and all other franchiſes and free cuſtoms, to the ſaid manor belonging, paying yearly to R. and his heirs, as chief lords of the fee, the ſervices and cuſtoms due for all ſervices.*

*If there be no original writ, yet the fine is *not void*, but *voidable* by writ of error. 2 Inſt. 513.——See (F) pl. 3, 4, 5, 6, 7.——† The number of juſtices here mentioned are not requiſite at this day; but there muſt be *above* the number of *one*. And therefore a fine levied before *Thom. Brian milite & ſociis ſuis* juſticiariis de commmuni banco was not good. 2 Inſt. 514, 515.——4 *H.* 7. 24. *Enacts, that it ſhall be good though levied in C. B. before*, 2 juſtices only there.——‡ It was reſolved, that a fine may be levied of *lands in ancient demeſne, in the court of ancient demeſne*, notwithſtanding this ſtatute, which ſays, that fines ſhall be levied in C. B. & non alibi. For this ſtatute *only takes away the validity of fines levied in borough courts, or other inferior courts*, which was the miſchief intended to be prevented by this ſtatute, and does not extend to courts of ancient demeſne; for it would be unreaſonable, that they ſhould be barred of levying fines in C. B. (as they may be by writ of diſceit) and yet not be able to levy fines in their courts of ancient demeſne.

S. 6. *And it is to be noted, that the order of the law will not ſuffer a final accord to be levied in the king's court without a* * writ original, *and that muſt be at the leaſt* before † four juſtices in the bench, or in eyre and ‡ not otherwiſe, *and* in preſence of the parties *named in the writ, which muſt be of full age, and good memory, and out of priſon.*

meſne. And it was reſolved, that ſuch fine levied in ancient demeſne makes a diſcontinuance, and has all the effects of a fine levied in C. B. except that it is no bar, which is only by force of the ſtat. of 4 H. 7. Lutw. 781. HUNT v. BOURNE, and al.——1 Salk. 340. Hill. 2 Annæ, B. R. S. C.

* S. 7. *And if a* woman covert *be one of the parties, then they muſt be firſt* examined *before four of the ſaid juſtices,* † *and if ſhe doth not aſſent thereunto, the fine ſhall not be levied.*

*See (F) pl. 1, 2. and (M) per totum.

†But if the fine be *received and recorded*, the feme, or her heirs ſhall *not* be allowed to *aver*, that *ſhe was not examined nor aſſented*. 2 Inſt. 515.

S. 8. *And the cauſe wherefore ſuch ſolemnity ought to be done in a fine, is, becauſe a fine is ſo high a bar, and of ſo great force, and of ſo ſtrong nature in itſelf, that it concludeth not only ſuch as be* * parties and † privies *thereto, and their heirs, but* ‡ *all other people of the world, being* ‖ of full age, out of priſon, of good memory, *and within the four ſeas the day of the fine levied.*

* 2 Inſt. 516. Parties are thoſe, that are parties *to the original.*

† 2 Inſt. 516. Firſt this is to be underſtood of privies *in blood*; *not only* of the *heirs by the common law*, which are here named, *but heirs by the cuſtom*, here comprehended under this word (privies) as borough-engliſh, gavelkind, or the like, which claim as heirs by cuſtom, and is *not* intended *of privies in eſtate*, as jointenants, the donor and donee, leſſor and leſſee, or the like. Alſo, this is to be underſtood of privies *in acceſſion*, as biſhops, abbots, and the like.——*Privies* ſignify thoſe that are partakers, or that have an intereſt in any action, or thing with another, or any relation to another. Theſe are either privies in eſtate, as donor and donee, leſſor and leſſee, jointenants, &c. or privies in blood, as the heir to the anceſtor, or between coparceners; for by privies in blood, privies *in blood inheritable* are to be underſtood privies *in repreſentation*, as executors to teſtators, adminiſtrators to inteſtates; privies *in tenure*, as lord and tenant, &c. all which may be reduced to two general heads, (viz.) privies *in deed*, and privies *in law*; privies only in eſtate are not to be underſtood here; but privies in eſtate and blood, and by repreſentation. Privies therefore, being heirs to the parties, are bound or barred preſently for ever by a fine if they claim the ſame title, that their anceſtors had, that levied the fine, whether under impediments, or no; for though the iſſue in tail is under impediments (as within age, under coverture, non compos mentis, in priſon, or beyond ſea) yet ſuch iſſue in tail is barred; for ſuch iſſue is out of the ſaving of the 4 H. 7. 24. Wood's Inſt. 244.

The words parties and privies are to be *underſtood* as to a *fee ſimple*, as the ſtatute 18 E. 1. intended them. Jenk. 192. pl. 97.——See 2 Jo. 241. &c. in Ld. Darby's caſe acc.——He that is *privy in blood only and not in eſtate* alſo, is not within theſe ſtatutes, neither ſhall he be barred by the fine. *As* if lands be given *to a man and the heirs females of his body*, and he *hath a ſon and a daughter*, and the *ſon levies* a fine, *and dies without iſſue*, this is no bar to the daughter; for though ſhe be heir to his blood, yet ſhe is not heir to the eſtate, nor hath ſhe need to make her conveyance to it by him; but if the father § had levied it, it would have been otherwiſe. 3 vol. R. S. L. 215, 216. cites Trin. 21 Jac. C. B. Godfrey's caſe.——By the words privies and ſtrangers in the ſtatute, if tenant in tail is party to the fine, and his *iſſue claims per formam doni*, yet he is privy; for he *cannot convey himſelf as heir to the tail but as of the body of his father, which is privity*. Br. Fines, pl. 109.——*So* if lands be given *to huſband and wife in ſpecial tail*, the *remainder to the right heirs of the huſband in fee*, and he alone levies a fine with proclamations of it, by this the iſſue in tail may be barred; for he cannot otherwiſe convey himſelf to the tail and deſcent, than as heir of the body of father and mother. 3 vol. R. S. L. 216. cites * D. 3. 251. and Br. Fines 109.——* D. 3. b. pl. 6. Trin. 19 H. 8.

‡ In theſe words are included as well *tenant for years*, tenant by *ſtatute merchant* and *ſtaple*, *copyholders* and *cuſtomary holders*, as tenants of *freehold and inheritance*, if they be *out of poſſeſſion or ſeiſin* at the time of the fine levied; for a fine levied by a ſtranger cannot barr him that is in poſſeſſion. And albeit, the words of this law are very general, yet do they not abrogate the ſtatute of W. 2. de donis conditionalibus, 2 Inſt. 517.——If *tenant in tail levies a fine*; this fine bars the intail, and every other perſon who has right, if he does not enter or claim within 5 years after the fine and proclamations; unleſs ſuch perſon be aided by ſome of the *impediments* mentioned in the ſtatute. By all the judges of England. Jenk. 192. pl. 97. cites 19 H. 8. 6.

‖ By this act, if any ſtranger was within age, or in priſon, or non compos, or beyond the ſeas at the fine levied, he was totally and for ever excepted; ſo as *after his full age, coming out of priſon*, &c. he or his heirs *need not make any claim*. 2 Inſt. 516.——*But* this is altered by the 4 H. 7. 24. Ibid. in Marg.

S. 9. *If*

S. 9. * *If they make not their claim of their action within a year and a day by the country.*

* Though the words are if they put not in their claim, yet in ſome caſes the *right of one*, who might *claim*, and *doth not*, ſhall be *preſerved*. As if diſſeiſor be diſſeiſed, and the ſecond diſſeiſor levy a fine; in this caſe, if the *firſt diſſeiſor enter within the year*, this ſhall preſerve the right of the diſſeiſee: becauſe the firſt diſſeiſor, by his entry, avoided the whole eſtate given by the fine, and yet the diſſeiſee might have entered himſelf. 2 Inſt. 518.—See B.

2. 27 *E.* 1. *cap.* 1. *ſ.* 3. *Enacts that, the juſtices ſhall ſee that ſuch notes and fines, as hereafter ſhall be levied in our court, be* read openly and ſolemnly, *and that in the mean time all* pleas ſhall ceaſe. *And this muſt be at two certain days in the week according to the diſcretion of the juſtices.*

Ha. F. N. B. 344. (a)

3. *At common law*, a man might *levy a fine by attorney*, as well as confeſs an action; and the attorney himſelf might enter and record it, though the party did not make conuſance, and of this great miſchief followed, and oftentimes diſheriſon; and therefore it was ordained by the ſtatute * *de finibus et attorn.* that a fine ſhould not be levied, until the parties went before the juſtices in proper perſon, ſo that the juſtices might have conuſance of their age, and other defaults; yet at this day a man may take eſtate by fine by attorney. Alſo, a man *may take a grant and render by fine by attorney*, as in proper perſon. Denſh. R. of Fines 7.

* 15 E. 2.

* *Orig.* is (ſeignior.) but quære? if ſhould not be (feme.)

4. *And* the *baron and feme* may take eſtate by fine by attorney made by the baron; but this ſhall not bind the * lord to claim other eſtate after the coverture diſſolved. Denſh. R. of Fines 7.

5. *But* mayor and commonalty, dean and chapter, *recluſe & ſimul* cannot levy any fine, nor take any eſtate by fine by attorney. Denſh. R. of Fines 7.

[See *Stat.* 4 *H.* 7. *Cap.* 24. *ſ.* 12. at (W. 4.) infra.]

(A. 4) How Conſidered in law.

1. A fine is no more in effect, than *a covenant made between the parties before juſtices, and entered of record.* Br. Fines, pl. 97. cites 21 E. 4. 4. per Tremaile.

Though a fine be a feoffment of record, yet it is but ſo *fictione juris*. If another were in by tort, it will not amount to an entry, as a feoffment ſhall, per Bridgman Ch. J. Cart. 176.——Jo. 16 Eliz. 459. cites D. 333. b. 334. a.——Co. Litt. 332. b.——D. 334. pl. 30.——* But ſee pl. 5.

2. A fine *ſur cognizance de droit come ceo, &c.* is a fine executed, and is a *feoffment of record*, and ſo are the other fines executed; as fines, *ſur releaſe confirmation, or ſurrender.* 2 Inſt. 513.

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3. Where one, who hath a *freehold in poſſeſſion*, levies a fine *come ceo*, &c. this enures as a *feoffment with livery on record*; but where he hath but a *reverſion or remainder*, it enures *only as a grant* thereof, without tort preſumed, or done to the poſſeſſion of a ſtranger, who hath the freehold. Arg. Mo. 629. in Sir Cha. Dauver's caſe.

4. A

4. A fine *is a perſonal action*, though the covenant is real in reſpect it concerns land. Arg. Hill. 6 Car. Cro. C. 270. in caſe of Favely v. Eaſton.

5. The Court denied a fine to be a feoffment of record, and ſaid it was *improperly* ſo called, but that the *meaning* was, that it had the effects of a feoffment to ſome purpoſes, if he that levied the fine was ſeiſed of the freehold at the time of the fine levied. 1 Salk. 340. Hill. 1 Annæ, B. R. in caſe of Hunt v. Bourne.

6. While a fine remains on record, *entire credit* muſt be given to it. per Cur. 10 Mod. 45. Mich. 10 Annæ, B. R. in Lord Say and Seal's caſe.

(B) Plea of the Fine [*Anciently.*]

[1. 11 H. 3. Plea rolls at the tower Rot. 7. in a writ of right by Galfrid de Cerlanda & Matillidem verſus Jollanum Nevil; the tenant pleaded a *fine upon releaſe* acknowledged by the anceſtor of the demandant *in time of H.* 2. *& inde ponit ſe ſuper pedem curiæ qui eſt in theſauro*, and the plaintiffs *deny the ſaid fine & inde ponunt ſe ſuper recordum curiæ & pes curiæ inventus eſt in theſauro domini regis & curia avocat & warrantizatus eſt a juſticiariis & ideo* adjudged that the plaintiff be barred, &c.]

(C) Who [*might, or*] may take a Fine Ex officio. [*Anciently and Now.*]

[1. A Fine may be levied *in eyre*. 11 H. 4. 68. b. 16 E. 3. 19 E. 3. Abbe 13. per Thorpe anciently. 2 E. 3. 35. b.] Weſt. ſ. 16. cites lib. intrat. tit. ſcire fac. in Ayde 2.——Denſh. R. of Fines 2.

[2. Anciently a fine might be levied before the *juſtices of aſſiſe in an aſſiſe*. 16 E. 3. 19 E. 3. Abbe 13. adjudged.]

[3. A fine might be levied before the *juſtices itinerants*. 8 E. 1 Rot. Clauſarum Membrana 10.]

4. Where a vill *preſcribes to hold pleas, and to make proteſtation, in nature of whatſoever writ they will*, yet *they cannot levy a fine in a writ of right, and make proteſtation of a covenant*, &c. For the action is real and the proteſtation perſonal, per Knevet J. therefore if it be not *expreſſed* to levy a fine, it is a great queſtion. Br. Fines, pl. 104. cites 50 Aſſ. 9.

5. Conuſance of fines may be levied in *parliament* by a ſpecial ſuit of any * coming to the *parliament*. Denſh. R of Fines 2. *Orig. (De. vinire al.)

6. The *King* may take conuſance of a fine, and ſend it into bank by writ; and alſo the Lord *Chancellor* of *England*. Denſh. R. of Fines 2. See the ſtatute de finibus. Olim coram ipſo rege & magnatibus regni peragebatur. Spelm. Gloſs. verbo, Fines.

7. *Juſtices in eyre* may take conuſance of fines, and ſo might *juſtices of the common bench*, before that it was a certain place, and now *juſtices of the common bench* may take conuſances of fines, &c. Denſh. R. of Fines 2.

8. *So juſtices of aſſiſe*, of tenements in plaint before them, and the *juſtices of niſi prius* may take conuſance of fines, and darrein preſentments in *quare impedit* of advowſon, in the ſame county, [216] where the advowſon is; but *juſtices of niſi prius*, in entering pleas of lands cannot take conuſance of fines. Denſh. R. of Fines 2. cites 37 Aſſ. 17.

9. At common law, the *barons of the Exchequer* held common pleas, and took conuſance of fines; but now they are prohibited by the ſtatute called *articuli ſuper chartas*, made anno 28 Ed. 1. Denſh. R. of Fines 2.

Br. Judge, pl. 6. cites 8 H. 6. 19. perStrange. Br. Judgmt. pl. 116. cites 8 H. 6. 19. per Martin.

10. A *juſtice*, or other perſon *being cogniſee* in a fine may not take cogniſance thereof himſelf; for if he ſo do the fine thereupon levied is void. 8 H. 6. 21. Weſt Symb. ſ. 17.

Coke in his reading on Fines, 10. ſays, he thinks that if a fine be levied before any by ded. pot. that is no judge, knight or ſerjeant, it is error, and may be reverſed in B. R. by writ of error: but that it is ſaid in F. N. B. that a ſerjeant ſworn to the king may take conuſance by ded. pot. and yet he is not named in the ſtatute.——Br. Fines, pl. 120. S. P. but adds a quære if a *ſerjeant at law* be not *taken as juſtice* by the equity of the ſtatute.——Trin. 5 Eliz. D. 224. b. pl. 31. Quilter's caſe.

11. The *king by patent or commiſſion, with a non obſtante, gives power to A. and B. juſtices of aſſiſe* in a circuit, to take the conuſance of all fines and recognizances, conjunctim and ſeparatim. *A. is not a judge of one of the benches at Weſtminſter*, nor one of the barons of the Exchequer; A. takes the conuſance of a fine by the authority abovementioned; the caption is good by force of this patent, without any dedimus proteſtatem ſued before or afterwards. This judgment was affirmed in error. Without ſuch ſpecial patent the Ch. J. of the Common Pleas only has the prerogative to take the conuſance of fines without any dedimus poteſtatem ſued before the caption, or afterwards. This caſe was reſolved upon good conſideration; theſe juſtices were the attorney general and a ſerjeant at law. The *ſtatute of* 18 *E.* 1. *de modo levandi fines* ordains the caption of fines before the judges of the Common Pleas; the *ſtatute of Carliſle* 15 E. 2. ordains in caſe of ſickneſs, or impotency of the conuſor, that one of the judges of one of the benches, with a ſerjeant, or a knight, ſhall have power to take ſuch conuſance. Theſe are *only affirmative ſtatutes*, and *do not take away the king's prerogative* to grant power by *dedimus poteſtatem* to other perſons than thoſe named in theſe ſtatutes, to take acknowledgments of fines. And ſo it is uſed at this day. Jenk. 227. pl. 90.

This is *per conſuetudinem regni*. Jenk. 227. pl. 90. ——Jenk. 169. pl. 28. —2 Inſt. 512.—Co. P. on Fines, lect. 9. pag. 10. S. P. as to the Ch. J. of C. B. and ſays, that the *chief juſtice of England*, nor any other juſtice of the king can take conuſance in the country without writ of ded. poteſt. and this *ſeems to be by cuſtom and uſage*; for he ſays he does not find any ſuch ſpecial authority given to

12. *Juſtices of* B. R. and C. B. and Barons of the Exchequer *in their circuits* without ded. pot. may take conuſance of fines; and a writ of covenant and ded' poteſt. is ſued out afterwards with an antedate. But none elſe may do ſo. * *Chief juſtice of C. B.* only may take fine without ded. poteſt. ſued out either before, or after, as by the prerogative of his place. Jenk. 279. pl. 3.

to the Ch. J. of C. B. by any ſtatute.——* Weſt. ſ. 16. ſays that the chief juſtice of C. B. *by the privilege and prerogative of his place* and office may take cognizance of fines *in any place out of court*, and certify the ſame without writ of dedimus poteſtatem. cites D. 224. pl. 31.

13. Fines may be acknowledged *before the Lord Ch. J. of C. B.* or *two of the juſtices in open court*; this is called acknowledging a fine at bar, but the *Ld. Ch. J. may take* fines *in any place out of court* without a commiſſion, and certify the ſame. *Juſtices of aſſiſe* may do it by the general words of their patents; but they do not uſe to certify the ſame before a ſpecial writ of dedimus poteſtatem is ſued out. Wood's Inſt. 242.

14. A fine cannot be levied by any that have *conuſance of pleas*, or power to hold pleas, it muſt be done only before the juſtices of the Common Pleas; for the king cannot grant power to hold plea for the levying of a fine. Wood's Inſt. 242, 243. (cites 34 and 35 H. 8. 22. concerning fines in towns corporate.)

[See *ſtat.* 18 *E.* 1. *ſ.* 6. and the notes thereon at (A. 3.)]

(C. 2) At Common Law, and Now. Levied in what Places or Courts, other than C. B. and who may take Fines elſewhere. [217]

1. In aſſiſe, the tenant ſaid that the *uſage of the ſoke of Wincheſter* is, and time out of mind hath been, *that if any baron and feme* make alienation of the land of the right of the feme by charter, and the baron and feme *come before the bailiff of the biſhop of Wincheſter, lord of the ſoke, in the court of the ſoke, and the feme is* confeſſed and *examined before the bailiff in the ſame court*, and they acknowledge the ſame deed; this ſhall bind as a fine at common law; and this matter was pleaded in bar of the aſſiſe, and Hank and Knivet J. were clear, that *they ſhall not preſcribe in ſuch cuſtom, if it was not a city or borough*; and after the aſſiſe was awarded: quod nota, and ſo no bar. Br. Cuſtoms, pl. 39. cites 45 Aſſ. 48.

2. A fine may be levied and acknowledged in *B. R.* when the record is there *by error*; but not upon *original* to be commenced there. Denſh. R. of Fines 3.

It ſeems to me that *before the fine* be *engroſſed the record* of the fine *ſhall remain with the chirographer*; and this is the reaſon, that a fine cannot be levied *in B. R.* becauſe *there is no chirographer*. Co. R. on Fines 12.

3. If a fine be levied *in B. R. it is not void, but voidable* by writ of error. Co. R. on Fines 9. cites 36 H. 6. 34.——Br. Faux. Recov. pl. 15. cites 36 H. 6. 32. that Forteſcue held it good enough.

Br. Fines, pl. 71. cites S. C. that a fine levied in B. R. is good, but Brook makes a quere thereof

4. Thoſe who have conuſance of pleas *by charter*, after conuſance granted in ſuch licences, &c. may take conuſance of fines in their courts of lands in the writ; but they ought to have power of levying fines by ſpecial words in their *charter*, &c. and they

By *ſpecial grant* a fine may be levied in a *baſe court*. Weſt.

ſ. 18. cites 44 E. 3. 38. —But fine levied *in ancient demeſne, by any cuſtom*, ſeems void. Weſt. ſ. 18. cites 44 E. 3. 38. and that it is the ſame in other inferiour courts, cites 50 Aſſ. pl. 9.

ought to pray conuſance in theſe caſes, before the fine acknowledged, or they ſhall not have it. Denſh. R. of Fines 2.

And deeds inrolled in *London* are as ſtrong as fines. Denſh. R. of Fines 3.

5. *And* upon conuſance granted, a fine may be levied before the *mayor of London* of lands in the writ contained; and ſo it may in *writ of right* in *London*. Tamen quære. Denſh. R. of Fines 2, 3.

6. *But* a man cannot *preſcribe* to levy fines in his court of lands *within his manor*; becauſe fine is a record, which no man ſhall have by preſcription; and the *king upon every concord is donor*, which a man cannot be by preſcription. Denſh. R. of Fines 3.

7. A fine levied in *C. B.* of lands within the *cinque ports* is good, and ſhall not be reverſed by *error*. Denſh. R. of Fines 3.

8. A fine levied of lands in *Ireland* in C. B. here is void. Denſh. R. of Fines 3.

9. In *marſhalſea*, *hundred*, *county*, *leet*, or *court baron*, fines cannot be levied, becauſe a *præcipe quod reddat* lies not there, nor a *writ of covenant*; yet upon *writ of right*, the ſuitors in court baron ſhall hold plea of land, and ſhall be tried by battle, and not by grand aſſiſe; yet none of theſe juſtices, nor courts, have power of recording a fine upon proclamation, but only the juſtices of the king in C. B. nor any of the fines levied in the ſaid courts at this day are of other force, but as the fines there levied, were before
[218] the ſtatute of 4 H. 7. 24. except the fines levied in C. B. with proclamation; ſo that it is in the election of every one to levy a fine by the ſaid ſtatute, or according to the form before uſed. Denſh. R. of Fines 3. 4.

10. By 34 *and* 35 *H.* 8. 26. *Fines may be levied in* Wales.
11. By 37 *H.* 8. 19. *In the county palatine of* Lancaſter.
12. By 2 *Ed.* 6. 28. *In the county palatine of* Cheſter.
13. By 5 *Eliz.* 27. *In the county palatine of* Durham.
14. By 43 *Eliz.* 15. *In the city of* Cheſter.

But fines in thoſe counties muſt be of lands lying in thoſe counties. Wood's Inſt. 243.—Fines may be levied within the county palatine of Lancaſter and Cheſter, but that is (as Coke ſays he apprehends) by force of divers acts of parliament, and ſo it may be in any cities or towns corporate, where they have *uſed to levy fines, if their uſages are confirmed by act of parliament.* But ſuch fines ſhall not bar any eſtate tail, nor any ſtrangers, who have preſent, or future, right. Co. R. on Fines 9.

[See **Prerogative** (D. c) **Conuſance.**]

(D) Fine of Land. What Perſons in reſpect of Eſtate, [*may levy Fines.*]

S. P. per Tremaile, and yet no original is between them. 21 E. 4. 5. pl. 8.

[1. *IN writ of right* againſt tenant for life [who makes default] after default, [if he in] *remainder is received*, a fine may be good *between the demandant and him* [in remainder] *who is received.* 21 E. 4. 5.]

[2. A

[2. A *vouchee* may levy a fine. 8 H. 4. 5. 5 H. 7. 41.] After he has *entered into the warranty* he may levy a fine to the demandant, though in fact neither of them is ſeiſed; for ſuch vouchee is *tenant in law*, and may confeſs the action; becauſe of the privity between him and the demandant. *But* a fine by him ſo levied *to a* * *ſtranger* is void. 8 H. 4. 5 H. 7. 40. Weſt. Symb. ſ. 13.——Br. Fines, pl. 34. cites 8 H. 4. 5 ——3 Rep. 29. b. in a nota of the reporter's.——In regard to the demandant, vouchee is tenant; but in regard to a ſtranger he is not. 1 Rep. 87. b. per Walmſley J. ——* Br. Fines, pl. 105. cites S. C. and that it is void for want of privity.

[3. A *prior preſentable, who had covent and commen ſeal*, might levy a * fine; for he had the right in him. 12 H. 4. † 11. 21 E. 1. b. adjudged 16 E. 3. 19 E. 3. Abbe. 13. adjudged 8.] *Fol. 14.

† 12 H. 4. 21. b. pl. 13.

4. Note, that *tenant for years*, tenant *by ſtatute*-merchant, or ſtaple, or *guardian in chivalry*, or *tenant at will* cannot levy a fine; and if they do, it is void, though it be with proclamation. Denſh. R. of Fines 11. If tenant for years levies a fine *without firſt making a feoffment*, the fine is void, as to the making of any title by way of non-claim, by reaſon of the imbecillity of the eſtate. Wms's Rep. 519. cites it as ſo held by Holt Ch. J. in delivering the reſolution of the court in the caſe of HUNT v. BOURNE; which Ld. Chancellor agreed, and thence it was inferred, that if in caſe of leſſee for years, as before, the fine might be ſaid to be void, becauſe parties finis nihil habuerunt; a fortiori, it might be ſo ſaid in caſe of *tenant at will*; but Ld. Chancellor held it otherwiſe, where a fine was *levied by one, who had a defeaſible right, and ſuch leſſee joined with him*, as in the principal caſe there. Mich. 1718. Wms's Rep. 519, 520. in caſe of Carter v. Barnardiſton.——(alias Loddington v. Kime. vid.)

5. *Ceſtuy que uſe in fee ſimple* may levy a fine, and this ſhall bind his feoffees. Denſh. R. on Fines 12.

6. *Executors* that have *power to re-enter* by will, cannot levy a fine. Denſh. R. of Fines 12.

7. A fine levied *to a corporation*, that is *aggregate*, is good enough; for a *man may receive a fine by attorney, but not levy a fine by attorney*, by the expreſs words of the ſtatute, anno 15 *E.* 2. *made* at *Carliſle*, by which it is provided, that *partes finis perſonaliter veniant coram juſticiariis, ut eorum ætas, facultas, ſeu alii defectus per eos adjudicari poſſint*; Co. R. on Fines 9.

8. A. *deviſed to J. S.* in fee *lands held by knight's ſervice*, J. S. granted a leaſe for years of the whole, and the leſſee occupied under this leaſe for 3 years; afterwards the *heir at law* levied a fine: reſolved, that this entry and leaſe by J. S. did not gain poſſeſſion but of 2 parts, and the heir was never out of poſſeſſion, and ſo his fine is good. Mich. 40 Eliz. B. R. Cro. E. 641. Hempſley v. Brice. [219]

9. Albeit every fine be good to bind the parties, yet for the validity of the fine it is convenient, that either the conuſor, or the conuſee be *ſeiſed of the lands alienated*, 41 Ed. 3. 14. 22 H. 6. 13. for the fine is void, if neither of the parties be ſeiſed at the levying thereof. Weſt's Symb. ſ. 13. cites 41 Ed. 3. 14. 33 H. 6. 18. 3 H. 6. 27. 27 H. 8. 4. and 20. 37 H. 6. 34. 13 Aſſ. p. 8. 3 H. 7. 9. 5 Ed. 3. 22 H. 6. 57. Denſh. of Fines 14.

10. The *king* levied fines by grant and render of *lands deſcended* to him *from* the E. of G. *a ſubject*, his anceſtor, by advice of Popham and Coke. After the render made, they adviſed it neceſſary to have letters patent granting to the conuſee by expreſs words, that he might enter into the land for otherwiſe the fine being executory,

upon grant and render, it might be doubted, if the conuſee without any ſuch grant might enter on the king. 7 Rep. 32. b. Mich. 2 Jac. caſe of fine levied by the king, tenant in tail.

11. *Tenant in fee-ſimple*, in *tail general or ſpecial*, or tenant in *remainder* or *reverſion*, may levy a fine; tenant *for life* may levy a fine *of lands*, &c. which he holds for life, to hold to the cognizee for life of the tenant for life. If he grants a greater eſtate, it is a forfeiture. *So* it is of tenant in *tail* after poſſibility of iſſue extinct, tenant in *dower*, tenant by *curteſy*. A tenant for *years* cannot levy a fine of his term, nor tenant *by copy of court-roll* of his eſtate. A tenant *in common*, *joint-tenant*, or a *coparcener*, may levy a fine of their parts. Wood's Inſt. 241.

12. Note, That the *cognizor* or *cognizee muſt be ſeiſed of a freehold*, be it by right or wrong. Wood's Inſt. 242.

13. A man by his will *deviſes* his *lands to truſtees for* 99 *years for* the *payment of* his *debts and legacies*; *and* afterwards *in caſe they ſhould not act*, and take upon them the truſt *within ſix months* after his death, *then* he deviſed the ſaid lands *to another*, *and his heirs in truſt to pay* his debts and legacies; *and afterwards to A. in tail*; remainder in tail to B. *A. levies a fine*, *and dies without iſſue*; five years paſſed and non claim. The Ld. Keeper was of opinion, that this fine by *ceſty que truſt* in tail, and non claim, ſhould bar the remainder man in tail. For equitable rights are as well to be bound by fines, as actions and titles at law; and cited the caſe of FREEMAN and BARNES, where a fine by ceſty que truſt was adjudged a good fine and bar; and he was of opinion, that it would bind at law. Hill. 1683. Vern. 226. Baſket v. Peirce.——

But it being urged for the plaintiff, that in the caſe of FREEMAN v. BARNES, the fine was levied by the ceſty que truſt, who had the whole entire eſtate in him, and ſo was to work upon his own equity only; but that here the ceſtuy que truſt had but an eſtate tail, only, which was ſpent, and there were other remainders over; and it being inſiſted in this caſe, that the remainder man was not barred by non claim; for that all the debts and legacies were not paid, and ſo his title was not commenced; and that the term for 99 years did ſubſiſt, and was not expired; and further, that the entire eſtate at law, being in the truſtee, he ought to have entered, and it was againſt equity, to ſuffer the ceſtui que truſt to be barred by non claim for the laches of his truſtee. Whereupon the Ld. Keeper decreed, that the truſtee ſhould give leave to the plaintiff to bring an action in his name to try his title, and ſaid, it *being a title at law, he would not determine it himſelf*; though his opinion was, that the plaintiff was barred. Vern. 226, 227. Hill. 1683. Baſket v. Pierce.——S. C. cited Paſch. 11 Geo. 9 Mod. 144. in caſe of Webber v. Earl of Montrath.

14. A. *deviſed land to B. for payment of his debts*, *and when his debts are paid* then *to B. for life*, with power to make leaſes for 99 years, if three lives ſo long live; *remainder to the heirs male of his body*, remainder over. This eſtate to B. though executory, and expreſsly limited to A. for life is yet an eſtate tail, and barrable by fine and recovery. Wms's Rep. 142. Paſch. 1711. per Ld. Harcourt, and thereby reverſed a decree of Ld. Cowper's. Bale v. Coleman.

(D. 2) By whom: Tenant in Tail; or by Perſons not ſeiſed of the Eſtate Tail.

1. A. Tenant for life, *remainder to B. in tail, remainder to the right heirs of B.* If B. bargains and ſells all his eſtate, * or levies a fine with proclamations of it to D. nothing paſſes to the grantee, as to the remainder in tail, but during the life of B. 3 Le. 60. Hill. 18 Eliz. C. B. Owen v. Sadler.

* Tenant for life dies, and then B. dies, the tail is barred. 3 Rep. 84. Paſch. 44 El. The caſe of fines.——————Jenk. 274. pl. 96. S. P. But if there had been *no proclamation*, there had been no diſcontinuance, becauſe the conuſor was not ſeiſed of the entail.

2. *Grand-father and grand-mother tenants in tail of the gift of A.* —remainder to the *right heirs of grand-father*. Grand-father dies —grand-mother enters—father by deed inrolled and fine with proclamations, conveys to king Philip and queen Mary, and the heirs and ſucceſſors of the queen. If this barrs the ſon, the grand-mother tenant in tail being ſeiſed? Mo. 146. Trin. 24 Eliz. Twine's caſe.—Mo. 455. S. P. adjudged a bar. Trin. 38 Eliz. Lynn v. Spencer.——Cro. E. 513. S. C.

3. Grand-father, father and ſon. Grand-father was tenant in tail. *Father in life of grandfather*, levies a fine to a ſtranger, who has nothing in the land—grand-father dies—father dies—the ſon is barred of the land by the fine of the father.—But * if the grand-father had ſurvived the father, the ſon ſhould not be barred. Hill. 27 Eliz. per J. Peryam. Mo. 252. Vid. Jo. 33. cites ARCHER'S CASE, that the father died, living the grand-father, and yet the ſon barred becauſe of the *lineal deſcent*. 1 Rep. 66. b.——* Jo. 41. Trin. 21 Jac. C. B. contra.

Jenk. 275. pl. 96. ſtates the father's dying firſt, and ſays that the heir in tail is barred,—and per Hobert Ch. J. accordingly; for though the ſon ſhould claim as heir in tail to the grandfather, as laſt ſeiſed by the intail, yet he *muſt claim as heir in blood by the father*; and ſo falls plainly within the words, as *heir of him that levied the fine*, and claiming only by an entail made to the anceſtor of him that levied the fine. Trin. 15 Jac. Hob. 258. in caſe of Duncomb v. Wingfield.——D. 3. pl. 3. Paſch. 19 H. 8. 4 Mod. 5.

4. *So* if the father has two ſons, and the *eldeſt ſon levies fine of the eſtate tail to the father*, and the father dies, and the eldeſt ſon dies without iſſue, the youngeſt is barred by the fine of the eldeſt; yet he claims as iſſue of the body of the father; but becauſe the *tail was deſcended in right upon eldeſt ſon*, his fine is a bar to all claiming the ſame tail. But if he had died without iſſue in the life of the father; the youngeſt ſon ſhould not be barred by the fine; becauſe the eldeſt, who levied it, never was in poſſeſſion, nor in right had the eſtate tail. Hill. 27 Eliz. Mo. 252. Zouch v. Bampfield.

S. C. Le. 84. Mich. 29 and 30 El. per Anderſon Ch. J. who ſaid it was lately adjudged in Stamford's caſe.—S. P. Jenk. 275. pl. 96.—S. P. but no judgment Cro. C. 524. 543. Edwards v. Rogers.

5. A. deviſed land to his wife, the remainder to his ſon and his heirs, and *if he dye before his age of twenty-one years*, that then it ſhall *remain to J. S. in fee*.—The ſon levies a fine, and dies before twenty one years—J. S. ſhall have the land after the death of the

wife; for it is a plain *limitation*. Trin. 31 Eliz. C. B. Cro. E. 142. Mills v. Snowball.

It was held that this was not a fine, which enured by way of *estoppel*; but that it passeth the very right. 3 Le. 227.

6. Deviſe of land in tail general to A. *to have, &c.* at his age of *twenty-five years*; *after twenty-one and before twenty-five, A. levies a fine* with proclamations, and after A. attains to twenty-five and has iſſue; though the conuſor had only a poſſibility at time of the fine, yet the eſtate tail was barred. 10 Rep. 50. GRANT'S caſe cited in LAMPETT'S CASE, as adjudged. Hill. 29 Eliz.—— The bar in the caſe above is by 32 H. 8. 36. for by 4 H. 7. it was not barred. Raym. 149, 150. cites S. C.

M 31 Eliz. C. B. pl. 104. Anon.——The deviſe in GRANT'S CASE, was *to the deviſor's wife for life, and when A. comes to 25, he to have in tail*, &c. A. died before 25, leaving iſſue, and the wife ſtill living; * and ſeiſed, ſo that *partes ad finem nihil habuerunt*, yet adjudged, that the eſtate tail was utterly extinct and deſtroyed Hill. 31 Eliz 2 Le. 36. S. C. by the name of Johnſon v. Bellamy.——Parties and privies, as the heirs, ſhall have no ſuch averment. Goldſb. 107. S. C. by name of Johnſon v. Earl le.——Cro. E. 122. Johnſon v. Gabriel, alias Bellamy. S. C.——Cro. E. 610. S. C. cited in caſe of Hunt v. King.—— cited Jo. 36. per Jones J.——40. per Hob. Ch. J.—— cited Cro. C. 435.

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In fines *among collateral iſſues*, and heirs among themſelves, it receiveth diſtinction according to contingency; for it is *not neceſſary that the collateral iſſue claiming* by an intail, muſt *make mention of every collateral iſſue inheritable before him*, as in the caſe of lineal anceſtors it is; and therefore make the caſe, that the father being tenant in tail to him, and the heirs male of his body, hath iſſue three ſons, and the ſecond ſon levies a fine in the life of the father, and then the father dies without diſpoſing of the eſtate; firſt, clearly the eldeſt ſon is not barred, becauſe he is not a privy to his ſecond brother, though he be within the rigour of the words, for he is * heir to him that levied the fine, and doth claim [not] only by the intail, but above him, and not as heir, which is the meaning of the law. Then again, if the *ſecond* brother *die without iſſue, in the life of the elder, or of his iſſue, the third* brother ſhall claim this in tail after the death of the elder brother, notwithſtanding the fine of the middle brother; becauſe he *doth claim immediately from his elder brother*, and need not to convey himſelf by, or make mention of his middle brother, no not in his pedigree. *But* if the *elder* brother *die without iſſue, in the life of the middle brother, or his iſſue*, without diſpoſing the eſtate, and then they all die, now the third brother and his iſſue ſhould be barred; for though he may bring his formedon in deſcender, and lay down the intail, and then bring it to his eldeſt brother, that was laſt ſeiſed, and make himſelf immediate heir unto him, without mention of the ſecond brother; yet the tenant in the formedon may plead the fine of the middle brother, and that he or his iſſue did ſurvive the elder and his iſſue; for by that it appears, that the middle, or his iſſue, were the perſons inheritable to the intail before the younger brother, in whom the title of the intail had been totally, but for the fine which bars him, and the whole intail, as well againſt his younger brother as againſt his own iſſue. By which it appears, that the fine bars, or bars not the younger brother, by contingency of ſurvivor, or not ſurvivor of either party. Whereof the reaſon is, that if after the fine of the ſecond brother, the elder had died without iſſue, and the father had died, the whole tail had been bound againſt all the brethren in the ſame manner as it were upon a fine, againſt the brethren in fee ſimple. Hob. 333. Mich. 19 Jac. in Mackwilliams's caſe.——* [Quere, if the younger brother is not intended dead?]

S. P. adjudged, and affirmed in

8. *Baron and feme tenants in tail*, have a ſon and a daughter; the baron dies, the *ſon levies a fine in the life of the mother, and dies*;

per

per 3 Juſt. the daughter; being a *collateral heir*, ſhall not be bound; but per 3 Juſt. ſuch fine ſhall bar a *lineal heir*; but by one J. ſuch fine ſhall bar neither collateral nor lineal heir; but per 1 J. ſuch fine ſhall bar both lineal and collateral. Trin. 21 Jac. Jo. 41. Godfry v. Wade.—Adjudged no bar to the daughter after the death of the mother. Becauſe the ſon had only a poſſibility to inherit the tail, which was only in his mother after the death of his father; and the mother ſurviving both her huſband and ſon, the land ſo entailed ſhall deſcend to her daughter immediately on her death. Mich. 19 Jac. Hob. 332. * Mackwilliams's caſe.

error, to be no bar; for collateral heir need not make title by the ſon. Cro. C. 434. Bradſtock Scovel. —Jo. 31. Godfry v. Wade. S. C. ——Cro. J. 689. cites M. 13 Jac. Godfrey v. Paſton. S. P. ——— * Win. 41. S. C. argued.

9. Tenant for life the reverſion to an ideot—*uncle heir apparent* to the ideot levied a fine and died—tenant for life died—the ideot died—the iſſue of the uncle is not barred—becauſe *he claims in the collateral*, and not in the right line;—and his naming his father here is not by way of title, but *pedigree*. Mar. 94. Paſch. 15 Car. B. R. Edwards v. Rogers.—Jo. 456. S. C. per 3 J. againſt Jones. —Cro. Car. 524. 543. S. C. per. 2 J. againſt Jones.

For the eſtate never paſſed through the uncle, and conſequently the iſſue of the uncle do not claim from

* their father (the uncle) but from the ideot, and is in effect a ſtranger to the fine of their father (the uncle) and may aver *quod partes*, &c. per Hale Ch. J. Vent. 318. cites Cro. C. and ſays, it was ſo ruled in caſe of Edwards v. Rogers.——The ideot died without iſſue. Cro. C. 524. S. C. ——Jones J. who was the judge, that held the fine a bar to the heir of the uncle, reports, that judgment was given, that it was no bar. Jo. 462. S. C.

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10. *A. made a feoffment* to the uſe of *himſelf for life, and after the death of him and M. his wife*, to the uſe *of B.* (eldeſt ſon of A.) *for his life, and after the death of A. M. and B.* to the uſe *of B. and the heirs male of his body*, and for default of ſuch iſſue to the uſe *of the heirs of B.—B had iſſue, a daughter*, and then, by fine and indenture, *granted to G. for* 500 *years*. B. dies. M. dies. A. ſtill living. Upon a reference out of chancery to the Ld. Ch. J. Hale, and after hearing the arguments of counſel, his lordſhip was of opinion, that the eſtate as above limited to B. was a contingent remainder; that the fine of B. did operate at the beginning by concluſion, and paſſed no intereſt, yet that this eſtoppel ſhall bind his heir, and he ſhall be in the ſame caſe with his anceſtor; that if the fine had been levied by B. in fee, this would have barred the eſtate of the heir, deſtroyed the contingent uſe, and have operated to the benefit of the poſſeſſion, as the fine of a diſſeiſee to a ſtranger; but being only for years, the fee is veſted, and the term is good, it being drawn out of the fee. January 3, 1672. Pollex. 55, 65, and 66. Weale v. Lower.

11. Lands deviſed to A. and B. for 99 years, *in truſt for payment of debts and legacies, and after to C. in tail the remainder to D. in tail.*—C. before the payment of, &c. levied a fine and died without iſſue, and 5 years paſſed without claim;—it was urged for D. that C.'s title was not commenced, and the term for 99 years was ſtill ſubſiſting, and that the truſtees ought to have entered, and that ceſty que truſt ſhould not be barred by non-claim for the laches of the truſtees, but North K. was of opinion the truſtee ſhould give leave to the plaintiff, to bring an action in his name to try the

the title, and ſaid that it being a title at law, he would not determine it himſelf; though his opinion was, that the plaintiff was barred. Hill. 1683. Vern. R. 227. Baſket v. Pierce.—S. C. cited per Cur. Paſch 11 Geo. 9. Mod. 144. and that the Court was of opinion, that the plaintiff was barred.

(D. 3) By Tenant in Tail after a Conveyance.

* Per Anderſon Ch. J. Le. 85. in caſe of Zouch v. Bampfield.

1. A. *tenant in tail conveys* to the uſe of *himſelf for life, remainder to B. his heir apparent*; A. levies a fine, B. enters for the forfeiture, before proclamation paſſed, A. dies, B. is not remitted to the firſt entail, although afterwards proclamations paſſed in the life of A. For notwithſtanding that the iſſue in tail, by that *entry*, hath defeated the poſſeſſion which paſſed by the fine, and ſo he entered quodammodo in aſſurance of the fine; * as if tenant in tail *diſcontinues and diſſeiſes the diſcontinuee*, and levies a fine with proclamation, and the diſcontinuee enters within the 5 years; now though the fine, as to the diſcontinuee, be avoided, ſo as the poſſeſſion, which paſſed by the fine, is defeated, yet the right of the entail continues bound. Arg. Mich. 25 and 26 Eliz. B. R. Le. 7. Stonely v. Bracebridge.

*3 Rep. 91. a. S. C. cited in the CASE OF FINES, and that the heir in tail was barred by the ſtat. 32 *H.* 8. though the eſtate, which paſſed by the fine, ‡ was

2. A. tenant in tail *diſcontinues* and then *diſſeiſes his diſcontinuee, and levies a fine*, the diſcontinuee before the proclamation re-enters, and then the proclamations are made; A. re-enters and dies ſeiſed; his iſſue ſhall not be remitted againſt this fine. per Anderſon Ch. J. Hill. 27 Eliz. Le. 85. in caſe of * Zouch v. Bamfield.——Le. 67. Mich. 29 and 30 Eliz. C. B. Stonely v. Bracebridge. ——The eſtate tail is barred, and the entry ſhall go to the benefit of him that has moſt right to the † poſſeſſion, and that is the diſcontinuee. Owen 76. Hunt v. King.——Mo. 391. S. C. Hill. 37 Eliz.

utterly avoided before the proclamations paſſed. By which it appears, that though the eſtate, which paſſed by the fine, be utterly defeated before the proclamations; yet after the proclamations paſſed, the eſtate tail ſhall be barred.——Mo. 114. pl. 256. S. P.——252. S. P.——And. 43. pl. 109. Anon. but ſeems to be S. C.——Bendl. 122. pl. 156. Anon. ſeems to be S. C.——S. C. cited And. 172. and 2 And. 177. in pl. 99.——Jenk. 275. pl. 96.——

† If *diſcontinuee enfeoffs tenant in tail*, the inheritance is involved in the poſſeſſion. Vid. Jenk. 286. pl. 21.

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3 Rep. 90. a. tenant in tail was *diſſeiſed*, and levied a fine to a ſtranger, it barred the intail.

3. Tenant in tail *diſcontinued* to B. and afterwards levied a *fine to C.*—The fine bound the eſtate tail. 3 Le. 211. cites it as the caſe of Lord Zouch.—Mo. 252. 253.—Jo. 36.—Cro. E. 610. Hunt v. King. S. P.—Jenk. 275. pl. 96.——Ow. 75. Hunt v. King.

4. *Tenant in tail covenanted with his ſon to ſtand ſeiſed to the uſe of himſelf for life*, and afterwards *to the uſe of his ſon in tail*, the remainder *to the right heirs of the father*; the father levied a fine with proclamations and died. It was moved by Fenner, if any eſtate

§ paſſed

paſſed to the ſon by the covenant, for it is not a diſcontinuance, and ſo nothing paſſed but during his life, and all the eſtates which are to begin after his death are void. Anderſon ſaid, the eſtate paſſeth until, &c. Le. 110. pl. 150. Paſch. 30 Eliz. Anon.

5. *And* he cited the caſe of one PITTS, where it was adjudged, that if *tenant* in tail of an *advowſon in groſs* grant the ſame in fee, and an anceſtor *collateral* releaſeth with *warranty*, and dieth, the ſame is a good bar for ever. Le. 111. Anon. pl. 150. ut ſup.

6. If *tenant in tail* grants *totum ſtatum*, and after levies a fine thereof with proclamations *come ceo*, *&c.* the iſſue is barred.—Secus, where the fine is *on a releaſe*, &c. per Wray. Trin. 33 Eliz. B. R. Le. 260. in caſe of Manning v. Andrews.

7. *Remainder man in tail diſſeiſed tenant for life*, and levied a fine, *tenant for life enters before proclamation* paſſed, ſo as he defeated the fine, and after the proclamations were paſſed.——Though neither the freehold, nor inheritance in fee were bound by this fine, yet adjudged that the intail was bound by it. Cited per Popham as Lord Sturton's caſe.—And ſaid, ſo it ſhall be in all caſes, where the fine is levied by one, *to whom the lands are entailed*, or who may claim as heir in tail. Paſch. 39 Eliz. B. R. Cro. E. 610. in caſe of Hunt v. King.

8. A. tenant in tail, remainder in tail to B. reverſion to the right heirs of A.—A * *bargains and ſells* to J. S. in fee, and then levies a fine. This being levied after the bargain and ſale, was no diſcontinuance; as it would have been, if levied before the bargain and ſale; but operated only upon, and corroborated the eſtate paſſed by the bargain and ſale, which is an eſtate in fee, but determinable on the entry of iſſue in tail, and on failure of iſſue of A. then ſubject to the remainder to B. and a fee expectant on the determination of the remainder to B. 10 Rep. 95. b. Mich. 10 Jac. † Seymour's caſe.———Jenk. 51. S. C.——Bulſt. 162.

A. tenant in tail, *bargains and ſells to B. and his heirs*, and after levies a fine to C. and his heirs to the uſe of C. and his heirs. B. has an eſtate now

to him and his heirs during the continuance of the eſtate tail. per Holt, Ch. J. Farr. 19. in caſe of Machil v. Clerk ——† A. paſſed all his eſtate by the bargain and ſale, and had nothing more to paſs, but to extinguiſh the eſtate tail by way of releaſe, and to leave the remainder untouched. Jenk. 51. pl. 97. S. C.———* The fine is void, becauſe the bargain changed the uſe, and ſo the conuſor had nothing in uſe, or poſſeſſion, at the time of the fine. Br. Feoffment al. Uſes, pl. 7. cites 27 H. 8. 28.——it was by deed indented and inrolled. See the firſt reſolution. 10 Rep. 96. S. C.———† Holt Ch. J. held this caſe to be good law. 2 Salk. 619.

9. A fine levied by tenant in tail *after a bargain and ſale in fee* works no diſcontinuance or wrong. But the law, to avoid a tort, doth *expound* it to operate upon the baſe fee, that was formerly granted, which wrought no diſcontinuance; as is adjudged, 10 Rep. 98. in Sir Edward Seymour's caſe. And yet if the fine had been levied *before the bargain and ſale*, there it had been a *diſcontinuance*; for then the law had no means to expound it otherwiſe. Arg. Paſch. 1653. C. B. Raym. 147. in caſe of Corbet v. Stone. [224]

10. Tenant in tail *covenants to ſtand ſeiſed* to the uſe of *himſelf for ninety-nine years, if he ſhall ſo long live*, remainder to his *firſt ſon in tail*, remainder over, and afterwards levies a fine.——— Whether this fine ſhall enure to the conuſee, or to make good the eſtate tail levied by the covenant was the doubt? for per Hale, the tenant in tail does not limit the eſtate *to himſelf for life*, but *for years*;

years; ſo it is not like to BLITHMAN'S CASE. Cro. E. 279. Nor to BEDINGFIELD'S 895. Where the firſt eſtate, being to himſelf for life, is all that he had power to diſpoſe of. But here he diſpoſes, by the firſt limitation to himſelf, only an eſtate for years; and the remainder to his ſon may well ariſe out of the reſidue of his eſtate tail, which he had power to diſpoſe of for his life; and ſo a *remainder executed in the ſon, corroborated by the fine*; as DUNCOMB AND WINGFIELD'S CASE. Hob. 254. where tenant in tail *bargains and ſells*, and then levies a fine; this corroborates the eſtate of the bargainee.——But the deed being found forged, the cauſe dropped. 2 Lev. 84. Paſch. 25 Car. 2. B. R. Whatley v. Greenfield.

(D. 4) By Feoffee, &c. of Tenant in Tail.

3 Rep. 87. a. b. Caſe of Fines.—* Cro. E. 896. Penyſton v. Lyſter—Noy. 46. S. C.—Pl. C. 374. a.—Godb. 301. Arg.

1. Tenant in tail diſcontinues; the *diſcontinuee* levies a fine with proclamations; *five years paſs* without claim *in the life time of tenant in tail*. In this caſe the iſſue ſhall have a formedon, and ſhall not be barred; for his father could not claim. It is otherwiſe where he is diſſeiſed, and the * *diſſeiſor* levies ſuch fine; for in ſuch caſe the tenant in tail may claim, &c. Jenk. 192. pl. 97.

2. *Feoffment by tenant in tail*, and then a fine is levied by conuſee, [feoffee] the tenant in tail has no right remaining in him, and the iſſue in tail is the firſt, that has right to impeach it. Cro. C. 430. Mich. 11 Car. B. R. in the caſe of Stone v. Newman.

(D. 5) Where it is levied by a Remainder Man, and a Conveyance is after made by Tenant in Tail in Poſſeſſion.

The ſon levied a fine in his life of his mother, ſhe afterwards leaſed the land for 21 years not reſerving the ancient rent, and died. The ſon had iſſue a daughter, and deviſed the land to J. S. adjudged a good leaſe to bind the deviſee. Cro. J. 688. Trin. 21 Jac. B. C.——affirmed in Cam. Scacc. Cro. J. 689. and ſaid there to have been reſolved in caſe of York v. Sparham.

1. *Huſband and wife were tenants in tail, remainder to the huſband in fee, he died*, and after his death, the ſon and *heir of the huſband and wife levied a fine*, &c. to the uſe of him and his heirs; and afterwards the *wife made a leaſe of the lands* for 21 years, and died; the ſon deviſed the ſaid lands to G. D. and died, and the queſtion being whether this leaſe ſhall be good againſt the deviſee; it was adjudged, that the iſſue in tail himſelf was barred by this fine to avoid the leaſe; and that though the eſtate tail was barred, yet it is not quite extinguiſhed; but ſhall have a being to ſupport the leaſe, ſo long as any of the iſſue in tail are living. Bridg. 28. Crocker v. Kelſey.

2. If

2. If tenant in tail, after fine levied by the iſſue, makes *feoffment* and dies, the feoffee ſhall hold the land againſt the iſſue and his conuſee; for if the iſſue brings formedon, the feoffee may plead his fine againſt him; and the iſſue ſhall be concluded to avoid the fine, by ſaying, partes finis nihil habuerunt; and the conuſee cannot have a formedon, or any other action or entry to recover the land; and ſo the feoffee ſhall hold as long as there is any iſſue, and then remainder-man or reverſioner, ſhall have formedon to recover the land, per Jones J. and not denied by any. Hill. 22 Jac. B. R. Jo. 61. in caſe of Crocker v. Kelſey. [225]

3. A. has iſſue 2 ſons B. and C.—*B. in the life of A.* levies a fine with proclamations; now *A. may convey*, and paſs *this land to whom he pleaſe, by virtue of the fine by his ſon*, and the vendee may plead againſt the conuſee, quod partes nihil habuerunt; and againſt the heir in tail, he may plead the fine of his father. Jenk. 275. pl. 96. S. P. per Hobert Ch. J. Hob. 258. For the fine in this caſe does *only extinguiſh the tail*, but cannot give it by his conveyance, who had not ſo much as a right, [nor] a *poſſibility, though there were a poſſibility* [in him.] So the ſtatute leaves the form and effect of the fine (as to all purpoſes and perſons, but the iſſues in tail) to the ordinary rules of law; whereof one is, that a conveyance to one by him that hath but a naked right or poſſibility, works by the extinguiſhment of it in the poſſeſſion.

(D. 6) Where there is a Diſſeiſin.

1. *A. diſſeiſor enfeoffs B. on condition*; *B. levies fine* with proclamations; 5 years paſs; the condition is broken; the diſſeiſor reenters; the *diſſeiſee* is bound; for by the fine and nonclaim the right of every ſtranger is barred; and when A. enters for the condition broken, the fine is not annoyed, but rather affirmed; and *former rights* ſhall not be revived. Le. 84. Mich. 29 and 30 Eliz. C. B. in caſe of Zouch v. Bampfield.

2. Tenant in tail enfeoffed his ſon of full age, and after *diſſeiſed* him, and levies a fine with proclamations; and *before the laſt proclamation* the ſon *enters, and makes feoffment.* Now the proclamations expire, and the father and ſon die.—Feoffee makes leaſe to a ſtranger and dies ſeiſed.—It ſeemed to the Court, that the entail was bound by the fine with proclamations. Mo. 391. Hill. 37 Eliz. King v. Hunt. Cro. E. 610. S. C. and the Court being of opinion, that the eſtate tail was bound by the fine, they reverſed a judgment to the contrary given in C. B. Hunt v. King.

3. If tenant in tail be diſſeiſed, and *diſſeiſor levies a fine*, and *tenant in tail ſuffers* 5 years to paſs without claim; that ſhall bind the iſſue. For tenant in tail had a right at the time of the fine levied, and therefore the iſſue is not within the ſaving. Cro. E. 896. Trin. 44 Eliz. in the Court of Wards, in the caſe of Penyſton v. Lyſter. Jenk. 192. f. 97. 3 Rep. 87. a. b. Caſe of Fines.—Pl. C. 374. a. per Dier.—S. P. per Dyer and Catlin, for the right was preſent to the tenant in tail at the time of the fine levied, and he *cannot claim but by the ſame title, which his father had*, which was barred in his life time. Weſt's Symb. f. 183. cites Dy. 3. pl. 6. 19 H. 8. 7.

The like it is of the laches of him in the *remainder or reverſion*, for it barreth him and his heirs. Weſt's Symb. f. 183. cites Dy. 3. pl. 6.

4. A *diſſeiſor makes a leaſe for life*, and afterwards levies a fine with proclamations to a ſtranger; *although he had only a reverſion*, yet this fine and non claim ſhall bar the diſſeiſee. Jenk. 254. pl. 45.

(D. 7) By Tenant in Tail Diſſeiſee.

Arg. to which Popham and Fenner J. agreed. Noy. 59. in caſe of Hart v. Ameredith.

1. Tenant in tail is diſſeiſed, and *during diſſeiſin* levies a fine to a ſtranger, ſur conuſance de droit come ceo, &c. The heir in tail is barred. He cannot aver, quod partes nihil, &c. by force of 27 *E.* 1. of Fines. But before the ſtatute 4 *H.* 7. he might have had formedon. At this day the diſſeiſor ſhall have advantage of this fine; and ſhall plead the *fine to the ſtranger*, whoſe eſtate he has; and the heir in tail muſt anſwer to the fine, and ſhall not be received to traverſe the *que eſtate*. Jenk. 274. pl. 96.

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2. Tenant in tail *diſſeiſed accepts a fine* ſur conuſance de droit come ceo, &c. *of a ſtranger, and renders* the ſame land to the ſtranger. This being *with proclamations*, bars the intail by the 4 H. 7. and 32 H. 8. In this caſe, the fine, being a fine by concluſion, ſhall bar the heir in tail; for he is privy to the *eſtoppel*. Jenk. 275. pl. 96.

3. If he that is ſeiſed of land, to which an *advowſon* is appendant, be diſſeiſed, and the diſſeiſee levies a fine to a ſtranger of the land, to which the appendancy is; the diſſeiſor ſhall keep the land, and by conſequence the advowſon for ever; for the diſſeiſee againſt his own fine cannot claim, and the conuſee cannot enter; the right which the diſſeiſee had, being extinct by the fine. Watſ. Comp. Inc. fol. 443, 444. cites 2 Rep. * 56. and terms of law, verbo diſſeiſor; but ſays that † 1 Cro. 484. ſeems contra.

* Buckler's caſe. † This ſeems miſcited.

(D. 8) By whom. In Reſpect of Eſtate. Before actual Commencement.

1. If one, who has but a *condition*, levies a fine; and *after levying the fine, enters for condition broken*, his iſſue is barred by the fine. See 3 Le. 227. pl. 304. Anon.

2. A. *deviſed* his lands *to truſtees for* 99 *years*, for payment of his *debts*; and *if they did not act*, he deviſed them *to T. S. and his heirs in truſt, to pay his debts*, and afterwards *to B. in tail*, remainder to *C.—B. levied a fine*, and died without iſſue; and 5 years paſſed with *nonclaim*. Decreed that C. the remainder man in tail was bound, though it was inſiſted that the title of C. was not yet commenced, becauſe the *debts were not paid*, and the term of 99 years was ſubſiſting, and that the entire eſtate at law being in the truſtees, they ſhould have entered; yet it was decreed to be barred. P. 11 Geo. 9 Mod. 144. in caſe of Webber v. E. of Montrath.—cited per Cur. as the caſe of Baſket v. Pierce.

3. A.

3. A. by fine *conveyed the manors of K. and N. to B.* viz. *K. to the uſe of B. his heirs and aſſigns*, and *N. to the uſe of M.* the wife of C. *for her life, and after to the uſe of the heirs of C. until M. ſhould evict B. his heirs, aſſigns*, &c. *of the manor of K.* or any part thereof; and *after to the uſe of B. his heirs and aſſigns, till ſatisfied by the profits.* B. by fine conveyed the manor of K. to D. in fee. C. died, and M. recovered dower againſt D. of parcel of K. and entered. D. entered into N. Reſolved that D. could not enter as aſſignee, but that by the words, heirs and aſſigns, which are words of limitation, the uſe on eviction ought firſt to veſt in B. and his heirs; and that before the eviction, D. had no title of entry as aſſignee, it not being an intereſt aſſignable over before the eviction. Hill. 9 Car. Cro. C. 358. E. of Kent v. Steward and Scott.

(D. 9) Who may be Cognizees.

1. All perſons, that may be grantees, or that might take by contract, may be cognizees, or take by fine; as *infants, perſons of full age, feme coverts, ideots, lunatics, corporations ſpiritual, or temporal, men attainted of felony or treaſon*, men *outlawed in perſonal actions, baſtards, clerks convict, villains*, * *aliens*, &c. but not thoſe that are civilly dead, *as monks*, &c. Weſt. Symb. ſ. 15.

* A fine ſhall not be levied to an alien; for after office the king ſhall have the land. Denſh. R. of Fines, 13.

2. An abbot, *dean and chapter, mayor and commonalty*, and ſuch like *corporations*, may be cognizees in fines: *but before the ingroſſing* of the fines to ſuch a corporation, *a writ ought to be directed* to the juſtices of the Common Pleas, *quod permittant finem illum levari*, 5 H. 7. 25. 19 H. 6. 15. A prior may be a cognizee, 22 Ed. 4. 15 Ed. 4. 22. Weſt. Symb. ſ. 15.

3. The *queen* at this day, and at common law, may levy a fine; and a fine may be levied to her. Denſh. R. on Fines 12. cites 13 H. 4.

(D. 10) What Perſons may levy a Fine. Ideots Infants, &c. and at what Time ſuch Fines may be reverſed, &c. [227]

1. 18 *E.* 1. *ſtat.* 4. § 6. *Enacts that the parties be of full age, ſound memory, and out of priſon.*

2. If an *ideot* levies a fine, *and after it be found by office, that he is ideot* from his nativity, * yet the fine is good; but if it be found by office, that one is an ideot, and ‡ after he levies a fine; this fine will bind him and his heirs; yet the king hath a freehold during the life of the ideot. Quære, if it will bind the heir as to the reverſion, in as much as the title of the king was to the freehold, during the life of the ideot. Denſh. R. of Fines 12. cites 12 E. 1.

* S. P. 2 And. 193. Lewis v. Winne.—‡ S. P. 12 Rep. 123. Mich. 12 Jac. Manſfield's caſe —Fine le-

3. Fine

vied by an *ideot a nativitate* ſhall ſtand good. For by the common law, neither

3. Fine by *ideot* ſtolen from his guardian, and who was after found an ideot, by which the king had poſſeſſion. After the death of the ideot, it was decreed in chancery, that the remainder man ſhould give the conuſee 60*l.* and he ſhould make a reconveyance. Arg. Roll. R. 115. in caſe of Dey v. Hungat—cites Ruſhly's caſe.

the king in this caſe upon office, nor the heir, nor any other can defeat or avoid this fine, by error, averment or otherwiſe; and by admitting an averment of ideocy, the act of the court (which is judicial) will be falſified, which is not convenient; and the court by allowing of the fine, having teſtified that he was no ideot at the time of his levying the fine, it ſhall not be controuled by an office found after his death. 2 And. 193. Lewis's caſe, alias Lewis v. Wynne.—— Br. Fines, pl. 75. cites 17 E. 3. 52 and 78.—and 17 Aſſ. p. 17.—— Remainder man in fee was relieved againſt the purchaſor. Toth. 104. cites Trin. 10 Jac. Ruthley v. Mansfield.

If they are *of age* a fine by them

4. *Ideots and madmen*, if they are admitted, are barred as parties. Wood's Inſt. 243.—See Co. R. on Fines 9.

ſhall conclude their heirs, and the fine ſhall not be reverſed. Co. R. on Fines, 17.

If an infant being a *feme covert*, or

5. *Error ſhall be brought* to reverſe a fine levied by an infant within age, by the ſame infant *during his non-age*; ſo that he may be adjudged by *inſpection*, whether he be within age or not. Br. Fines, pl. 79. cites 27 Aſſ. 53.

* other *infant*, levies a fine by

grant and render to her or him in tail, or for life, and the *huſband dies*; the widow ſhall not have a *writ of error*, becauſe ſhe is tenant of the land; and ſhe cannot have error againſt herſelf, and ſo is without remedy, per Catlin. Owen 33. Hill. 40 Eliz. Anon.——But it ſeems it ſhould be Trin. 6 Eliz. as in Mo. 74. pl. 202.——* S. P. per Catlin, that the infant ſhall not have a writ of error to deſtroy the fine, *becauſe he himſelf is ſeiſed of the land*; and ſo he is without remedy. Trin. 6 Eliz. in the Star Chamber. Mo. 74. pl. 202. Anon.—— If the fine of an infant is *not avoided during his minority*, it ſhall bind him. Co. R. on Fines 8. ſays it has been ſo adjudged, contrary to Catlin's opinion in Stowel's caſe.—— So Wood's Inſt. 243. becauſe his infancy muſt be tried by inſpection of the judges. But if he dies in his infancy, his heir is not limited to any time.—— *Ac*, in a writ of error brought by an infant upon a fine levied; the plaintiff ſued a *ſcire facias* againſt the conuſee, for whom a † *protection* was caſt; and the *court examined* the age of the plaintiff, *and by inſpection adjudged him within age, and recorded the ſame*, and then allowed the protection; and this can be no miſchief to the plaintiff; whereupon it follows, that albeit the *plaintiff dies afterwards before the fine be reverſed*, yet after his age adjudged and recorded, *his heir ſhall* in that caſe *reverſe the fine*, for the nonage of his anceſtor. And ſo it was reſolved in the caſe of Keckewiche, in a writ of error brought by him, by the opinion of the whole court of B. R. otherwiſe it is if the plaintiff dies before his age inſpected. Co. Litt. 131. a.—— † Br. Error, pl 60. cites 21 E. 3. 20. and that the infant was firſt examined, and then his godfather and godmother, and that they put the plea fine die, ſaving to the defendant his anſwer at the new garniſhment, and all this was *upon the tranſcript of the note*, but the judgment ſhall be upon the note itſelf.

Co. R. on Fines 17.

6. *Infant dies*, the fine muſt ſtand. 1 Mod. 246. Paſch. 29 Car. 2. C. B. Barrow v. Parrot.——2 Vent. 30. S. C. Perrot's caſe.

7. Fines levied *by infants*, *vacated* upon complaint of remainder man in fee, expectant upon eſtate tail, and on bringing the infants into court; and information ordered againſt commiſſioners that took the conuſance. 3 Lev. 36. Mich. 33 Car. 2. C. B. Hutchinſon's caſe.

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See (A. 3) *ſtat.* 18 *E.* 1. *ſ.* 7. and the notes thereon.—

8. If a *married woman under age*, (of which the judges may examine her upon oath) doth levy a fine with her huſband of her own lands, ſhe cannot reverſe it during her huſband's life; nor after his death, if ſhe is of full age, when he dies. She can only reverſe it, if her huſband dies during her minority. Wood's Inſt. 243.

writ of error was brought to reverſe a fine levied by a feme covert during her nonage, and *at the ſcire facias* ad audiendum errores the *defendant caſt protection*, and yet the juſtices tried the age of the infant by *inſpection*, and did not ſtay it till the expiration of the protection. Co. R. on Fines 17. Marg.

Error

Error was brought by both of a fine ſo levied, ſhe being yet within age, and per Cavendiſh, if they reverſe the fine for nonage of the feme, *yet no execution ſhall be awarded during her life, quod non negatur.* Br. Fines, pl. 29. cites 50 E. 3. 5.——* The year book of 50 E. 3. 5. b. 6. pl. 12. is that execution cannot be till *after the death of the baron.*

9. Perſons *blind, deaf, or dumb accidentally*, may make cognizance if they can expreſs their meaning by writing. Weſt. Symb. 2. b. f. 5. Denſh. R. on Fines. 11, 12.

10. Lord Ch. J. Bridgman acquainted the Court of C. B. that a woman, *born deaf and dumb*, came before him to levy a fine. She and her three ſiſters have an houſe and land. An uncle hath maintained her, and taken great care of her, and he is to buy the houſe and land of them; and he agrees to maintain her, if ſhe will paſs her land for ſecurity. As for her *intelligence*, the ſiſters ſay, ſhe knows and underſtands the meaning of all this. He demanded, what *ſign* ſhe would make *for paſſing away her lands*; and, as it was interpreted to him, ſhe put her hands that way, where the lands lay, and ſpread out her hands. It being a buſineſs of this nature, and for her own good, he thought fit to communicate it to them; and the fine was taken by the conſent of the other juſtices. Cart. 53. Trin. 18 Car. 2. Elliot (Martha's) caſe. Denſh R. on Fines, 11, 12. See Co. R. on Fines, 9 —*So* one born deaf, and dumb, and he was brought before judge Warburton to levy a fine. Judge Warburton would do nothing, till he had acquainted his brothers; then he examined him, and found him intelligent, and ſo he took the fine; cited per Bridgman Ch. J. Cart 53. as Hill's caſe.

11. *Monks, friars, nuns*, &c. ought not to be received; yet *if they are admitted*, their fines are good and unavoidable. Wood's Inſt. 241.

12. If the *heir* being *in ward* of any other, levies a fine; this will bind the heir for ever, if it be not reverſed by error within age; and if he be of full age, in ward of the king, it never ſhall be avoided. But where the heir in ward of the king at his full age, intrudes upon the poſſeſſion of the king, and levies a fine; this is void as to the title of the king, *quia nullum accreſcet ei liberum tenementum, ſi ingrediatur antequam homagium & ſeiſinam ceperit de rege.* But it ſeems good againſt the party and his heirs. Denſh. R. on Fines, 12. cites 1 H. 7. 26.

13. *But* where the *king* is *ſeiſed of land, as in name of diſtreſs*, as for alienation without licenſe, &c. and he, who hath right, enters, and levies a fine; it is good, and will bind him and his heirs for ever. Denſh. R. on Fines, 12.

14. The *queen* at this day, and at common law, may levy a fine. Denſh. R. on Fines, 12. cites 13 H. 4.

15. An *alien* who hath purchaſed land in England, cannot levy a fine, if the Court perceive it; but if the fine be levied, it ſeems that it is good, and ſhall never be reverſed. Denſh. R. on Fines, 13. But it ſhall not conclude the *king* after office found. Co. R. on Fines, 17.

16. Fine was levied *by A. in the name of B.* but a reconveyance decreed. Roll. R. 115. in caſe of Day v. Hungate. ——cites the caſe of Gilderbrand v. Hubard.

[See (D. 11)]

(D. 11) Vacated.

1. *Feme infant*, tenant in tail, levies a fine *with her baron.* The fine was vacated, though the king's ſilver was paid; and the exemplification was brought into court, and delivered up, and the commiſſioners ordered to be proſecuted. But the vacat was *quoad the feme only*, and not as to the baron. 3 Lev. 36. Mich. 23 Car. 2. C. B. Hutchinſon's caſe.

Skin. 23. S. C. by name of ſerjeant Buckby's caſe.--And. Tr. 34 Car. 2. another fine was vacated for the ſame cauſe. 3 Lev. 36. cites it as Sir Robert Maſſam's caſe.

2. *But the feme dying before any thing was ſtirred* as to the fine, it was agreed per tot. cur. that they could not meddle with the fine. But if ſhe had been alive, and ſtill under age, they might bring her in by *habeas corpus*, and inſpect her, and ſet the fine aſide upon motion. 2 Vent. 30. Paſch. 29 Car. 2. C. B. Herbert Perrot's caſe.

3. In the Common Pleas, they will *ſet aſide* a fine levied by an infant *(during his life and infancy) upon motion*, as null and void, and without any writ of error; as they will do a judgment irregularly obtained by trick or ſurprize, and puniſh the commiſſioners beſides, if taken by dedimus; and they will do this by *inſpection and examination of witneſſes in court*; but if he be affirmed to be of age, they will order a *trial by a feigned action*, if infant or no? but the complaint muſt be before he comes of age, and then it matters not if after the motion, (and ſo if after a writ of error) he arrives at age, this will not prejudice him. So if the *next heir*, or any relation come and *inform the Court, that the party was a feme covert*, and levied a fine without her huſband, they will ſet it aſide as void. 2 Show. 281. Hill. 34 and 35 Car. 2. B. R. Caſe of vacating fines in C. B.

4. Several precedents were produced of fines, recoveries, and declarations of uſes thereupon, being vacated on motions, becauſe of their being by *femes covert under age*; and one of the rules produced was, that the feme ſhould not be admitted to levy any more fines, till ſhe came of age. And another, that the counſel, who adviſed it, ſhould be fined 14 *l.* becauſe no writ of error could lie. And another, that the huſband he fined 100 *l.* And in the caſes of * Sir Robert Marsham, a 6 clerk procured his wife under age to levy a fine; and being ſent for into court, he was fain to deliver the fine and the deed of uſes to be cancelled in court. And per Powell, if the commiſſioners before whom the fine was taken, knew the feme to be under age, they are finable: but there are *no precedents of vacats* of this kind *ancienter than* † 4 *Jac.* 1. But the true *ancient way* was to bring a writ of error; but becauſe the huſband would not join in the writ of error, &c. this way was introduced: and ſome books ſay, that if feme covert be outlawed without her huſband, there is no remedy for her; but now in ſuch caſe the Court will diſcharge her upon motion. But in this caſe there appears that there is a *purchaſor*; and therefore we ought to bd

* S. C. cited 3 Lev. 36. as of Trin. 34 Car. 2. and cited Skin. 24. as of Mich. 33 Car. 2. between Boyer and Hutchenſon.

† Hill. 4 Jac. 1. Rot. 70. Pierpoints caſe cited in 3 Lev. 36. in Hutchinſon's caſe—and in Skin. 24. in ſerjeant Buckby's caſe.

be well adviſed. But in regard the *feme* is to be *of age in 2 or 3 days* time, let us de bene eſſe *examine* her age by *affidavits and inſpection*; and that was done, and the inſpections *entered on record*; and the rule was to ſee precedents, and to give notice to the purchaſor. Hill. 12 W. 3. C. B. 12 Mod. 444. Sarah Griffith's caſe.

5. A. having *inveigled his wife* to levy a fine of her land to him, *when ſhe lay on her death-bed*; pretending as was ſuggeſted, he was to have it only for his life; and a dedimus was ſent into the country to take the fine, and the *caption* was *taken about* 100 *miles from London, the very day ſhe died*; and becauſe the fine would not have ſtood, the party being dead before the king's ſilver was paid, the *writ of covenant* was *razed in the teſte*, and made to bear date 10 days backwards, and all other parts of the fine were razed likewiſe, and [230] made to correſpond with it; and the king's ſilver was paid, and ſo *all appeared on the record, to have been done before the death of the woman*; on a bill brought to have the fine ſet aſide, or to have a reconveyance, it was held by the Court, that though *Chancery has a power* to relieve, as much againſt a fine, obtained by fraud or practice, as any other kind of conveyance; yet that ſuch relief was *not by decreeing a vacate of the fine, but by ordering a reconveyance*; but that for any error in the fine, or irregularity, or ill practice in the commiſſioners, it was a matter properly cognizable in that court where the fine was levied, and for which that court may vacate the fine; and there being no proof of fraud or practice in this caſe, the bill was diſmiſſed. Hill. 1700. Abr. Eq. Caſes, 259. St. John v. Turner.

[See (E. b. 2).]

(D. 12) By Tenant in Tail. In Reſpect of his Eſtate. What Eſtate barred.

1. Land was given by A. and others *to B. for his life, remainder to C.* (who was heir apparent to B.) *et* * *primogenito filio & hered. maſcul. of the ſaid C.* to be begotten, *& ſic de primogenito filio & herede maſculo ipſius C.* de corpore ſuo procreand' *in primogenitum filium et hæred. maſcul.* de corpore ſuo procreand. *et pro defectu* talis exitus remanere inde *to D.* the 2d ſon of the aforeſaid A. *& primogenito filio ipſius D.* with remainders over in like manner as are limited to C. &c. and then limits a *remainder to the heirs males of the body of the ſaid D. and A. the father, to be begotten.* It was agreed per Cur. that D. had eſtate tail in remainder, after the death of his father, in the one moiety, and the father had eſtate tail in the other *moiety*; and that a fine with proclamations might bar his moiety, and adjudged accordingly; and the Court held that the words *primogenito filio in primogenitum filium, &c.* were *void* words. And. 264. Smye v. Chown, alias Cotton's caſe.

* Thoſe words make no entail. Cro. E. 220. S. C.—Le. 211. S. C. Cotton's caſe.—Savil. 127. S. C. Trin. 32 El.

(D. 13) By whom Fines may be levied. Perſons under legal Diſabilities by Crimes.

S.P.Wood's Inſt. 241.

1. Perſons *attainted or waived in perſonal actions* may alien by fine or otherwiſe; for their eſtates remain in them ſtill, though they thereby forfeit the profits of their lands. 9 H. 6. 20. 21 H. 7. 7. Weſt. Symb. ſ. 13.

Denſh.R. of Fines 15. * S. P. Wood's Inſt. 241.

2. Perſons attainted of *felony and treaſon* may not be cognizors, by reaſon that by their offences their eſtates are forfeited: * but if they do, their fines are *good againſt all perſons but the king and the lord*, of whom the lands are holden, for their times. 8 Aſſ. pl. 25. For their eſtates remain in them during their lives. Weſt. Symb. ſ. 13.

[See (D. 10) Utlawry.]

(E) To whom it may be levied; [*or who may take by it, in Reſpect of Eſtate.*]

* *Orig.* is (2. tenant per garranty.)

[1. A Fine *ſur releaſe* may be levied to the * 2*d* tenant by his warranty. 18 E. 3. 12. *b.*]

This caſe ſeems obſcure, and therefore have taken it from the year-book and Fitzh. which are as follows, viz.

Note, that in writ of dower brought by the baron and feme, where the 2d tenant by his warranty was party; a fine ſur releaſe was levied between him and the demandants, viz. that the demandants ſhould † releaſe to the tenant all, which they had of the right of the feme by his warranty, [per ſa garrantie.] Paſch. 18 E. 3. 12. b. pl. 3.

In dower the 2d tenant by his warranty entered into the warranty, and a fine was levied between the demandant and him, by which the demandant releaſed and quitclaimed all the right, &c. which was admitted, and yet none of them had any thing in, &c. Fitzh. tit. Fines, pl. 102. cites P. 18. E. 3. 12.

†[231]

[See (D. 9) S. P.]

(F) Fine of Land, upon what Writ. In what Caſes being levied by a Feme Covert, ſhe ſhall be examined.

N. B. *This letter* (F) *might be more properly divided thus, viz.*

In what caſes being levied by feme covert, *ſhe ſhall be* examined (F)

Levied without writ, *in what caſes it may be* (F. 2)

Levied upon what writ (F. 3)

As to examination. Vid. (A. 3) ſtatute 18 E. 1. ſ. 7. and the notes thereon, and (M) per totum.

[1. IF *baron and feme grant by fine*, the feme ſhall be examined. 33 H. 6. 31. per Priſot.]

[2. *But*

[2. *But* upon a *grant and render to a feme covert* ſhe ſhall not be examined: for ſhe is at no prejudice, but ſhall be in her remitter, (quære the remitter.) 33 H. 6. 31.] Where they take by a fine, *and depart from nothing*, ſhe ſhall not be examined. 2 Inſt. 215.——Br. Eſtoppel, pl. 92. cites 15 E. 4. 28.

[(F. 2) *Without Writ.*]

[3. A fine *cannot be levied without a writ.* 12 H. 4. 12.] 18 E. 1. *ſtat.* 4. *The order of the law, will not ſuffer a final accord to be levied in the king's court, without a writ original.*

The ignorance, or error of ſome judges, was the cauſe of the declaring the law herein. 2 Inſt. 513.—The writ is the very baſis, ground and foundation of the fine, whereby the parties have day in court to levy the fame, and containeth the perſons and things to be paſſed certainly. Weſt's Symb. ſ. 23.——Co. R. on Fines 3.

[4. In *ancient times* a fine might be levied without an original. 21 E. 4. 62. 16 E. 3. 19 E. 3. Abbe 13.]

[5. *But now* a fine cannot be levied without a writ. 12 H. 4. 12.] Nor can it be levied *upon an original determined.*

As where the plaintiff entered a *retraxit*, by which it was awarded, that defendant *eat inde ſine die*; the parties cannot come and have a compoſition between them, in nature of a fine; for the original is determined, and they have no day in court. Br. Fines, pl. 82. cites 37 Aſſ. 17.—Co. R. on Fines 10.

[6. *But* if ſuch fine be levied at this day without original, it is not void, but * *good until it be reverſed.* 21 E. 4. 62. Com. Count ‡ Leſtrange, 394. b.] S. P. and it is voidable by writ of error; and

ſo it is, when there is an original writ, and the fine is levied, as well *of a thing contained in the writ, as of another thing not contained in it*, it is voidable for what is not contained in it. 2 Inſt. 513, 514.

So if the fine is *levied immediately to a perſon not named in the writ of covenant*; as if A. be plaintiff in the writ againſt C. and C. levies the fine to A. and B. it is voidable by writ of error. 2 Inſt. 514.—Denſh. R. on Fines, 16. cites 21 E. 3. and 2 E. 3.——Co. R. on Fines 10. For it is not coram non judice, inaſmuch as the juſtices have power of the thing, though they proceed *inverſo ordine.*——* Br. Fines, pl. 97. cites 18 E. 4. 22. by Brian.——It is not void, but error; for they are judges of the thing. Br. Aſſiſe, pl. 397. cites 26 H. 6.——‡ It is in the caſe of the count, or Earl of Leiceſter v. Heydon, and ſo ſeems miſprinted.

[7. *But* it is *erroneous.* 21 E. 4. 60. b. Com. 394. b.] †In aſſiſe, the *plaintiff appeared, and after made retraxit*, and then *the juſtices of aſſiſe recorded an agreement between them in nature of a fine*, and by the beſt opinion it is void, and coram non judice, and ſhall not be executed, by reaſon that *no original was pending*, but was *determined before by the retraxit*; and ſo ſee, that judgment, where there is no original, is void by this opinion. Br. Judgment, pl. 114. cites 37 Aſſ. 17.——and ſee 26 H. 6. where it was held, that it was error, and * not void. But quære inde; for without original they have no commiſſion to hold plea, and then they are not judges of this cauſe; and of this opinion was Bromley. Ch. J. H. 2. M. 1. Ibid.——* For they are judges of this cauſe, and therefore nul tiel record of writ of covenant, upon which ſuch fine was levied is no plea. Ibid. pl. 130. cites 26 H. 6.

†[232]

[(F. 3) *Upon what Writ.*]

[8. In *ancient times* fines were levied *upon actions mixt with the perſonalty.* 18 E. 4. 22. The Prior of Merton's caſe.] * They are now thought to be againſt the height and force of a fine. 2 Inſt. 514.——* Orig. (perſonal.

[9. *But at this day* such fines are not good; but only such fines as are *levied upon writ of covenant or* upon *actions in right or realty.* 18 E. 4. 22. per Litt.]

Co. R. on Fines, 10.

[10. A fine may be levied *of an annuity upon writ of annuity.* 18 E. 4. 22. 11 H. 4. 68. b. 20 H. 6. 3. Contra admitted. 44 E. 3. 37, 38.]

[11. A fine may be levied upon a writ *of right patent.* 19 E. 4. 8. b. 21 E. 4. 5.]

On such writ a fine may be levied *of rent or services*, &c. But *not of land.*

[12. Fine may be [upon a] writ *of right of customs and services.* 19 E. 4. 8. b. 18 E. 4. 22. 21 E. 4. 4. b. 21 E. 3. 18. b. 53. 21 Ass. 1. 20 Ass. 1. 24 E. 3. 29. b.]

Densh. R. on Fines, 16.——D. 179. b. pl. 46. Pasch. 2 Eliz. Bruce v. Bonet.——Bendl. 116. S. C. See a precedent there.

In antient time, in *quare impedit* a fine might have been levied of an advowson; but at this day, such fine is not receivable, because *it is only a personal action*, but in the time of K. Henry 3. fines were often levied in such personal actions.

[13. A fine has been levied in a *quare impedit.* 18 E. 4. 22. 19 E. 4. 8. b. of the advowson.]

Co. R. on Fines 10.——2 Inst. 514.

In times past fines were as usually levied upon a writ of *warrantia chartæ*, as now they are upon a *writ of covenant.*

[14. So in a *warrantia chartæ.* * 18 E. 4. 2. 21 E. 4. 4. b. 61. b. of the land. 42 E. 3. 5. 12 H. 4. 12.]

Co. R. on Fines 10.—West's Symb. f. 23. cites 18 E. 4. 22.——[*And so it seems it should be here.]

In a writ of *rationabilibus divisis*, if a *piscary, or other thing be allotted* by the dividers *to one* of the parties: in consideration thereof the said party *may levy a fine of an annual rent to the other* for the said piscary, and this fine is good enough, and receiveable.

[15. So in a *rationabilibus divisis.* 19 E. 4. 4. b. 29 E. 3. 3. b. 25 E. 3. 46. 20 H. 6. 3. 1 E. 3. 14 b.]

Co. R. on Fines 10. cites 20 H. 6. 3. a. but the book seems mis-cited.

2 Inst. 514.——Co. R. on Fines 11. cites 31 E. 3. and Br. Fines, pl. * 90.——* This seems misprinted.

[16. So in *assise of darrein presentment.* 21 E. 4. 4. b. of the patronage. 43 E. 3.]

[17. *In a franchise* upon a writ of *right patent by protestation in nature of a covenant*, a fine cannot be levied; for the protestation cannot change the plea real into the personalty. The same law is of such fines *in ancient demesne.* 44 E. 3. 38.]

[18. A fine may be levied *in an assise.* 16 E. 3. 19 E. 3. Abbe 13. adjudged.]

[19. So *in a præcipe quod reddat.* Abbe 13. per Thorp.]

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[20. A fine *upon release* may be levied in writ of dower. 18 E. 3. 12. 29 E. 3. 46. b.]

Co. R. on Fines 10.

* Fol. 15

[[21] 22. A fine may be levied in a *quid juris clamat.* As the defendant may grant, that he holds of the conusor, and render his estate to the grantee. 12 E. 3. 60.]

*S. P. Co. R. on Fines 10. cites 20 H. 6. 3. a.—S. P. 5.

22. In a * *writ of mesne, warrantia chartæ, quem redditum reddit, per quæ servitia, quid* juris clamat, a fine may be levied of lands comprised within the writ; and yet no land is demanded, or shall be recovered in them. But as Statham said, ‡ *in all writs where land*

land is demanded, or upon other writ, *that charges land*, a fine may be levied of the land comprized within the writ. Co. R. on Fines 10. Rep. 39. cites for this, 5 E. 2. tit. Fines, Statham and 18 E. 4. 22. a. b. 19 E. 4. 2. 21 E. 4. 4. b. 32 E. 3. ſcire facias. 100.—‡ *But* in all actions, where land is *not demanded, nor to be charged*, a fine cannot be levied. But in perſonal actions a fine may be levied. Co. R. on Fines 10.

23. A fine may be levied, and acknowledged in *B. R.* when the record is there *by error*, but not upon *original* to be commenced there. Denſh. R. of Fines 3.

24. A fine ſhall be levied in the court of *ancient demeſne* upon a petty *writ of right-cloſe*; but not upon *plaint*; and becauſe it is no court of record. Denſh. R. of Fines 3.

25. In *attaint* upon *writ of ayel* a fine may be levied. Co. R. on Fines 10.

26. *So* in a *quod permittat of a way*, a fine may be levied of it. Co. R. on Fines 10. S. P. and yet no præcipe lies of it. Co. R. on Fines 11. cites 2 E. 3. 13.

27. A fine may be levied on a writ *of right-cloſe*, or *in any real action*, but *not in an original or perſonal action*; and a common writ of covenant, on which a fine is levied, is not a perſonal, but a real action; for though it is to have damages for a breach of covenant, as in perſonal actions, yet it is to have an execution and performance of the covenants. 1 Salk. 340. Hill. 1 Annæ, B. R. in caſe of Hunt v. Bourne.

(F. 4) Levied by whom, and to whom. *Strangers* to the writ. Take by it, who.

1. Where a fine is levied *between A. and B.* by which A. *acknowledges to B.* and *B. renders to A. to hold to him and E. his wife*, and the heirs of their bodies, &c. there E. has not any eſtate; for ſhe is only in the habendum, and is no party to the writ of covenant. Br. Fine, pl. 61. cites 24 E. 3. 28.

2. *So* a writ of *covenant was between A. and B.* and after *A. acknowledged* the tenements *to be the right of B.* and then *B. granted and rendered to A. for life, remainder to M. his wife for life*, the remainder to A. and his heirs. This is not good, becauſe the feme was not named in the writ. See Br. Fines, pl. 108. and 114. cites 30 H. 8. and 7 E. 3. 64. and Fitzh. Tit. Sci. Fa. 136. It is not void but voidable by error. 3. Rep. 5. cited by Coke as adjudged. Trin. 27 Eliz. C. B. in caſe of Owen v. Morgan.

3. Fine ſur conuſance de droit *come ceo*, &c. cannot be levied to any perſon that is not party to the writ of covenant, neither can the *grant and render* of the land, &c. be immediately, in primo gradu, to any that is not party to the writ, but immediately or *in 2do gradu*, &c. it may. For example, if a writ of covenant be brought by A. againſt B. of the manor of D. and B. levies a fine to A. *come ceo*; A. may grant and render the ſame to B. for life, or in tail, the remainder to F. in fee; for albeit the writ of covenant be inter A. querent' and B. deforc', ſo as F. is a meer ſtranger to the writ, yet ſeeing he takes it *by way of remainder, depending upon the eſtate warranted* Co. R. on Fines 9.

ranted by the fine, it hath been allowed in our books, and hath been compared to a deed indented between A. and B. whereby A. doth give lands to B. To have and to hold to * B. for life, or in tail, the remainder to C. (who is a ſtranger to the deed) in fee. 2 Inſt. 514.

† S. P. and ſo of a prayee in aid. Co. R. on Fines 11. cites 5 H. 8. 7. ——So if a *præcipe* be brought *againſt a tenant for life*, and *upon his default*, he in *reverſion is received*; he in reverſion may levy a fine to the demandant of this reverſion, and yet no writ is pending between them. Co. R. on Fines 11. cites 18 E. 2. 82. 21 E. 4, 5.——The words being the affirmative do not reſtrain them. 2 Inſt. 515.

4. Where the 18 *E.* 1. De modo levandi fines, ſays, that the order of law does not ſuffer that the final accord be levied in the king's court, *without writ original, &c.* It does *not ſay, without writ original between the parties*, but generally; and therefore a fine may be levied *by* a † *vouchee* to the demandant, *or by the demandant to him*; and *ſo* likewiſe by *tenant by reſceit* to the demandant or by the demandant to him; and yet they are not parties to the writ. 2 Inſt. 514.

(F. 5) Take. Who ſhall take by the Limitations.

1. In Scire facias, theſe words *procreavit* vel hæredibus *procreatis*, ſhall ſerve as well thoſe, which ſhall be born after the gift, as thoſe which were at the time of the fine. Br. Fines, pl. 61. cites 24 E. 3. 28.

(G) Covenant.

[1. A Fine may be levied *of an annuity* upon writ of covenant. 18 E. 4. 22.]

[2. A fine cannot be levied *upon a bill of covenant.* 44 E. 3. 38.]

[3. A fine may be levied *in writ of covenant.* 29 E. 3. 31. b. 16 E. 3. 19 E. 3. Abbe 13.]

4. A fine ſur conceſſit was levied *of lands in ancient demeſne in the court of ancient demeſne.* In ejectment it was found by verdict, that upon *writs of right-cloſe, fines* have been time out of mind levied and leviable in the ſame court; and upon ſetting forth the fine, it appeared to be levied *in placito conventionis ſecundum conſuetudinem manerii come ceo que il ad de ſon done*, with warranty. It was reſolved, that the fine found in this caſe is good, notwithſtanding that the *cuſtom* is *found to levy fines founded upon writ of right-cloſe*, and that the fine levied is in placito conventionis inter eos, &c. For it is found to be ſecundum conſuetudinem Cur. and there is not any inconſiſtency between writ of right-cloſe and this action of covenant; for the action of covenant is not perſonal in this caſe, but real, *quod teneat conventionem*, &c. and not for damages for breach of covenant. Lutw. 781. Hunt v. Bourn and al.

Salk. 340. S. C. Hill. 1 Annæ. B. R.

(H) How

(H) How it ſhall be [*expreſſed in the Writ of Covenant.*]

[1. IF it be *of a rent-ſeck, charge, or ſervice*, it ought to be put in the writ of covenant, *who is tenant of the land.* 19 E. 4. 3. Becauſe otherwiſe it cannot be known againſt whom to bring the quid juris clamat, or quem redditum.]

[2. If it be of *rent ſervice* the *writ ſhall be, ſo much of rent, with the appurtenances in D.* and of *rent-charge ſo much of rent iſſuing out of the land in D.* 21 E. 4. 61. b.]

[3. If a man grants by fine *a reverſion*, the writ ſhall be *quod teneat conventionem of the land*, &c. 19 E. 4. 9.]

[4. Where the fine is levied of *rent and other ſervices*, as homage and fealty, the covenant *mentions only the rent.* 19 E. 4. 8.]

(I) Render. [*How the Writ ſhall be.*] [235]

[1. WHERE the *conuſance is of land*, and a *render of common* out of it the writ ſhall be *quod teneat conventionem of the land, &c.* 19 E. 4. 9.]

(K) Fine at Common Law. What Perſon may levy a Fine.

[1. IF an *infant* levies a fine, he may *reverſe* it during his nonage 17 E. 3. 53. 79. 17 Aſſ. 17.]

[2. But if he does *not reverſe it during his nonage*, this ſhall bind him perpetually; becauſe he ought to be *tried by inſpection*, which cannot be now, being of full age. 17 E. 3. 53. 79. 17 Aſſ. 17.] But where the *commiſſioners know, that the conuſor was within age*, the commiſſioners were fined, but the fine ſtood. 12 Rep. 122. cites it as the caſe of Cavendiſh v. Worſeley, and Lanter and al.——Roll. R. 115. 12 Rep. 121. Ann Hungate's caſe.

3. Note, that every one who have *power to implead, and to be impleaded*, may levy a fine. He, *againſt whom præcipe quod reddat lies*, may levy a fine, and every one that may levy a fine at common law, may levy a fine by this ſtatute. Denſh. R. 11. upon 4 H. 7. 24. cites 8 E. 2.

4. The king, and *all perſons, who may lawfully grant by deed*, may be *cognizors*, or levy a fine. Wood's Inſt. 241. Denſh. R. on Fines, 12.——A fine was levied by *the king*, viz. K. James the firſt, and was held to be good. 7 Rep. 32.

5. *Civil corporations*, as *mayor and commonalty*, may levy a fine of land belonging to their body: *but biſhops, deans, and chapters, prebendaries, parſons, vicars, heads and fellows of colleges*, are reſtrained by

by ſtatutes from levying of fines of their inheritances to bind their ſucceſſors. Wood's Inſt. 241.

[See (D. 10)]

(L) Of what Thing it may by levied. Of what Thing a Man may levy the Fine upon the Writ, [*and of what a Render may be*].

[1. IF the deforceant acknowledges all his right to be to the plaintiff, for which conuſance he *grants and renders* 20 s. *rent de novo*; this is a good grant, 19 E. 4. 2. b. For it is comprehended by implication in the covenant, 16 E. 3. 19 E. 3. Abbe 13. per Thorp. 2 R. 3. 5. 49 E. 4. 8. b. 21 E. 4. 4. b. 60. b. 19 E. 4. 8. adjudged.]

[2. *So* if he, for ſuch conuſance, grants and renders to the defendant *the land for life*, it is good. 19 E. 4. 2. b.]

[3. *So* he may render a *common out of the land*. 19 E. 4. 9. 21 E. 4. 61. b. Or *ſo many load of wood*, to take upon the ſame land. For this, which is *comprehended within the covenant, expreſsly, or by implication*, will paſs by the fine. 19 E. 4. 2. b. 21 E. 4. 61. b.]

Fol. 16. [4. In *writ of cuſtoms* and ſervices, if the *lord releaſes* all his right by fine, *and the tenant grants to him* 20 *s. rent*, it is good. 19 E. 4. 8. b.]

[5. If the *writ and conuſance be of the manor of D.* and the other *renders the manor to S.* this is void; becauſe it is not comprehended within the original. 21 E. 4. 4. b.]

[236] [6. In *aſſiſe of darrien preſentment, plaintiff acknowledges the right* of the patronage to the patron, parſon, and ordinary, who *render an annuity out of the ſame church* to the plaintiff; this is good. For th parſon is not charged, but the land. 21 E. 4. 61. 2 R. 3. 5. b.]

[7. *In a rationabilibus diviſis*, a render may be of a *free-fiſhery, in his ſeveral fiſhery*. 21 E. 4. 4. b.]

[8. *So*, in this writ, a render *of an annuity* is good. 21 E. 4. 62. b.]

[9. So in the ſaid *writ of piſchary*, defendant *renders an annuity* to the plaintiff. 2 E. 4. 62. b. 2 R. 3. 5.]

[10. If the fine be *of a manor*, defendant may *render to find capellanum divina celebrantem in another manor*. 2 R. 3. 5. b. (Quere).]

[11. If conuſor *acknowledges the third part* of a manor to be the right of the conuſee, he cannot *render all the manor*. Contra 42 E. 3. 12.]

[12. An *acquittal* may be *acknowledged* by fine *in writ of meſne*. 46 E. 3. 31. 49 E. 3. 8. b.]

A. may grant and render to B. a *rent out of the ſame manor*, contained in the fine, *but not out of any other land*; *neither* can the grant and render be of any *thing collateral to the land*, &c. contained in the writ, *or of another nature*,

[13. If the writ be *of certain land*, yet a render may be of a *rent out of this and other land*. Time of E. 2. 75 b. admitted, and note.]

nature, and neither iſſuing out of, nor incident to the land, &c. contained in the original. 2 Inſt. 514.

[14. If the writ be *of tenements in D.* and the fine is levied *of tenements in S.* this is void. For the writ does not warrant it. 19 E. 4. 9. 7. b. 3.]

[15. *So* if it be levied *of land in D.* where I *have nothing there*, the fine is void. 19 E. 4. 4.]

[16. *So*, if it be *of meadow*, where *I have not any*, it is void. 19 E. 4. 4. It ſeems *nothing can be granted immediately, by fine, unleſs* it be *upon a render* which is not immediate if it was not in eſſe, at the time of the writ of covenant ſued. Dubitatur 19 E. 4. 7. b.]

[17. A *rent de novo* cannot be granted by fine. Dubitatur 19 E. 4. 7. *b.* (Quere) if it may, how the covenant ſhall be: for if the covenant may be of the land, it ſeems that [a man] may levy a fine of any thing out of the land. It is a *ſure courſe, firſt to grant the rent, and after to levy the fine of it.* 19 E. 4. 3. Contra 21 E. 3. 44. b. It ſeems in the other caſe, if the *writ be brought of a rent, where there is not any ſuch*, and he acknowledges it by fine, it *will be eſtoppel* againſt him, and all claiming under him.]

As concerning the thing whereof the fine is levied, it is to be known, that in caſe of a fine, *ſur grant and render*, which contains a double fine; there is a great *diverſity* between the fine *ſur conuſans de droit come ceo*, &c. for that muſt he levied of the land, &c. in the original; but the grant and render may be of another thing, than is expreſſed in the original. As A. brings a writ of covenant againſt B. for the manor of D.—B. cannot levy a fine to A. of a rent to be iſſuing out of the manor of D. but he muſt levy the fine of the manor of D. according to the writ, and his covenant therein expreſſed. 2 Inſt. 514.

[18. If the *writ* be *of* 20 *acres, and the fine* 40 acres, it is not good of * 20, 21 E. 4. 4. b. 61. For it is not in the writ. *So*, if the writ be *of land, and the conuſance of paſture, meadow or wood*; it is not good, nor e contra; for it *is of other nature, and not contained in the writ.* 21 E. 4. 61. b.]

* As to 20. the party ſhall be diſcharged. 21 E. 4. 61. a. by Pigot.

[19. If the covenant be *of land*, he may *grant the reverſion* by the fine. 21 E. 4. 62.]

[20. If the covenant be *of rent*, yet the fine may be levied *of the other ſervices, as homage and fealty.* 19 E. 4. 8.]

A concord can *not* be *of any other thing than is contained in the writ of covenant*, and not of a foreign thing, *if it be not conſequent*; as in a writ of *land*; *rent, common, &c.* may be rendered iſſuing out of it. 18 Ed. 4. 22. Weſt's Symb. S. 30.

[21. Upon a covenant *of a manor*, a *rent may be reſerved* by the fine. 2 R. 3. 5.] [237]

[22. If the writ be *of a rent with the appurtenances*: the conuſance may *be of an annuity.* 21 E. 4. 60. The prior of Bingham and Merton's caſe adjudged.]

[23. The writ may be *of a rent*, and the conuſance may be *of rent.* 21 E. 3. 44. b.]

[24. Two might anciently *exchange* by fine. 16 E. 3. 19 E. 3. Abbe 13.]

25. Upon a writ of *covenant of one acre*, a fine hath been levied of it, and further, *by a præterea* in the ſame fine, *a manor hath been conveyed*, and the fine received. Denſh. R. on Fines 16.

[See (O) pl. 16, &c.]

(M) In

Fol 17.

(M) In what Caſe a *Feme Covert* ſhall be *examined*.

Denſh. R. on Fines, 14.

[1. IF a fine ſur conuſance de droit be *levied to a baron, and feme rendering rent*; the feme ſhall be examined, becauſe ſhe is to be charged with the rent. 46 E. 3. 15. b.]

S. P. Br. Examination, pl. 29. cites 24 E. ‡ 4. 30. and 62.—Br. Fines, pl. 63. cites 24 E. 3. 62.

[2. If A. acknowledges to B. and *B. grants and renders to A. and his feme for life, to hold of** A. *by the ſervices of* 10 *s. per ann. &c. and doing for him to the chief lord, the ſervices due, &c.* though the feme ſhall be charged of the ſervices, yet ſhe ſhall not be examined. 1 E. 3. 5.]

* It ſeems it ſhould be (B).——‡ It ſhould be E. (3.)

[3. If a fine *upon grant and render* be made *to the baron and feme*, ſhe ſhall not be examined. 8 H. 4. 8. b. (It ſeems it is intended as the principal caſe there was) that here was *not any conuſance by baron and feme*, but only a grant and render by the other.]

Br. Fines, pl. 63. cites 24 E. 3. 62.

[4. If A. *render certain land to the baron and feme in tail*, to hold by certain rent, the feme ſhall not be examined, becauſe ſhe hath not diſmiſſed herſelf of any right. 24 E. 3. 30. adjudged.]

[5. If a fine *upon releaſe* be levied *to the baron and feme*, ſhe ſhall not be examined, becauſe the fine is not eſtoppel, but for her advantage. 3 H. 6. 42. Quere.]

* This ſeems miſtaken, for 3 H. 6. 42. a. pl. 12.

[6. *So* if fine *ſur conuſance de droit come ceo*, be levied to the baron and feme; for this ſhall not eſtopp the feme to claim other eſtate. Contra * 4 H. 6. 42. ‡ 8 H. 6. 4. b.]

—and S. C. is cited Br. Examination, pl. 4. but ſays, that it is ſaid elſewhere, that ſhe ſhall not be examined, where ſhe takes, but where ſhe departs by fine; and, that where ſhe is not examined, ſhe ſhall not be eſtopped after to claim a greater eſtate.——‡ Br. Fines, pl. 51. cites S. C. that the feme, who took eſtate for life, was examined, if it was her will to have that eſtate, and no other; and Brooke ſays that by this it ſeems, the feme, who took the eſtate, ſhall be *eſtopped to claim a better eſtate.*

Br. Eſtoppel, pl. 73. cites S. C.

[7. If *upon a warranty of charters* a fine ſur conuſance de droit come ceo, which they have of this gift, he levied to the baron and feme, to have to them, and to *the heirs of the baron*; the feme ſhall not be examined, and therefore the eſtate of the feme ſhall not be changed by it. 21 E. 3. 32. b.]

[8. In *quid juris clamat againſt baron and feme*, if the *defendants come into court, and grant that they hold* of the conuſor, *and ſurrender their eſtate to the grantee*, the feme ſhall be examined. 21 E. 3. 60.]

If a fine be levied of *land to the huſband and wife, and the huſband and wife grant and render the land*, there the wife ſhall be examined, * and the examination muſt ever be upon the writ; and therefore a baron and feme, upon a fine *levied to them of land, cannot grant and render a rent out of the land*, becauſe that rent is not contained in the writ. 2 Inſt. 515.——Co. R. on Fines, 8.——Br. Fines, pl. 27. cites 46 E. 3. 15. per Finch.——Ibid. pl. 39.

[9. If *baron and feme render* land by fine to another, the feme ſhall be examined. 25 E. 3. 44. b. adjudged.]

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See the notes at (A. 3) on this ſect.

10. 18 *E.* 1. *ſtat.* 4. *ſ.* 7. *A feme covert muſt be examined by four of the juſtices of C. B. and if ſhe conſent not, the fine cannot be levied.*

11. In every caſe, *where the feme ſhall make any eſtate* by the fine, or *depart from any intereſt*, ſhe ſhall be examined. Denſh. R. of Fines, 13.

12. The Court have no authority to examine the feme, but *where ſhe is named in the writ, upon which the fine is to be levied.* And in ancient books, the Court would not examine the feme, but *of ſuch things*, which were *contained within the writ.* Denſh. R. on Fines, 13.

13. A fine was levied *ſur conuſance de droit* to the baron and feme, and to the heirs of the baron to *hold of the chief lord*; and the feme was examined upon this *render*, and ſo bound. Denſh. R. on Fines, 14. cites 11 E. 3.

14. Where ſhe is *not examined*, ſhe ſhall *not* be *eſtopped from claiming a greater eſtate.* Br. Fines, pl. 7. cites 9 H. 6. 42.

[See (F) pl. 1, 2.]

(M. 2) Grant and Render, upon what Fine.

1. The fine *ſur grant and render cannot be levied upon a fine executory*; and therefore, if a man levies a fine ſur conuſance de droit tantum to J. S. he cannot grant and render the lands back to the conuſor, becauſe the *conuſee has nothing in the lands till execution ſued*, and a man *cannot grant that which he hath not.* Co. R. on Fines, 8.

2. One would have drawn a fine *ſur conuſance de droit tantum*, and that the conuſee ſhould grant and render a robe annually for life to the conuſor, with clauſe of diſtreſs; and ſuch render was not received, becauſe the conuſee cannot *charge that which he hath not.* Co. R. on Fines, 8. cites Hill. 7. 3. Fol. 14.

But upon a fine executed, as a fine ſur conuſance de droit *come ceo*, &c.

or a fine *ſur releaſe* or a fine *ſur ſurrender*, grant and render may be made; for thoſe fines are immediately executed, and therefore the conuſee may well grant and render. Co. R. on Fines, 8. cites 24 E. 3. fol. 36.

3. Quære, if one may render upon a fine ſur *releaſe*, *which ſhall enure by way of extinguiſhment*; for the conuſee takes nothing. Co. R. on Fines, 8. Marg. cites 2 H. 5. 2.

(N) Who may Grant and Render.

[1. IF *A. brings writ* of covenant *againſt B.* B. without any conuſance by A. may grant and render the land to A. 8 H. 4. 8. admitted good, and 11. ſo held. (But it ſeems that *B. ought to be tenant of the land*, otherwiſe it is not good.) But. fo. 12. per Markham it is ſaid, that it is not neceſſary.]

(N. 2) Render to whom and how, Strangers, &c.

Note, that per Dier a render cannot be but *only to him that is named in the fine.*

1. If *two levy* a fine, the grant and render may be *to one* of them. 2 Inſt. 514. cites 24 E. 3. 35. —— *As* if *baron and feme* levy a fine to J. S. he may grant and render *to the baron, and to his heirs* for ever. Co. R. on Fines, 8. cites 24 E. 3. tit. Fines 61. 66.

But a remainder may be limited to one, by the fine, though he be not named in the præcipe. Weſt's Symb. ſ. 145.

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2. *So* if the baron and feme acknowledge by fine, the conuſee may grant and render *parcel to the baron only, and the other parcel to him and to his feme.* Co. R. on Fines, 8. cites 17 E. 3. 31. 12 E. 3. 33. Tit. Fines, 61.

3. A. and M. his wife levied a fine to J. S. and J. N. of the manor of D. &c. come ceo &c. and they grant and render to A. and M. for their lives, the *remainder of one 3d part to the eldeſt daughter, of A. and M. in tail*, remainder *to the right heirs of A*; *the remainder of another 3d part to the ſecond daughter* of A. in tail, remainder as above; *remainder of another 3d part reſidue, to the 3d daughter in tail*, the remainder in fee as above. Quod Nota. Br. Fines, pl. 111. cites 18 H. 7. and Brooke ſays, that he ſaw and read the ſaid Fine.

* Co. R. on Fines, 8. ſays, that he takes this caſe to be miſreported. For this ſhall be no taking of the immediate eſtate by the

4. In a fine ſur grant and render none can take the firſt eſtate upon the render, but ſome of the cogniſors; but *reverſions* or remainders any *ſtranger* may take: for if A. acknowledges a fine to B. and B. * *renders to the ſaid A.* habendum *ſibi et E. uxori ejus*, and the heirs of their bodies, &c. by this fine E. can have no eſtate, becauſe ſhe is *not named in the writ.* Weſt's Symb. ſ. 30. cites 24 E. 3. 27. 30 H. 8. Br. Fines, 108. 7 Ed. 3. 63.

grant and render, but by him who was party to the conuſance; but in remainder a ſtranger may take, as by a caſe put there for example plainly appears, and ſo are the books in 42 E. 3. 2. 16 E. 3. Br. tit. Fines, 3. 7 E. 3. 64. —— Br. Eſtates, pl. 23. cites 24 E. 3. 28.

See Br. Fines, 108. and 114. contra.

5. A. levied a *fine to B. and C.* and to the heirs of B. who grant and *render to A. and M. his wife.* Though *M. was neither party to the writ nor to the conuſance*, and though it appears by the ſame record, that ſhe was a ſtranger and not party, yet the grant and render to her was *not void, but voidable by error.* 3 Rep. 5. cited there by the reporter as adjudged. Trin. 27 Eliz. in C. B. in caſe of Owen v. Morgan.

[See (F. 4)]

(O) How being it may be received.

[1. *BARON and feme* may *grant and releaſe without warranty* in the fine. 44 E. 3. 36. b.] Candiſh. would have drawn a fine in this manner, *the baron and feme granted and rendered all which they had* in the tenements comprised in the writ, *for term of their lives to J. S. to have and to hold to him and to his heirs for ever*, and it was not received by the court. Then they *granted and releaſed what they had for* term of their 2 lives to the ſame J. S. and to his heirs for ever; and this was accepted *without warranty*. 44 E. 3. 36. pl. 27. Sir Giles Daubeny's caſe.

[2. If baron and feme *acknowledge their right* to another by fine *and releaſe, and the feme only obliges her and her heirs to warranty*, it is good. 44 E. 3. 21. b.] Baron and feme join in a fine ſur conceſſ: with warranty. The baron dies. *Covenant on the warranty lies againſt the feme.* Mich. 22 Car. 2. B. R. Wotton v. Hale.——2 Saund. 180. S. C. Lev. 301.

[3. If baron and feme levy fine (*of land whereof they are ſeiſed in right of the feme*) *come ceo, &c.* this ſhall not be received *with warranty by them and the heirs of the baron*; but ſhall be [received], being warranted *by them and the heirs of the feme*. 42 E. 3. 14. It ſeems the reaſon is, becauſe it is the inheritance of the feme. Baron and feme may levy a fine, ſur conuſance de droit come ceo que il ad, &c. *to A. and A. may render* * *to the baron in fee*, and this ſhall be received. 24 E. 3. 34.] 42 E. 3. pl. 26. Br. Fines, pl. 15. cites 42 E. 3. 13. *Br. Fines, pl. 103. cites 24 E. 3. 35.

[4. Baron and feme cannot *acknowledge* certain land *to be the right of A. as that* which he has of their gift, *and alſo releaſe all their* † *right* to the conuſee; for they cannot do both in one fine. 28 E. 3. 91.] Fol. 18. Denſh. R. of Fines 6. cites 27 E. 3. contra, that a fine *ſur conuſance de droit & ſur releaſe* may be in one and the ſame fine, *to one and the ſame perſon, and of one and the ſame land*; and may be *of part ſur conuſance de droit come ceo, &c.* and *of part ſur releaſe*.

And there may be in one fine *ſur conuſance, &c. come ceo, &c. grant* and *ſur releaſe*: and the conuſee by the ſame fine, may *render to the conuſor*. So at this day, two or three * ſorts of fines are in one. Denſh. R. of Fines 6.—— * *Orig.* (Partes fines.)

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[5. Fine levied *of a manor, except* 4 *acres, and of the* 4 *acres alſo when certain monies are levied*, for which the ſame are now in extent, was received. 44 E. 3. 21. b.] Br. Fines, pl. 19. S. C.

[6. A man may *acknowledge the tenements* contained in the writ *to be to the conuſee to have in taile*, and ſhall *not acknowledge the right*, 1 E. 3. 6. b.]

[7. In a fine, a man cannot *acknowledge the right of a conuſee, and after grant it to him in taile*. For the conuſance is of a fee, being of the right. 1 E. 3. 4. b. a. b.]

[8. In a fine, a man *ſhall acknowledge the right to be only in one*, and not in more *of the conuſees*. Contra 17 E. 3. 9. b.] Co. R. on Fines, 9.—Yet if received *to two and their heirs*, it ſhall ſtand. 5 Rep. 38. b. Tey's caſe.——And in caſe of a fine *levied by the king*, the juſtices will not refuſe a fine *to ſeveral, and their heirs*, for the benefit of the king. Co. R. on Fines, 9. cites 33 H. 6. 52. 7. H. 4. 7.

But *if received* it shall * *ſtand* [9. A fine levied *upon condition*, ſhall not be reſceived. 44 E. 3. 22. 5 Rep. 38. b. Tey's caſe.]

5 Rep. 38. b. Tey's caſe.——A fine *levied* to one *in tail* upon condition *with remainder*, is holden to be good. 27 H. 8. 24. Plowd. 34. b. 24 Ed. 3. 62. Contra per Priſot. 33 H. 8. 52. and 44 Ed. 3. 22. *But* a fine *with a re-entry* was ejected. 44 Ed. 3. 22. Weſt's Symb. ſ 30.—See (O 5)—Br. Fines. pl. 20. S. C.—Fitzh. Fines, pl. 15. 33 H. 6. 52.—Co. R. on Fines, 5. Br. Fines, 5. cites 28 H. 8. 24.

A fine was levied of land in tail, *upon condition to carry the ſtandard of the conuſor*, and for default thereof *remainder to W. N.* And per Fitzh. J. the remainder is good, and is in the grantee preſently before the condition broken or never; for if the remainder be not good at firſt, it never ſhall be good. And per Montague Serj. contra and Fitzh. after doubted. Br. Done, &c. pl. 3. cites 27 H. 8. 24.

A clauſe of *re-entry* cannot be in a fine. Weſt. Symb. ſ. 145.

I. Covenant to levy a fine, the writ was *quod teneat conventionem of* 120 *and* 10 *acres of land*; and Herle would not accept the fine upon ſuch form of writ. But per Shad. the writ ſhall not abate without challenge of the party. But per Herle we will not abate the writ, but we will ſuffer the writ to lie in peace. Br. Office del, &c. pl. 22. cites 7 E. 3. 39. and Fitzh. Office de court, 27.

II. *Baron and feme* tendered to *grant the reverſion* by fine *for their lives, which reverſion they had in tail*, and becauſe it was notified to the court, therefore the juſtices refuſed to accept the fine. Br. Fines, pl. 80. cites 29 Aſſ. 34.

III. In quare impedit, a fine was levied *of the advowſon by J. N. to the abbot of B. who granted to the ſaid J. N. that he and his heirs at every avoidance ſhould name a clerk to the abbot and his ſucceſſors, and that he ſhould preſent him to the biſhop*; and it was admitted a good fine. Quod nota, the form of this ancient fine, and was tempore H. 3. Br. Fines, pl. 42. cites 14 H. 4. 10.

IV. A fine *ſur grant and render* is executory, and therefore the law preſuppoſes, that he who renders is ſeiſed; yet if the other, at the time of the fine levied, be ſeiſed, the fine is good and executed preſently; and therefore the court will receive this conuſance de droit only, and that the conuſee by the ſame fine renders to the conuſor the ſame land, that he who ſurrendered by the conuſance ſhall have nothing in the land, nor can the conuſee in this caſe grant rent to the conuſor by the ſame fine, &c. Denſh. R. of Fines, 6.

[241] V. And a *fine ſur conuſance de droit come ceo, &c.* the conuſee by the ſame fine, *renders to the conuſor the ſame land*, and this is commonly uſed. Denſh. R. of Fines, 6. cites 8 E. 3.

VI. Note, a fine for the maſter and fellows of the college in Oxon, of the foundation T. White militis, civis & alderman London, of certain *land to be amortiſed* to the ſaid college, was refuſed to be ingroſſed *pro defectu brevis inde direct' juſticiar. de banco to paſs ſuch fine*; ſicut fuit anno 19 H. 8. pro hujuſmodi fine pro collegio Cardinalis Wolſey in Oxon' in banco prædict' levand'; item pro collegio reginæ in Cantabrigia ſimilis finis fuit reject' hoc termino, ex cauſa præd'. D. 188. pl. 9. Mich. 2 and 3 Eliz. St. John's College's caſe. (Oxon.)

VII. In *warrantia chartæ quod warran. unam acram*, the defendant may *acknowledge all his right which he hath in this acre* to the

the plaintiff; and the fine is well enough receivable. Co. R. on Fines, 10.

VIII. *So* if at this day the defendant will levy a fine *of the ſame acre, and of one other acre*, the fine is not good for the other acre; for it is not compriſed within the original. Co. R. on Fines 10. cites 20 H. 6. 3. a.

[See (P).]

[(O. 2) *Reſerved what.*]

[10. If *tenant for life renders his eſtate*, he may *reſerve a rent.* 29 E. 3. 7. b. contra 3 E. 3. 1.] *But* it ſeems to me in the caſe aforeſaid, if the *reverſion of leſſee for life be granted for life*, that the tenant *for life may grant* the land by fine *to the grantee for life, the grantee rendering rent*, becauſe it is not an abſolute ſurrender; for if the grantee dies, the tenant for life ſhall have the land again, as our books ſay. Co. R. on Fines 5. cites 7 H. 6. 13 R. 2. 29 Aſſ. Brook. tit. Eſtates 69.

[11. *But* if fine be levied *of land in fee in taile*, he may *reſerve ſeveral rents at ſeveral times.* 44 E. 3. 22. ſo received. 17 E. 3. 48. b.]

[12. A fine ſur conuſance de droit, which *reſerves a rent*, may be received. 46 E. 3. 15. 49 *E.* 3. 10. Contra 17 E. 3. 24. b.] Pl. 14.

[13. *But* otherwiſe it is *of a grant and render reſerving rent*; becauſe this fine is executory. 46 E. 3. 15. (Quære the reaſon.) contra 4 E. 3. 8. b. 50 E. 3. 9. b. Contra 17 E. 3. 48. b. 29 E. 3. 7. b.] Br. Fines, pl. 27. cites 46 E. 3. 15.

[14. Upon a fine *ſur conuſance &c. come ceo, &c.* a *rent* cannot be reſerved, becauſe it is executed. 50 E. 3. 9. b.] Pl. 12. This reſervation is void becauſe the fine is executed; for *no reſervation can be but on a fine executory*, as ſur render. Weſt's Symb. ſ. 30. cites 50 E. 3. 9. 24 E. 3. 26. 29 E. 3. 1.——*But* it may be *rendered* on ſuch fine. Br. Fines, pl. 27. cites 46 E. 3. 15. per Finch.

[15 A. *diſtreſs for a rent* may be reſerved by fine. 44 E. 3. 22. 46 E. 3. 15. 29 E. 3. 7. b.]

I. In aſſiſe, the *tenant held by finding certain* * *maſſes, &c. and rendering* 6 *marks rent per annum*, and the *lord brought writ of cuſtoms and ſervices* againſt the tenant, *in which he releaſed the ſervices reſerving the* 6 *marks, and a mark more*; and awarded a good reſervation, which Brooke ſays ſeems not to be law. Br. Fines, pl. 78. cites 26 Aſſ. 37. * *Orig.* (Meſſes.)

II. A man made a *leaſe for life*; and *after granted the reverſion for life*, the *remainder in tail by fine*; the grantee for life brought quid juris clamat againſt *tenant for life*, who *would have ſurrendered by fine to the grantee, with reſervation of rent during the life of him that ſurrendered*; and this fine was rejected; and the reaſon of the refuſal, as I apprehend, was becauſe the eſtate of him who ſurrendered was extinct and merged in the eſtate of him in the remainder for life; and then if he in the remainder dies, during the life of him who ſurrendered, and he in the remainder in tail enters, he ſhall hold it diſcharged. Co. R. on Fines 5. [242]

[(O. 3) *Rendered, what may be.*]

[16. In a fine *upon releaſe by baron and feme, and warranty againſt the feme* a *rent* may be rendered to them *for life of the feme*, by the conuſee, *with diſtreſs*, and this ſhall be received. 17 E. 3. 57. 24 E. 3. 36. b. 28 E. 3. 95.]

Br. Fines, pl. 20. cites 44 E. 3. 22.

[17. A *rent* may be granted and rendered *with clauſe of diſtreſs*. 29 E. 3. 40. b.]

——— *As, baron and feme granted, releaſed* and quit-claimed all *their right*, which they had in the tenements, &c. viz. *the franktenement, for life of the feme, to D. and G* and for this grant *D. and G. grant d to the baron and feme, for life of the feme, a rent of* 30 *quarters of barley per annum*, &c. *and if* the rent be *arrear, that they ſhall diſtrain*; &c. and per Wilby and Cur. the *right ſhall not be acknowledged to two in common*, but to one alone, and therefore it was made accordingly. Br. Fines, pl. 64. cites 24 E. 3. 64.

See (P) pl. 3.—And becauſe it was not received they *granted and releaſed* all which they had for their lives to the conuſee and his heirs, and ſo it was received. Quære. Br. Fines, pl. 21. cites 44 E. 3. 36.

[18. *Baron and feme grant and render* whatſoever they have in the lands in the writ *for term of their lives to the conuſee and his heirs*, and not received. But if they *grant and releaſe*, &c. as aforeſaid, it ſhall be received. 44 E. 3. 36. b.]

[19. Baron and feme *ſeiſed for life of the feme*; he in *reverſion* levies a fine, and *grants, that after the deceaſe of the feme it ſhall remain to the baron for his life rendering rent.* 44 E. 3. 45. b.]

20. *Baron and feme acknowledge* the tenements *to be the right of T.* and they releaſe and quit claim for them, and the heirs of the feme, to him and his heirs for ever, *to hold of the chief lord*, &c. the baron and feme, and the heirs of the feme warrant, &c. and *for their acknowledging, releaſe*, quit claim and warranty *T. granted* 40 *s. rent to the baron and feme, for life, to take of the ſame tenements with clauſe of diſtreſs*, &c. and it is received. Br. Fines, pl. 60. cites 24 E. 3. 26.

21. The baron and feme *granted a meſſuage* to J. &c. which they held *for life of the feme, rendering to them* 4 *s. rent with clauſe of diſtreſs*, and it was refuſed; and after they granted and rendered as above; for which grant, J. grants back 4 *s.* of rent out of the meſſuage, &c. and it was refuſed, quære cauſam; and after they granted and rendered to J. and releaſed and quit claimed to him and his heirs for term of the life of the feme, for which J. grants 4 *s.* &c. cum clauſula diſtrictionis, and it was accepted. Br. Fines, pl. 68. cites 39 E. 3. 1.

22. A fine was levied with a render, and the render was *with warranty*; and the officers of the fine refuſed to take it, by reaſon of the warranty annexed, which had not been known before time; but all the juſtices conceived it was good; for although it was *not uſual*, that he, which renders, ſhould warrant the land, becauſe he takes no benefit; yet if he will warrant it, it is not to be doubted, *but* it is *good enough*, and the officers were commanded to receive the fine. Cro. E. 17. pl. 9. Paſch. 25 Eliz. C. B. Anon.

(O. 4) Done.

(O. 4) Done. What Things may be done by Fine, and How.

1. A *manor* may be *divided* by fine. Br. Fines, pl. 17. cites 43 E. 3. 11. See Manor.

2. If a man will, he may make a *jointure* by fine, thus: J. viz. levies a *fine to A.* in fee ſur cognizance de droit come ceo, &c. and after *A. renders to J. for life, without impeachment of waſte*, the *remainder to B. his wife for term of her life*, the remainder to J. and his heirs. Weſt's Symb. ſ. 30. cites 38 H. 8. Br. Fines 108. [243]

3. A *leaſe for years* may be made by a fine in *this form:* the leſſee muſt acknowledge the tenements to be the right of the leſſor, as that, &c. and then the leſſor muſt grant the lands back again to the leſſee, for ſo many years as are agreed upon, reſerving a rent with a clauſe of diſtreſs: but this fine will not bind the iſſue in tail, becauſe he taketh by the fine, but giveth nothing thereby. Weſt's Symb. ſ. 30. cites Br. Fines 106. tempore H. 8. 36 H. 8. Br. Fines 118. Plow. 455. 14 Eliz. See Goldſb. 87. pl. 12. Anon.

4. *Or* a leaſe for years, may be made by fine, *to bind the tenant in tail thus:* the *tenant in tail, and the leſſee to acknowledge* the tenements *to be the right of a ſtranger, as that*, &c. and the cognizee to grant and *render* the tenements *to the leſſee for certain years*, yielding a rent with a clauſe of diſtreſs, *and then grant the reverſion to the tenant in tail.* Weſt's Symb. ſ. 30. cites 39 H. 8. Br. Fines 118.

5. If a *ſtranger, who has nothing* in the lands, *levies a fine to him in the remainder in tail dependant on eſtate for life*, ſur cognizance de droit come ceo que il ad de ſon done, &c. and the cognizee by the ſame fine, renders to the cogniſor for years, to commence at Mich. enſuing, and dies, and all the proclamations are made after his death. The tenant for life, after ſuch time as the ſaid leaſe is limited to begin, dies; it is adjudged a good leaſe, to *bar the iſſue in tail for the term.* Weſt's Symb. ſ. 30. cites 14 Eliz. Plowd. 437. b. Smith v. Stapleton—which ſeems contrary to the opinion before. Br. Fines, 106. 118. Weſt's Symb. ſ. 30.

6. A *particular tenant*, as for life, &c. *cannot ſurrender* his term to him in the reverſion, or remainder, by fine; *but* he *may grant and releaſe* it to him by fine. Weſt's Symb. ſ. 30. cites 44 Ed. 3. 36.

(O. 5) How being, it may be received; want of *Certainty*, &c.

1. Note, that *it is againſt the nature and credit of a fine to omit any thing*, in which *certainty* is not repoſed, or in which the thing *cannot take effect* and continuance, *according to the purport of the fine.* For it is againſt the nature of a fine; *be-*

cauſe a fine, of its nature, *is a final concord*, and rejects certainly all incertainty; for certainty (as is ſaid) begets repoſe, and incertainty, contention; and it is againſt the credit of a fine, *becauſe credit always attends* and accompanies with *certainty*; and of the contrary part, incertainty and falſity begets trouble and diſcredit. Co. R. on Fines 5. cites 2 H. 5. 33 H. 6. 45 E. 3. 18 H. 7. 24 E. 3. 36. 21 E. 3.

Therefore fine cannot be levied, *de tenemento*; becauſe tenementum is of uncertain ſignification.

A fine *upon condition* is not good; becauſe ſuch fine, finem litibus non imponit. See Br. Fines, pl. 5. cites 28 [27] H. 8. 24.——But the year book is, that if it be ſo taken, it is good.]

Co. R. on Fines, 5. cites 19 E. 3. [Quære, for there is no ſuch year.]

2. *And* therefore in our books, a grant and render was drawn by fine to A. for the life of B. remainder to C. in fee; and there Chard ſaid, that the fine *ought* to be certain, and *to limit in what perſons the land ſhould remain*; and becauſe it was uncertain, who ſhould have the land, if the *tenant for life died, leaving ceſty que vie.* Upon this Thorp drew the fine *to A. and his heirs for the life of B. remainder to C.* and yet Stone doubted; becauſe, as I apprehend, ſome ſay the limitation to one and his heirs during the life of J. S. is void; and notwithſtanding this, there ſhall be an *occupant*, becauſe a fee ſimple cannot depend upon the life of a man. But I hold the law e contra as to this; and ſo is Litt. 168. 19 E. [3.] Accompt. 56. 33 Aſſ. p. 17. 22 Aſſ. p. 31. and 11 H. 4. 43. But I agree that this ſhall not be ſaid in fee ſimple, but that the heir ſhall take it as a ſpecial occupant named in the deed. Co. R. on Fines 5.

[244] 3. *So*, if a fine be drawn, that J. S. *acknowledges* the land *to be the right of J. D. and J. G.* and to their heirs; ſuch fine the juſtices ought not to receive, becauſe the fee ſimple ſhall not be certainly repoſed in any certain perſon; for it may be that J. D. ſhall ſurvive, and then he ſhall have the fee; the which (as I have ſaid) ſhall be againſt the nature and credit of a fine. Co. R. on Fines, 5.

Br. Fines, pl. 24. cites 45 E. 3. 12. S. C. And after Kirton drawed the fine *of the 3d part of every parcel of the manor and advowſon, &c. and that the firſt tenant for life, ſhall have the firſt preſentment*, or he in remainder, if it falls not in the life of the tenant for life, or his heirs, &c. *and the other*, in the other 3d part of the manor, *the 2d preſentment*, &c. and alſo the other, to whom the 3d part was granted, &c. the 3d preſentment, &c. & ſic de ſingulis, &c. quære if this matter ſhall ſever the preſentments.

4. A *fine* was levied *of a manor*, unto which an advowſon was appendant, wherein a *3d part was rendered back to A.* for life, with divers remainders over, and *ſo of the other two parts with the advowſon of every 3d part as aforeſaid*; if they cannot agree to preſent, a lapſe ſhall incur. They are all tenants in common, and being *firſt named*, or laſt named, is of no privilege or prejudice. For being *by one deed*, it ſhall be uno flatu. Arg. Godb. 128. cites 45 E. 3.

[See (O) pl. 9. (P) pl. 2. (Z. 3) (Z. 4) (Z. 5)]

(O. 6) *Uncertainty* in Fines. *Made good* or explained by the Intent.

1. A fine was levied ſur conuſance de droit come ceo, &c. to J. N. and he *rendered to the conuſor and W. his ſon*, and to their heirs, where there were 2 *W.'s elder and younger*; and the contention came between W. the younger, and the heir of W. the elder, and *the iſſue was joined*, whether the fine was levied (to give the inheritance) to W. the elder, or W. the younger; and ſo ſee iſſue taken upon *the intent*. Br. Fines, pl. cites 47 E. 3. 16.

2. *And* where a man hath the *manors of over S. and nether S.* and levies *a fine of the* manor of *S.* this ſhall be taken the manor of S. of which they diſcourſed or have communication, and the manor that the conuſor intended to paſs. Br. Fines, pl. 28. cites 12 H. 7. 6. And if they had no communication, then it ſhall paſs the manor, which the conuſor intended. Br. Fines, pl. 88. cites 12 H. 7. 6. Per Vaviſor and **Davers**, and denied by none; and that the ſame was agreed. 27 E. 3.

Circumſtances ſhall be given *in evidence* to prove what manor they intended. And phraſes of ſpeech declare the intent of perſons. Per Mountague Ch. J. Pl. C. 85. in caſe of Partridge v. Strange and Crocker.

[See (J. b. 2.)]

(O. 7) Received or not. In Reſpect of the Grant.

1. Fine was drawn, by which A. granted a certain rent in the writ to B. to have and *receive of J. N. and his heirs tenant of a houſe*, with the appurtenances *in E. & hered' ipſius B. imperpetuum cum warrantia*, and this fine was accepted; and B. prayed a writ to put him in poſſeſſion; and it was granted. Br. Fines, pl. 49. cites 21 E. 3. 44.

2. A. brought a writ of covenant againſt B. who was *ſeiſed of a manor, to which an advowſon was appendant*; and he levied a fine *ſur conuſance de droit tantum*; and thereby *granted*, that the conuſor ſhould have *the next preſentment, and himſelf the 2d, and conuſor the 3d, and he the 4th; and ſo they and their heirs to preſent by turns for ever*. D. 259. b. pl. 20. Paſch. 9 Eliz. cites 43 E. 3. 35.

(P) How the Fine being, ſhall be received. [*Being with Render, or not.*] [245]

[1. A Fine ſhall not be received, being *with warranty to four and their heirs*, unleſs they are *coparceners*. Contra 17 E. 3. 9. b.] But *being received, ſhall ſtand*. 5 Rep. 38. b. Tey's caſe.

See (O. 5). [2. A fine ſhall not be received, being *with render to A. and B. and to the heirs of the one for the life of A. the remainder to the other*, for the *uncertainty* of the eſtate. Contra 17 E. 3. 48. b.]

See (O) pl. 18. [3. A *grant and render* by 2 barons and their femes, *of as much as they have for the lives of the femes to another and his heirs with warranty, for the lives of the femes* ſhall not be received. 17 E. 3. 66. b. becauſe no right is ſaved in the renderor, nor granted over by render as ought to be. *But a fine upon releaſe*, in ſuch manner ſhall be received. 17 E. 3. 66. b.]

Fol. 19. [4. A fine *by grant and render of a reverſion to* 2. ſhall not be received, but it ought to be *to one in certain.* 21 E. 3. 13.]

[5. The *ſame* law *of land in poſſeſſion.*]

[6. But *otherwiſe* it is if the *render be to two, and to the heirs of one.* 21 E. 3. 13.]

[7. The *ſame* law *of land in poſſeſſion.* 21 E. 3. 27. b.]

[8. A man *ought not to acknowledge the right to two, but to one of them, as that which the two have of the gift*, &c. For otherwiſe the fine ſhall not be [received]. 27 E. 3. 84.]

Warranty. See (B. b. 3) But in [9. A fine *by grant and render by two* to another *with warranty for them and their heirs*, ſhall not be received. 21 E. 3. 27. b.]

caſe where the land was *gavelkind*, the render by 3 conuſees, and warranty for them and their heirs, was received. Br. Fines, pl. 65. cites * 24 E. 3. 66. ——— Co. R. on Fines 5. ———
* Br. Fines, pl. 48. cites S. C.

[10. *But* if the *warranty* be *for them, and the heirs of one*, it ſhall be received. 21 E. 3. 27. b.]

5 Rep. 38. b. [11. A *warramty cannot be* limited *to two, and their heirs*, by fine. For this ſhall not be received.]

[12. *But* it may be limited *to two, and the heirs of one.* 21 E. 3. 27. b.]

* *Orig.* (ove). [13. If *baron and feme* by fine, *grant, releaſe, and confirm to two, all that* * *which they have of the tenements of the feme, which they hold for the life of the feme of the heritage of the ſaid two.* This fine ſhall not be received; becauſe the inheritance is not granted to one. 24 E. 3. 36. b.]

[14. A fine may be levied *of land in ſeven counties* together. 1 E. 3. 4. b.]

15. *Rent* of 20 *l.* per annum was granted by fine *to J. N. and his heirs upon* ſuch *condition, that if after the death of J. N. his heir*, or any of his heirs, *be within age, that during the nonage he ſhall be quit of the payment* of the rent, & it was agreed, and diſputed after if the fine be well accepted, or not; quod mirum; for at this day they *will not ſuffer a condition*, becauſe finis *finem litibus imponere debet.* Br. Fines, pl. 62. cites 24 E. 3. 61.

16. If *covenant* be *brought by two*, the defendant may acknowledge the one *moiety* [to the one, and the other moiety] to the other; or the *one part in ſeveralty to the one and other part in ſeveralty to the other.* Co. R. on Fines 8.

17. *But* it ſeems if 3 *bring writ* of covenant, the fine *ſhall not be levied to two only.* Co. R. on Fines, 8. cites 7 E. 3. 25.

[246] 18. *But* in writ of covenant by two, the defendant may levy a *fine to one*, the *remainder to the other, or* levy a fine *to one rendering rent,*

rent, and by the ſame fine grant the *reverſion to the other*. Co. R. on Fines 8. cites * 16 E. 3. Br. tit. Fines † 5. 7. 36 H. 8.

* Quære. For there is no ſuch year. † This ſeems a miſtake, and that it ſhould be pl. 118.

19. The *manors* and tenements *contained in the writ may be divided*. *As* if a fine be levied between R. and M. of 2 manors, and M. acknowledgeth all his right of the ſaid 2 *manors* to be the right of the ſaid R. as that which, &c. for which R. granteth and *rendereth* the *one* manor *to M. for life, with two parts of the other* manor, *which N. holdeth in dower*; *to have the one* manor, *and two parts of the other* manor, *to M. for life*, the *remainder after her death to R. in tail*, and that *after the death of A. the third part ſhall remain to another*. Weſt's Symb. ſ. 30. cites 43 E. 3. 11. 45 E. 3. 12. Br. Fines, pl. 17. cites 43 E. 3. 11. S. C.

20. Fine levied to baron come ceo &c. and they grant and render to the conuſor the land, to hold for term of the lives of baron and feme, and after their deceaſe *the remainder to the heirs of the baron*. The fine was not received; for a man cannot *entail a remainder to his heirs living himſelf*, unleſs he commences firſt with himſelf; and this becauſe of the reverſion ſaved. Paſch. 7 Eliz. D. 237. b. pl. 32. Vide.

21. A fine was levied with a render, and the *render was with warranty*—it is good though unuſual, and that he, that renders, takes no benefit. Cro. E. 17. Paſch. 25 Eliz. C. B. Anon.

22. *Render with warranty* was commanded to be received. Cro. E. 17. pl. 9. Anon. ut ſupra.

23. Exception was taken, that the writ of covenant, and the caption was *de manerio & tenemento, and 5 s. rent*; and the fine engroſſed was *de manerio & tenemento*; but it was agreed, that the courſe of fines is, that if the *rent be under 5 l.* they uſe not to mention it in the fine engroſſed. Cro. E. 275. Hill. 34 Eliz. C. B. Argenton v. Weſtover and Lucas.——Cro. J. 11. Paſch. 1 Jac. B. R. Arundel v. Arundel. S. P.

(P. 2) Certified. How Fine acknowledged ſhall be certified, and when, and by whom.

1. *By 15 E. 2. ſtat. of Carliſle. The commiſſioners, that take the cognizance, ſhall make a certificate thereof to the juſtices, to the end the fine may be lawfully levied according to the former ordinance.*

2. If *two juſtices* have *dedimus poteſtatem* to take the conuſance of a fine, the one alone cannot take it; but if it be taken by both, *the one may certify it* alone, *after the death of the other*. Denſh. R. on Fines, 9.

3. 23 *El.* 3. *Enacts, that the day and year of the acknowledgement of a fine, and the warrant of attorney for the ſuffering a recovery, ſhall be certified together with the concord or warrant; and none ſhall be enforced ſo to certify, but within one year after ſuch acknowledgement made, or warrant given.* If they who have taken cogniſance of a fine, *will not certify* the ſame in conveni-

ent time, a *certiorari* is to be awarded unto them, comprehending the matter of the ded. pot. and commanding them to certify, &c. which if they do not, there lies againſt the commiſſioners, an *aliat, pluries and attachment*, &c. Weſt's Symb. ſ. 156. cites F. N. b. 147. b.

No officer ſhall receive any writ or entry without the day ſo certified in pain of 5 l.

But they are *not bound* to certify ſuch recognizances *but within the year* after ſuch caption thereof; but if they do, it is good enough by this act. And with every ſuch certificate, they muſt certify the day and year, wherein the ſame was acknowledged, thus, viz. *Capt' apud R. in Com. Ebor.* 20 *Die Octob. Anno Reg' Ja. Regis, &c.* Weſt's Symb. ſ. 156.

4. Though *juſtices of aſſiſe*, by the general words of their patents may take and certify cognizances of fines without any ſpecial ded. pot. yet ſuch juſtices uſe not now to certify them without a *ſpecial writ of ded. pot.* ſued forth of the chancery directed to them, and *giving them thereby power* to take and certify ſuch cognizances as they have already taken. Weſt. ſ. 16. cites D. 224. pl. 51. [but it ſhould be pl. 31.]

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Br. Fines, pl. 84. cites 1 H. 7. 9.— S. P. S. * if he be *diſcharged before he has certified*; he may certify it by writ, but not otherwiſe; notwithſtanding that he be *reinſtated*. Br. Fines, pl. 34. cites 8 H. 4. 5.——* Weſt. Symb. 156. cites S. C. and 1 H. 7. 9.

5. If a *judge takes the conuſance, and dies*, a certiorari ſhall be awarded to *his executors* to certify the conuſance. Co. R. on Fines, 10. cites Fitzh. 147.

So if a *commiſſioner dies* after the cognizance, his executors may certify on a certiorari. Weſt. Symb. ſ. 156. cites 8 H. 4. 5. 1 H. 7. 9. F. N. B. 147. (B).

6. A writ of *covenant* is proſecuted *Jan. 23. returnable Oct. Purificat.* The dedimus poteſtatem is *teſted* 23 *Jan.* the judge certified the concord *taken Feb.* 14. which is 2 days after the term, at which time the writ of covenant is not depending; the fine is, hæc eſt finalis *concordia facta in Oct. Purif.* And after it is recorded in 15 Paſch. and yet adjudged a good fine. Hutt. 135. Sir Richard Champernoon's caſe.

(P. 3) Executed. How; and in what Caſes neceſſary.

It is ſaid in our books, that at common law before this ſtatute, if a fine executory was not executed, that the party ſhould not have *brief de fine facto*, in the which the plaintiff will recover only damages; but under correction, *before the ſaid ſtatute of W.* 2. the *conuſee might have entered upon the conuſor and his heirs.* For the ſaid *ſtatute does not give entry* to the conuſee or his heirs. Co. R. on Fines 12.

1. *Weſtm.* 2. 13 *E.* 1. 45. *Enacts that for all things recorded before the king's juſtices, or contained in fines, (whether contracts, covenants, obligations, ſervices for cuſtoms acknowledged, or any other things inrolled) a writ of execution ſhall be within the year, but after the year a* ſcire facias, *whereupon if ſatisfaction be not made, or good cauſe ſhewed, the ſheriff ſhall be commanded to do execution.*

He, to whom a remainder was made by fine, ſued *habere facias ſeiſinam* to the ſheriff, and the *ſheriff returned*, that he cannot make execution for *reſiſtance*, and it was adjudged that his return was not good; and the ſheriff was *amerced* 20 *marks*. Co. R. on Fines 12.

2. A fine may be executed by writ of *habere facias ſeiſinam*, and if *reſcous* be made, the ſheriff may take the *poſſe comitatus*, and make execution. Br. Fines, pl. 112. cites 19 E. 2. Fitzh. tit. Execution, 247.

3. Scire

3. Scire facias upon *a fine between T. and H.* by which *T. acknowledged the land to be the right of H.* &c. and *H. granted and rendered to T. habend' to him and E. his feme, and to the heirs which T. should beget on the body of E.* ſo that *if they died without ſuch heirs*, that *then it ſhould revert to the ſaid H. for his life*, the *remainder to C. and S. his feme in tail*, &c. *T. died without heirs of the body of E*; and the tenant ſaid that *after the death of H. and S. who was the mother of the plaintiff, C. the father of the plaintiff entered and was ſeiſed*; and ſo the fine executed, &c. Judgment, &c. and the opinion was; that becauſe it was *once executed*, it ſhould not be executed again by ſcire facias of the ſame eſtate which was executed; but *the heir is put to his formedon for the miſchief of warranty*; for though the tenant in the ſcire facias may have writ of warranty of charters, yet his feoffor ſhall loſe his warranty paramount, which he may have by way of voucher in a formedon, which he loſt in writ of warranty of charters, & adjornatur. Br. Sci. fa. pl. 125. cites 24 E. 3. 57.

4. Land was given *to J. N.* by fine *in tail*, the *remainder to P. in tail*, the *remainder to the right heirs of J. N.* the firſt donee; and A. as right *heir of the firſt donee ſued execution*, becauſe *the others were dead without iſſue*, and it well lay; for the *fee was not executed during the firſt eſtate.* Br. Sci. fa. pl. 89. cites 38 E. 3. 17.

5. Scire facias to execute a fine was *ſued by the heir of S.* becauſe *the fine was levied to A. for life*, the *remainder to J. in tail*, the *remainder to S. in fee*; and that *all are dead, and J.* [*died*] *without iſſue*; and the tenant ſaid that *A. ſurrendered his eſtate to J. and after S. died, and J.* [*died*] *without iſſue*; and that *A. entered as brother and heir to S.* whoſe eſtate he has, judgment if execution. And the other ſaid, that A. by his entry after the death of S. had only his firſt eſtate for life; which is a great error; for it is a ſurrender; and then *after the death of J. and S. A. was in of fee, and* then *the fine executed in the fee*, and never ſhall be executed again; and per Finch. becauſe the *eſtate for the life of A. merged in the ſeiſin of J. and he is in in tail*, and not for the life of A. the wife of J. ſhall be endowed. Br. Sci. fa. pl. 21. cites 42 E. 3. 9. [248]

6. Eſtate by *fine is made to two and to the heirs of one*; and he who had the *fee died*; and after the *tenant for life died*, and *J. N.* abated; the *heir of him who had the fee may have* an aſſiſe of mort-danceſter, or a writ of right, or a *ſcire facias*, per Kirton, to which Finch, agreed; quod mirum, that it ſhall be *executed to ſome actions, and to ſome not.* Br. Sci. fa. pl. 21. cites 42 E. 3. 9.

7. Fine *levied by him in reverſion, without expreſs mention of the reverſion*, is not executory; nor ſhall the party have execution where it is levied *ſur conuſance de droit, or ſur grant and render.* 43 E. 3. 15. but ſuch fine was executed the ſame year, fol. 22. and there it is ſaid clearly that the right paſſes, though the conuſor had nothing but reverſion in tail; but it ſeems clearly, that *by fine ſur conuſance de droit come ceo, &c. reverſion paſſes.* Br. Sci. fa. pl. 28. cites 43 E. 3. 22. per Thorp.

8. Scire facias. The caſe was, that land was entailed for *life* by fine, the *remainder to baron and feme in tail*; the *baron died*, and after the *tenant for life died*; the *feme entered and died*; and the ſon brought ſcire facias as heir to his father and mother of their bodies;

bodies; and by award *it is a good execution by the entry of the feme after the death of her husband*, as well as if the baron and feme had been seised; quod nota. Br. Sci. fa. pl. 51. cites 49 E. 3. 22.

9. A fine is levied *to J. N. in tail, remainder to the right heirs*; the heir *lineal* shall not have execution; for this is executed of the tail; but *the heir collateral*, after the tail determined, shall sue execution of the fee simple in the remainder. Br. Fines, pl. 32. cites 7 H. 4. 16.

10. If a fine be levied *to the husband and wife in special taile*, the *remainder to the heirs of the body of the husband*, and the *wife dies without issue*; the remainder is executed in possession in the husband; for the *estate tail meeteth with the freehold, and drowneth it.* West. Symb. s. 176. cites 7 H. 4. 23.

Fr. Fines, pl. 97. cites 18 E. 4. 22.

11. *Some* fines are to be executed *by entry only, some by scire facias, or entry*, as long as the entry of the conusee is lawful. But *at common law*, our books say that the conusee has no remedy, if the fine be not executed, but only *writ of fine facto*, which (as it seems to me) is to be intended, *when the entry of the conusee was taken away.* For by the order of the common law, the conusee might have entered; but the *scire facias is given by the statute of Westm. 2. cum de his quæ recordata sunt, &c.* Co. R. on Fines 3. cites 21 E. 4. 4. b. 45 E. 3.

If conusee is *in possession*, the fine is executed, so that he may have formedon or other action; and if the conusor be in possession, he may enter upon him or upon his heir; but if the land be recovered or aliened, so that his entry be taken away, the fine is void. Br. Fines, pl. 12. cites 41 E. 3. 14.——West's Symb. s. 126.

12. A fine sur conusance de droit come ceo, &c. is executed; because it *supposes a gift precedent*; but though it be executed *between the parties*, yet, *as to all strangers, the conusor remains seised of the land. But* if such fine be levied *of a rent, common, advowson, liberties*, or such like; the conusee has a freehold in law in him, before any possession or actual seisin had. Co. R. on Fines, 4.

[249] (P. 4) Execution barred, by what. Disseisin, &c.

1. If a man *seised in fee levies a fine* to another sur conusance de droit *come ceo*, &c. and, *before entry* made *by the conusee, a stranger enters and dies seised*; neither conusee nor conusor has any remedy. 41 E. * 1. 14. b. per Finch. *But if*, after the fine levied, the *conusor continues possession*, and dies in possession, the conusee *may enter upon the heir*, and if he enters after the descent, he shall avoid the ward. * 12 H. 4. 16. per Thirning. Co. R. on Fines 4.

* This should be 41 E. 3. 14. according to Br. Fines, pl. 12.

* Br. Fines, pl. 41. cites S. C.

2. *But* if such fine (as it seems to me) be levied *of a reversion expectant* upon the estate for life, or in tail; in such case, after the death of the lessee, or the estate determined, the conusee shall have *scire facias*; and therefore if the lessee be disseised, and a *descent*, and after the lessee dies, the conusee is not without remedy, as I think. Co. R. on Fines 4.

3. It is said in the 1 E. 4. 6. that if a fine was *levied before time of memory*, a man shall not have scire facias at this day to have execution of it. Co. R. on Fines 12.

[See (N. b. 5)]

(P. 5) Abate-

(P. 5) Abatement. By Death of the King.

1. If a juſtice takes a conuſance, and after, the king dies *before any writ of covenant, or ded. poteſtatem* upon the conuſance, it is utterly void. So it ſhould be (as it ſeems to me) at common law, if the writ of covenant or ded. pot. had been ſued, and conuſance taken, and after the king dies, that ſuch conuſance ſhall not be received: but now at this day, it is otherwiſe; for now a writ ſhall not abate by the death of the king. Co. R. on Fines 10. Br. Fines, pl. 85. and 124. cites 8 H. 7. 9.

2. 1 *Annæ*, 8. *ſ.* 5. *Enacts that no original writ, proceſs, or proceedings whatſoever, ſhall abate or diſcontinue by the death of any king or queen of his realm.*

(P. 6) Execution, by Entry, at what Time it may be, and in what Caſes tolled by Deſcent, Alienation, Recovery, &c.

1. If a man levy a *fine* to another, *ſur conuſance de droit come ceo*, &c. the *conuſee may enter upon the* conuſor, or his *heir*, quod nota. *But if recovery or alienation be*, ſo that his entry is tolled he is without remedy, nota; and ſo it ſeems, that he cannot enter upon the alienation, quære inde. Br. Entre Cong. pl. 7. cites 41 E. 3. 14.

2. In ward, it was agreed, that where a man levied a fine, *ſur conuſance de droit* to another, and yet continued poſſeſſion, and *died ſeiſed*, and his heir entered; yet the *entry of the conuſee is good* and lawful *upon the heir*, per Thir. clearly, which none denied. Br. Entre Cong. pl. 23. cites 12 H. 4. 16. Br. Fines, pl. 41. S. C.

(P. 7) Execution of Fines. What amounts to it, or what Fines need it.

1. Sci. fa. was brought to execute a fine, becauſe the fine was *levied to A. B. and C. and to the heirs of the body of B.* the remainder *to the right heirs of C.* and becauſe *all were dead, and B. without iſſue*; the plaintiff, as right *heir of B. brought writ to execute* the fine. The *defendant ſaid that A. died, and B. alſo, without iſſue, living C. and ſo the fee ſimple executed in his life, and therefore ſci. fa. does not lie*; for it now is as if an eſtate for life had been granted to C. the remainder to his right heirs, in which caſe he has fee ſimple. Br. Scire Facias, pl. 16. cites 40 E. 3. 20. [250]

2. *But* where a fine was *levied to baron and feme and C. and the heirs of C.* and *C. died*, and then the *baron and feme died*, and the heir of C. brought ſci. fa. It was agreed that the fine was *executed*

cuted for a moiety in the life of C. Quod nota. Br. Scire facias, pl. 16. cites 40 E. 3. 20. But Brooke ſays it is *contra in the caſe above, for B. had eſtate tail*, and therefore the fee ſimple in that caſe could not be executed for any part. Note the difference.

3. If at the levying of executory fines, the party unto whom the eſtate is limited, be *in poſſeſſion of the lands* paſſed, he needeth no writ of execution for the ſame; for then ſuch fines do *enure by way of extinguiſhment of right*, but alter not the eſtate nor poſſeſſion of the cogniſee, but perchance better it. Weſt's Symb. 6. ſ. 20. cites 7 H. 7. 12 and 22. 2 Ed. 3. 6. 21 Ed. 3. 44. 8 H. 4. 8. 41 Ed. 3. 14. 7 H. 4. 23.

Weſt's Symb. ſ. 177.

4. Note, that a fine is either executed by writ of *habere facias ſeiſinam*, which is a writ to the ſheriff to put the cogniſee or his heirs in poſſeſſion; and this muſt be ſued forth within a year after the fine ſued forth, or after judgment upon a *ſci. fa.* Or elſe he muſt have a writ of *ſci. fa.* which is to be ſued forth after a year and a day after the fine is levied; and thereby the ſheriff is to warn the tenant to appear and ſhew cauſe, if he can, why the cogniſee or his heirs ſhould not have execution; at the return whereof, if the *tenant appear, and can ſhew cauſe* to the contrary, the plaintiff ſhall have an *habere facias ſeiſinam* to the ſheriff, to put him or his heirs in poſſeſſion; or the cognizee, where the fine is *ſur cognizance de droit come ceo, que il ad de ſon done*, may obtain the actual poſſeſſion of the land contained in the fine, *by an entry:* for in this caſe of a fine executed, if the cogniſor be ſtill in poſſeſſion of the land, whereof the fine is levied, the cogniſee may, without any writ of habere facias ſeiſinam, enter upon him, and ſo get the ſeiſin and poſſeſſion of the land. Brown of Fines 167.

Weſt's Symb. ſ. 178.

Weſt's Symb. ſ. 176. cites 41 E. 3. and 14 E. 3. 5.

5. *And* note, that if a fine be *levied to a huſband and wife in ſpecial tail*, the remainder *to the heirs of the body of the huſband*, and *the wife died without iſſue*, the remainder is executed in poſſeſſion in the huſband; for the eſtate tail meeteth with the fee ſimple, and is drowned. Brown of Fines 167. cites 41 Ed. 3. 14. 14 Ed. 3. 5. 7 H. 4. 23.

Weſt's Symb. ſ. 176. cites 7 H. 4. 23.

(Q) What ſhall be good Cauſe to ſtay a Fine.

S. P. Hob. 330. FARMER's CASE. S. P. 2 Lev. 127. ——See (H. b)

[1. IF baron and feme levy a fine, and *the conuſance is taken ſix days before Eaſter term 7 June, and the writ of covenant is returned 15 Paſchæ, which was the third of May*, and the *baron dies the 9th of May*, the *king's ſilver not being entered*; yet if upon examination it appears, that the clerk had entered the king's ſilver *in paper* before any exception taken to it; and that now he had entered the king's ſilver upon the back of the writ of covenant as it ought to be, the fine ſhall not be ſtaid. P. 7. * Ja. B. Booth's caſe per Cur. preter Foſter. For when this is entered, it has relation to the return of the writ of covenant.]

* Orig. is (Ju. b)

[2. If *J. S. with the feme of another* levies a fine *(by the name of J. S. and Jane his wife) of the inheritance of the feme* and he who is her true baron comes into court, and ſhews [this] matter and

and prays to ſtay the fine, yet the court will not ſtay it. For the court will not determine the legality of matrimony, and if the truth be that ſhe is not the wife of J. S. this will not hurt the right baron. Tr. 7. Ja. B. per Cur. between Keblethwaite and Wade.]

[3. If a man levies a fine, and *before the king's ſilver is entered, there is ſhewn to the court an office*, by which it is found *that the land is held in capite, and a licence of alienation before granted of the ſame land*, the court may ſtay the fine till he has purchaſed a licence of alienation, and a writ of quod permittat comes to them. M. 11. Ja. B. per Cur. Ld. Arundel's caſe.] [251]

4. If a *feme ſole* by dedimus poteſtatem *acknowledges a fine*, and *before the return* thereof *marries*; this fine *may be certified*, and ingroſſed, *as of a feme ſole*, becauſe the taking of her huſband, after the fine acknowledged, is her own voluntary act, and ſuch fine ſhall barr her and her heirs for ever; and the taking the baron was after the teſte of the writ of covenant; and it was held, that a *releaſe of the baron to the conuſee* of all his right made all clear. D. 246. pl. 68. Mich. 7 and 8 Eliz. Anon. Weſt.f.156.

[See (H. b)]

(Q. 2) Stayed, by Death of any of the Parties.

1. A fine was ready to be ingroſſed, and Laicon came and ſhewed that the *conuſor had before levied other fine to another*, and prayed that it be not ingroſſed, and non allocatur; for the firſt conuſee may have his remedy by aſſiſe, vel aliter, upon the firſt fine. *But if the court be aſcertained, that the conuſor is dead*, the fine ſhall not be engroſſed, per Priſot; wherefore licence was ſhewn upon the firſt fine, and that the land was held of the king, upon which they ſtayed the ingroſſing; and by him no fine ſhall be ſuffered *upon condition, nor to divers perſons and their heirs*, but ſuch as are held of the king; and by him, notwithſtanding the licence, the fine ſhall not be engroſſed without *writ* out of Canc. *of quod permittat*. Quære of this writ. Br. Fines, pl. 10. cites 33 H. 6. 52.

2. A. tenant for life, and B. remainder man in fee acknowledge a note of a fine; A. *dies*; per Hobart, the conuſee might proceed with the fine, as againſt B. only, and take his writ of covenant accordingly. Hob. 329. Erſfield's caſe. Winch. 4. Paſch. 19 Jac. S. C. Sackville v. Earnſby.

3. A feme covert one of the cognizors died *after the caption*, and *after the teſte, but before the return of the writ of covenant*; and a caveat being entered, it was inſiſted that the *king's ſilver was not paid before the wife's death*; and therefore the fine ought not to paſs. But it was anſwered, that fines are common aſſurances, and that the acknowledgment makes the fine compleat, and that the king's ſilver is the fine pro licentia alienandi, which is the præ-fine paid at the alienation office, and for which a *receipt was indorſed on the writ of covenant* and is not part of the poſt-fine, which is never collected till after the fine is compleated; and the court after conſideration was of that opinion, and ordered the fine to paſs. Barnes's

Barnes's Notes of Caſes in C. B. 141. Mich. 6 Geo. 2. Harneis v. Micklethwaite.

4. A *year having lapſed ſince the caption* of a fine, it was ſtopped at the king's Silver Office, for want of an *affidavit, that the parties were living*; and *one of the conuſors being dead*, application was made in the treaſury, to the judges, to ſtrike him out, and that the fine might paſs as to the other, which they denied, but made a *rule, that the ſurviving conuſor ſhew cauſe, why the fine ſhould not paſs generally, as to all parties*; and upon affidavit of ſervice, the rule was made abſolute. Barnes's Notes of Caſes in C. B. 142. Cotton & Tyrrel, Bart. v. Baylie & Ryder.

5. In a like caſe of want of affidavit, the court, upon inſpecting the writ of covenant and conuſance, made a *rule upon the clerk of the king's Silver Office to ſhew cauſe, why the fine ſhould not paſs*, and upon hearing counſel for the conuſee, and the clerk of the office, and it appearing that *all the parties were living at the time, when the king's*
[252] *ſilver was paid*; the fine was ordered to paſs. And the court ſaid, that ſuch affidavit was all which the office ought to require. Barnes's Notes of Caſes in C. B. 142. Mich. 7 Geo. 2. Gregory v. Croucher.

6. A fine *acknowledged in South Carolina, ſworn to before the chief juſtice there to be duly acknowledged*, was *atteſted by a publick notary*. But it was held by the judges in the treaſury, that it cannot paſs without *oath before one of the juſtices of C. B.* of the due acknowledgment. Barnes's Notes of Caſes in C. B. 143. Paſch. 8 Geo. 2. Dean v. Tidmarſh.

(R) ‡ In what Caſes the Fine being received, ſhall be good. [* *Lieu Conus.*]

Adjudged, that the fine is good enough; for it is but the *agreement of the parties*, which being recorded is good enough.

[1. * IF a fine be levied *of a common of paſture in A.* this is good, though *A. be no vill, hamlet, or lieu conus out of the vill, &c.* but only the name of the paſture, where the common is to be taken, and this *within a vill.* P. 17 Ja. B. R. Rot. Per Cur. though judgment given of the other part for other cauſe.] Cro. J. 574. Trin. 18 Jac. B. R. Monk v. Butler.

For the fine *is drawn according to the writ of covenant* which is *guided by the indenture and agreement of the parties*,

[2. * If a fine be levied *of land in Eaſton*, and there *is a farm called Eaſton in the pariſh of B.* and there *is not any lieu conus, by name of Eaſton out of the vill*; yet this is a good fine, being received by *conſent* of the parties, without exception to the writ, and it being alſo a *common aſſurance.* M. 8 Car. B. R. adjudged per Cur. upon a ſpecial verdict, between Eveleigh and Eaſton. Intratur Hill. B. Rot. 1075.]

viz. what they agree to paſs by ſuch names, and it ought not to vary, and if it *varies* from the deed, the other is not bound to levy the fine. Cro. C. 269, 276. Faveley [alias Staveley] v. Eaſton.——Jo. 301. Mich. 8 Car. B. R. S. C.

3. * Scire facias upon a *fine of a houſe, three acres of land, and of the manor of U.* and becauſe he *did not ſhew in what vill* the tene-

ments

ments are, the writ was abated, by reaſon of the viſne; for in the writ of covenant there was a vill, and this writ ſhall not be brought out of the vill, quod nota. And yet Thorpe ſaid, that he had ſeen a fine levied in a *hamlet*, and the *writ brought in the vill where the hamlet was*, and was not abated for the variance. Br. Brief, pl. 141. cites 38 E. 3. 20.

4. ‡ If a fine be *to two and their heirs*, or if the *conuſance de droit be to two*, or if fine be *on condition*, yet being received, ſuch and like fines ſhall ſtand. 5 Rep. 38. b. Tey's caſe.

5. ‡ If a *feme covert* is of full age, and joins with her huſband to levy a fine of her lands, ſhe muſt be privately examined, whether ſhe parts with the right in her land freely, or by compulſion. But though ſhe is not examined, if the fine is *received and recorded*, it is good. Wood's Inſt. 241.

[See (O) (E. a).]

(R. 2) Bound by the Fine. Who? Perſons that muſt mention the Conuſor in conveying their Title.

1. If the *ſon diſſeiſes the father*, and levies a fine, and afterwards the *father dies*, and then the ſon dies, the land ſhall not deſcend to the 2d ſon; but if the eldeſt *had died in the life of his father*, it had been otherwiſe. Arg. Lat. 66. cites 8 H. 5. 7.

2. *Grandfather father and ſon are*, and the *father diſſeiſes the grandfather*, and levies a fine, and then the *father dies*, the ſon is barred, becauſe he muſt make his conveyance from his father. Arg. Lat. 73. cites 19 H. 8. D. 3. [253]

But if my *uncle diſſeiſe my father*, and he levies a fine in life of my father, it ſhall not barr me, becauſe my uncle is not mentioned in the conveyance to the land. But if the father dies, and the uncle after levies a fine, the ſon ſhall be barred. Arg. Lat. 73, 74. cites D. 3.

3. A. tenant for life, *reverſion to B. an ideot in fee, C. (who was B's uncle)* [and heir apparent, as Mar. 95, S. C. calls him] levied a fine come ceo, &c. with proclamations to J. S. and afterwards C. died; then A. died; and then B. died without iſſue. C. left iſſue D. his ſon and heir. D. entered as ſon and heir of C. who was heir of B. It was held by Crook and Barkley J. that the entry of D. was lawful, and that the fine of C. his father was no bar. For though there was a neceſſity of naming the uncle in deriving the deſcent of the inheritance to D. his ſon, as C. the uncle (father of D.) was heir to B. the ideot, who was laſt ſeiſed of the inheritance; yet the naming him here, is *not by way of title, but pedigree only:* but Jones J. contra. Cro. C. 524, 543. Adjornatur. Hill. 14 Car. B. R. Edwards v. Rogers.

Jones J. who held the fine a barr to the heir of the uncle, reports that it was adjudged no barr. Jo. 462. S. C. —And Serjeant Rolls, who was of counſel with D. in in the argument of the ſerjeant's caſe (which was the very point) ſaid, that this caſe was adjudged no barr. Mar. 95. S. C.

[See (D. 2)]

(S) Who

(S) Who ſhall be bound by the Fine. Party.

[1. IF a man by fine *acknowledge all his right* of certain land *to me, and I render to him again in fee*, where *none of us had any thing* in the land, and *after I purchaſe the land*; this fine will bind me, for it is executory upon me. 17 E. 3. 53. b. 776.]

2. If a *ſon diſſeiſe his father*, and *levies* a fine with proclamation to a ſtranger, upon whom *the father enters and dies:* the ſon may re-enter againſt his own fine. Paſch. 4 Car. C. B. Het. 97. Iſham v. Lawne.

(S. 2) Bound who. Conuſee of a Fine, by Leaſes, &c. preceding the Fine.

1. *A ſtranger levies a fine to tenant in tail in remainder* expectant on two eſtates for life, and he *renders to the conuſor for* 54 *years*, and *dies before the proclamations* are any of them made; afterwards the proclamations are made, and the tenants for life (after the time in which the years are limited to commence) dye. Adjudged that the term was good againſt the iſſue in tail. Pl. C. 437. b. Paſch. 15 Eliz. Smith v. Stapleton.

2. *A. tenant in tail, remainder in fee to B. A. makes a leaſe for life* according to the ſtatute, and *dies without iſſue*; afterwards B. grants his remainder by fine before any entry; the conuſee cannot now enter on tenant for life, and avoid his leaſe; for by the livery to tenant for life a freehold paſſes, which cannot be avoided without an entry; and then, when B. grants his remainder, the *grantee ſhall have it but as a remainder*, and ſo the eſtate of tenant for life, which before was voidable, is now made good; per Fenner and Windham J. but per Mead and Dyer, by the death of tenant in tail, the leaſe for life is become void, the eſtate out of which, &c. being determined by the dying without iſſue. 4 Le. 118. 23 Eliz. C. B. Anon.

3. A. ſeiſed in tail of the manor of S. leaſes W. acre, parcel thereof to W. for 40 years, and after to G. G. for 70 years. G. G. aſſigned to C. and M. the wife of A.—A. afterwards by indenture gave the ſaid manor to the ſaid G. G. by the words (dedi, conceſſi, barganizavi & vendidi) upon condition, that G. G. pay [254] to A. within 15 Days 1000 *l.* and on failure, then after the 15 Days, G. G. ſhould be ſeiſed of a tenement parcel of the ſaid manor of the yearly value of 60 *l.* until he had levied 500 *l.* for payment of the ſaid A's debts, &c. and after to the uſe of B. the eldeſt ſon of A. in tail; and of the reſidue of the ſaid manor, to the uſe of the ſaid A. and M. for their lives, &c. A. made livery to G. G. in a place, parcel of the ſaid manor, which was in his own occupation, in name of the whole manor; the 1000 *l.* is not paid at the time; the indenture is inrolled; W. attornes; M. dies; A. grants the lands to R. by *fine*, and *before proclamation B.* (the defendant) *enters*

for

for forfeiture; *proclamations are made*; A. dies; the 40 years leaſe expires; C. enters and leaſes to the plaintiff. Adjudged that the *moiety of M. the wife of A. and aſſignee with C. by G. G.* was *extinct by the livery*; and as to the *moiety of C.* it *is in being*; for here is *no remitter to B.* For if any remitter had been in the caſe, it ſhould be after the uſe raiſed, which is not as yet raiſed; for the land ought to remain in G. G. till the 500 *l.* be levied, and that is not found by the verdict; and therefore for the ſaid moiety, the plaintiff had judgment. Mich. 25 and 26 Eliz. B. R. Le. 7. Stonely v. Bracebridge.

4. *Tenant in tail* makes a leaſe for years not warranted by the ſtatute, and dies, *the iſſue aliens the* land by fine; before affirmance or diſaffirmance by acceptance or entry, the conuſee cannot avoid this leaſe; for the liberty is not transferred; per Gawdy J. Mich. 29 and 3 Eliz. B. R. 3 Le. 154.——Jo. 61. in caſe of Crocker v. Kelſey.

5. Huſband and wife are ſeiſed of land in the right of the wife; *huſband alone makes a leaſe for years by word*; afterwards the huſband and wife levy a fine, and both die; per tot. Cur. the conuſee ſhall avoid the leaſe. Mich. 30 and 31 Eliz. B. R. Le. 247. * Harvy v. Thomas.——Becauſe it was merely void by the death of the huſband. 2 Le. 141. S. C. cited.——4 Le. 15. per Wray Ch. J. the leaſe is void, but Gawdy J. contra, S. C.——Becauſe all paſſed from the feme. Arg. S. C. cited Roll. R. 402.——Arg. Bridgm. 45. S. C. cited——Cro. E. 216. S. C.

* Arg. 3. Bulſ. 273. cites 2 Rep. 77. b. Harvey's caſe put in Cromwell's caſe.——If the huſband makes a leaſe of the wife's land *for* 100 *years*, the wife may avoid it after his death; but if after they both levy a fine, the leaſe ſhall be good for ever. Arg. Goldſb. 13. Paſch. 28 Eliz.——S. P. agreed Arg. ibid. 14.

6. *A. tenant for life, remainder to B. in tail*, join in a *leaſe to J. N. for life, remainder to J. S. for life*, rendering rent; A. dies; B. accepts the rent and dies; *the iſſue of B. accepts the rent of J. N.* and after enters and makes a feoffment, and levies a fine to W. R. Afterwards J. N. re-enters and dies; J. S. as in his remainder enters. Adjudged that the eſtate of J. S. in remainder was good, and could not be avoided by a purchaſor. Cro. E. 252. Mich. 33 and 34 Eliz. B. R. Jeffry v. Coyte.

7. Alienee of iſſue in tail by fine may enter, and avoid a leaſe *made by a jointreſs* tenant in tail for 3 lives contrary to the 11 H. 7. 3 Rep. 51. Hill. 36 Eliz. Sir Geo. Browne's caſe.——cited Show. 378. Arg. Paſch. 4 W. and M.

8. A. leſſee for life, *remainder to B. in tail*; *B. leaſes to C. for years to commence after A.'s death*; B. ſuffers a common recovery to D. and dies; the leaſe for years is good againſt D. Dyer 51. b. Marg. pl. 17. cites M. 41 and 42 Eliz.

A. ſuffered a recovery *with voucher of B.* and dies, the leaſe to C. is not deſtroyed. Cro. E. 718. Mich. 41 Eliz. C. B. Pledgard v. Lake.

9. A. conveyed land to the uſe of *himſelf and his wife in tail, remainder to his right heirs*; and had iſſue a ſon and a daughter, and dyed; and the *ſon leaſed for years to begin after the death of his mother, and dyed without iſſue*; the daughter levied a fine; the wife,

who was tenant in tail, dyed. The queſtion was, if this leaſe for years iſſued out of the eſtate tail by way of eſtoppel; for then the conuſee ſhall not avoid it. It was adjudged, that this leaſe was drawn out of the reverſion in fee, and the conuſee of the daughter [255] ſhall avoid it. Arg. Winch. 44. cit s it as 10 Jac. B. R. Errington v. Errington.—2 Bulſ. 42. Mich. 10 Jac. S. C. but ſays, that no judgment was given. Coke Ch. J. was ſtrong in opinion againſt the leaſe of the ſon to bind the conuſee; and Dodderidge for it; and that the cauſe was ended by agreement as he heard.

10. A. levies a fine *to B. to the uſe of C. in tail*, remainder *to his own right heirs*; A. in the life of C. makes a leaſe for 100 years; C. dies without iſſue; it is a good leaſe againſt A. For though it is called a remainder, yet *it was a reverſion in A.* and in ſuch caſe, his heir ſhould be no purchaſor, but ſhould take by deſcent. Jenk. 267. pl. 78. 2 Rep. 91. Bingham's caſe.

* 6 Rep. 58. b. Paſch. 5. Jac. C. B.

11. If *tenant in tail* makes a leaſe for years, and levies a *fine* with proclamations *to the donor* and dies having iſſue, the donor ſhall avoid the leaſe. Arg. Bridgm. 28. cites 6 Rep. Ld. * Abergany's caſe.

So where the *reverſion was in the king*, and

12. *Tenant in tail makes leaſe for years*, and *levies a fine* to another, this makes the leaſe unavoidable. Arg. 2 Roll. R. 490. Hill. 22 Jac. B. R. Crocker v. Kelſey.

the tenant in tail levied a *fine to the king*, he ſhall not avoid the leaſe; becauſe he came in in the *reverter*. But if tenant in tail was attainted of treaſon, the king ſhould avoid the leaſe. Arg. Godb. 324. cites 2 Mar. Austin's Case, cited in Walſingham's caſe.

S. C. Bridgm. 28. but the report there is, that the *wife and iſſue joined* in the fine, and that afterwards ſhe made a leaſe.—Cro. J. 688. S. C. reported as

13. *Baron and feme* [*tenants in ſpecial tail*, by a conveyance made by the baron during coverture. Cro. J. 688. S. C.]—Remainder to the heirs of the baron, had iſſue a ſon; the baron dies; the *ſon levies a fine* with proclamations to the uſe of himſelf and his heirs; the *feme makes leaſe for* * 21 *years*, rendering rent; the ſon having deviſed the land; the feme dies; adjudged that the leaſe continues. Hill. 22 Jac. B. R. 2 Roll. R. 490. 499. Crocker v. Kelſey.—Jo. 60. S. C.—— but when the *iſſue are all dead*, then the conuſee having the reverſion ſhall avoid the leaſe; but till then the eſtate tail continues in right as to a ſtranger. Jo. 62. S. C. affirmed in error. Ibid.

in Roll.——Hutt. 84. S. C. Bridgm. 28. S. C.——S. P. Sid. 62. Mich. 13 Car. 2. B. R. Cunmore v. Betison, in which the leaſe was made for 100 years.——Bridg. 29 S. C.—S. C. cited Sid. 62. in caſe of Cudmore v. Betiſon.——* Roll Eſtate (I. a) S. C. pl. 3. Reports the leaſe to be for 30 years.——The eſtate tail in the feme, was by the proviſion of the baron during coverture; and the leaſe made by the feme, was for 21 years *without reſerving the ancient rent*, and then ſhe died; the ſon deviſed the land and died leaving a daughter; this was adjudged a good leaſe to bind the deviſee. Cro. J. 688. Trin. 21 Jac. Crocker v. Kelſey.

The juſtices ſaid that the reſolution of Crocker and Kelsey's case went very far, and perhaps, if to be adjudged at this day, it would be contrary. Skin. 31. Hill. 33 and 34 Car. 2. B. R. in caſe of Bettiſon v. Elways.

14. If there are father (tenant in tail) and ſon; and the *ſon levies a fine*, and the *father afterwards makes a leaſe for years* and dies; the conuſee ſhall not avoid it; for ſuch leaſe was good at common law againſt the iſſue; and the ſtatute of W. 2. ſhall aid none but the iſſue in tail; and when the iſſue are extinct, ſhall aid only the reverſioner. Jo. 61. Hill. 22 Jac. B. R. in caſe of Crocker v. Kelſey

——And

——And in all the ſaid caſes when the eſtate tail is ſpent by death of all the iſſues, the *reverſioner* ſhall avoid the leaſes. Ibid.

15. *Baron and feme, tenants in tail*, and *to the heirs of the baron*; they have *iſſue two daughters*; the two *daughters levy a fine to a ſtranger and his heirs*; the *baron dies*; the *feme makes leaſe for* 100 *years* and dies, under which leaſe the plaintiff in this ejectment claimed, there being iſſue in tail alive; and if this be a good leaſe againſt the conuſee of the fine, was the ſole queſtion. And thoſe for the plaintiff cited the caſe of CROCKER and KELSEY. 2 Cro. 688. for authority in point, that the leaſe was good as long as there ſhall be any iſſue in tail alive; which caſe is more largely reported in Bridgman's Rep. 27. And they alſo cited Mackwilliams's caſe. And this caſe not being within the Stat. 11 H. 7. the feme may, without doubt, have and diſpoſe of all the eſtate as long as there ſhall [256] be iſſue in tail. And of this opinion was all the court in the principal caſe; but they offered to the counſel of the defendant to have ſpecial verdict if they thought neceſſary; but they knowing the authority before to be againſt them in point, and perceiving the opinion of the court, would not pray ſpecial verdict; wherefore the court directed the jury to find for the plaintiff. And they gave their verdict accordingly. Mich. 13 Car. 2. B. R. Sid. 62. Cudmore v. Bettiſon.

16. If *conuſee of* a fine by tenant in tail ſhall *avoid a voidable leaſe*, made by the tenant in tail, as the iſſue in tail might have done? Per 2 J. that he may, Twiſden J. contra. Lev. 167. Trin. 18 Car. 2. B. R. Opy v. Thomaſius.——Adjudged, that he cannot. Hill. 2 W. and M. B. R. 4 Mod. 4. * Simmonds v. Cudmore.——In the caſe of OPY and THOMASIUS, the leaſe was a leaſe *in futuro*, made by the father tenant in tail, and the fine was levied by the ſon, before a former leaſe determined; and therefore the Court thought the cognizee not bound by it; otherwiſe, had it been a *leaſe in præſenti*. 4 Mod. 6. ibid.

See Eſtate (Y. 2) pl. 1.

* S. C. adjudged Carth. 258. and 1 Salk. 338. S. C.—Sid. 261. S. C. and P.

17. *A. tenant for life, remainder in tail to B.* B. makes a leaſe *to commence after A's death*; A. ſuffers a common recovery with voucher of B. and dies. Held that the leaſe is not deſtroyed, and that ſuch leſſee might well *falſify* ſuch *recovery*. both at common law and by the ſtatute 21 *H.* 8. 15. Arg. Paſch. 4 W. and M. Show. 381. cites Cro. E. 718. Pledger v. Lake.

18. *A. tenant for life, with power to make a leaſe for* 3 *lives*, executes his power and dies; and after *B.* being *ſeiſed in tail of the reverſion* (after the determination of the term, for which the 3 lives was granted) *and alſo of the remainder to him in fee, makes a reverſionary leaſe for* 2 *lives, and dies, (the other* 3 *lives being ſtill in being)*; upon B's. death the *eſtate tail and remainder in fee deſcended to C.* and afterwards *C. levied a fine* with proclamations to J. S. and R. S. to the uſe of F. and his heirs. It was adjudged that this reverſionary leaſe iſſued out of both the eſtates of B. (viz.) as well out of the remainder in fee as out of the eſtate tail; and that the eſtate tail being extinguiſhed by the fine, the reverſionary leaſe (iſſuing out of the remainder in fee, which B. had at the time of the leaſe made) was

S. C. Show. 370. S. C. 12. 12 Mod. 32. Skin. 328. S. C.

good and unavoidable. Hill. 4 W. and M. B. R. Carth. 257. Simmonds and Cudmore.

12 Mod. 33. S. C. and P. Skin. 330. S.C. and P.

19. *But* per 3 J. contra Holt Ch. J. *if B. had been only tenant in tail*, without having the remainder in fee *at the time of the leaſe* made by him, the cognizee ſhould not avoid the leaſe; *becauſe the power of avoiding* ſuch charges *was annexed to the eſtate tail*, and reſts in privity thereof, *being given* to the iſſue *by the ſtatute de donis*, and is not transferrable by the iſſue to the cognizee, or any ſtranger, but is as a power of revocation, which is determined by changing or deſtroying the eſtate, to which it is annexed; *nor* is ſuch future leaſe *merely void* by death of tenant in tail leſſor before the commencement. But that after his death it is voidable only by ſome act of iſſue in tail. But per Holt Ch. J. even in ſuch caſe the cognizee, or feoffee of the iſſue in tail, might avoid this leaſe; for he held, that by the death of the tenant in tail before the future intereſt could commence, the ſame would become *ipſo facto void* as to the leſſee; *for leſſor*, tenant in tail, *dying before the leaſe is to begin, is the ſame in reaſon, as* where tenant in tail makes *a leaſe to commence after his death*, which is admitted to be void ab initio; for upon the death of tenant in tail the eſtate deſcends to the *iſſue*, and he *is in paramount the future intereſt*; *and the leſſee*, in that caſe, *has only a right or poſſibility of an eſtate, which, by the death of tenant in tail before that right is to veſt as an eſtate, is extinct* and gone. Carth. 259. in caſe of Simmonds v. Cudmore.

[257] (T) Fine of land. What Perſon might, and may be bound by it at Common Law. [*Baron and Feme, or Feme without her Baron.*]

If a feme covert, as a feme ſole, levies a fine executory, and after execution is ſued againſt her and her baron, the baron makes default, and the feme is received, ſhe ſhall defeat her own fine, for the benefit of the baron; as in one book is adjudged, and yet ſhe appears in manner as a feme ſole. Co. R. on Fines 9. cites 17 Aſſ. 17.——*But* if ſhe, without her huſband, levies a fine *by the name of A. the wife of J. S.* (her huſband) the fine is merely void; becauſe it *appears by the record that ſhe is covert*, per Bridgman Ch. J. Sid. 122.——Hob. 225. 7 Rep. 8. 10 Rep. 43. Perk. ſ. 20.

[1. IF *feme covert* levies a fine *as feme ſole*; if the *baron does not defeat it*, it ſhall bind the feme and her heirs for ever. 7 H. 4. 23. 17 Aſſ. 17. Dubitatur. 17 E. 3. 52. b. 79.]

It ſhall not bind; for ſhe is named by the name of the ſecond baron, and not of the firſt, and ſo it is not good. Br. Fines, pl. 33. cites 7 H. 4. 23. per Gaſcoigne.——Br. Eſtoppel, pl. 55. cites S. C. but adds a quære.——Br. Scire facias, pl. 60. cites S. C.——Weſt's Symb. 2. b. ſ. 8. cites 7 H. 4. 22, 23. that it ſhall not bind her, becauſe ſhe is *miſnamed*.—*Yet* if ſhe *with her right huſband, by a wrong chriſtian name*, levy a fine, ſhe is eſtopped during her life. Ibid. cites 1 Aſſ. 11. Br. Fines 17.

[2. If *feme covert take ſecond baron, and they levy a fine*, this ſhall bind the feme and her heirs for ever. 7 H. 4. 24. 9 H. 6. 33. b.]

But if *the firſt baron dies before entry* by him, this ſhall bind her and her heirs for ever. Co. R. on Fines 9. and yet he cites a book to the contrary. 32 H. 6. 27.——Br. Entre Cong. pl. 129. cites S. C.——Kelw. 205. b. pl. 7.——Dal. 50. pl. 16.

[3. *But* in thoſe caſes the *baron may defeat it*. 7 H. 4. 23. 9 H. 6. 34. b. 17 E. 3. 52. b. 79. 17 Aſſ. 17.]

[4. And

[4. And *if the baron avoids the fine*, it ſhall avoid the fine againſt the feme and her heirs for ever. * 17 Aſſ. 17.] He may enter and defeat it, as

to the franktenement, which he claims for his life in jure uxoris to be *tenant by the curteſy*. Br. Fines, pl. 33. cites 7 H. 4. 23. per R. Hull and Hulls.——Kelw. 205. b. pl. 7. Dyer Ch. J. doubted, but he ſaid that Fineux was of opinion that the fine was avoided in toto.——Dal. 50. pl. 16.——
* Br. Fines, pl. 75. cites S. C. and 17 E. 3. 52. and 78.

[5. If baron and feme levy a fine *and after they are divorced, cauſa præcontractus*, yet the fine remains good. 9 H. 6. 34. b.]

[6. And this remains *good* as well *againſt the heirs of the feme* as againſt the feme herſelf. Contra, 18 H. 6. 34. b.]

7. If a fine be levied *by baron and feme during the nonage of the feme*, the reverſal muſt be during the nonage of the feme, but *ceſſet executio during the life of the baron*; for he has authority thereof given for his life. Br. Error, pl. 28. cites 30 E. 3. 5. 6.

8. In ſcire facias, the caſe was, that a *feme had two barons together*, and the *ſecond baron levied a fine and died*, and the *firſt baron* ſurvived and *died*, and the *feme was always ſeiſed, and no party to the fine*, and after died, and *the heir of the feme entered*, and ſcire facias was brought againſt him to execute the fine, and held that the fine does not bind; and the tenant pleads that M. his mother was ſeiſed before the fine, at the time of the fine, and always after, and was the feme of Rich. and never the feme of Rob. who levied the fine; and by ſome, he ſhall ſay, that thoſe, who were parties to the fine had nothing, but M. whoſe eſtate he hath, &c. and per Finch. the iſſue ſhall be, whether M. feme of Rob. who was party to the fine, had any thing? quære, quia non adjudicatur. Br. Fines, pl. 16. cites 42 E. 3. 20.

9. If a *feme covert* only *without her baron* levies a *fine executory*, though the *baron continues in poſſeſſion during his life*, and after dies, yet this ſhall conclude the feme and her heirs; but if *execution* had been ſued, and after the baron had died, this had avoided the fine for ever. Co. R. on Fines 17. [258]

10. If the *wife alone*, *without her huſband*, levy a fine of her own lands, wherein ſhe hath fee ſimple, it will be a * bar againſt her and her heirs, unleſs the huſband avoid it during her life, or after her death, if he is *tenant by the curteſy*. Wood's Inſt. 243. * Becauſe ſhe was examined and had power over the land. 10

Rep. 43, in PORTINGTON'S CASE.—And (after ſo ſolemn an act) ſhe ſhall not be admitted to ſay that ſhe was covert, though her huſband ſhall, and he may enter and reſtore the land to himſelf and his wife both. Hob. 225.——For by the entry of the baron the eſtate of the conuſee was defeated and the ancient eſtate of the feme reveſted in him, and he is ſeiſed of the intire eſtate as in right of his wife. 7 Rep. 8. a. b. in Counteſs of BEDFORD'S CASE, and cites 17 E. 3. 52. b. 17 Aſſ. 17. 7 H. 4. 23. 2 R. 3. 20. 9 H. 6. 33.——Weſt's Symb. ſ. 8. cites 17 E. 3. 52. and 78. 17 Aſſ. 17. 7 H. 4. 23.—Co. R. on Fines 9.

11. *Huſband and wife* levied a fine of the lands of the wife, ſhe being within age, and afterwards they ſuffered a common recovery; the *huſband died*; the widow married again, and her huſband and ſhe brought a *writ of error* to reverſe this fine and recovery; the Court was of opinion to reverſe the fine, but would adviſe on the recovery; becauſe it was had againſt them after appearance, and not by default, Goldſ. 181. Sir Henry Jones's caſe.

(U) Bound. Corporation.

[1. IF, *upon a writ of annuity againſt a prior preſentable*, who has covent and common ſeal, the prior levies a fine; this ſhall *bind the ſucceſſors*; becauſe the annuity was before, and this is but as a judgment. 12 H. 4. 21. b.]

[2. If an *abbot* levies a fine ſur conuſance de droit of land of the right of his houſe, this ſhall not bind the ſucceſſor, but he ſhall recover it again. 20 H. 6. 46.]

There ought to be a general *conſent of the whole corporation.* Manb. of Fines 24.

3. If they be *ſuch* civil bodies or corporations, *as have in themſelves abſolute eſtate and authority* of their poſſeſſions, *ſo as they may maintain a writ of right* thereof, as *mayor* and commonalty, *dean* and chapter, *colleges*, *ſocieties corporate*, and ſuch like, and their ſucceſſors; they are barred by fines preſently. Weſt's Symb. ſ. 181. cites Pl. C. * 338. a. Trin. 20 Eliz.

* It ſhould be (538.)

1 *Eliz.* 19. *diſabled* arch-biſhops and biſhops from granting any parcel of their poſſeſſions to any but the crown, and afterwards the 1 *Jac.* 1. 3. *enacted that all aſſurances of the lands of archbiſhops or biſhops ſhould be void, though made to the crown.* And the ſtat. 13 *Eliz.* 10. *makes void* all eſtates made, or ſuffered by any *maſter, or fellows of any college, dean and chapter* of any cathedral, or collegiate church, *maſter* or guardian *of any hoſpital, parſon, vicar, or any other having any ſpiritual or eccleſiaſtical living*, of any houſes, lands, &c. parcel of their college, &c. promotion, or belonging thereunto, other than for 21 *years or* 3 *lives from the making*, and whereupon the accuſtomable yearly rent, or more ſhall be reſerved and payable yearly during the term. Wats. Comp. Inc. 427. fol. and 478.

4. *But deans*, *biſhops*, priors, abbots, *maſters of hoſpitals*, *parſons' vicars*, *prebendaries*, chauntrie prieſts, and ſuch like, which *may not have a writ of right*, but either a *juris utrum*, F. N. B. fol. 48. (R) or *ſine aſſenſu capituli*, F. N. B. fol. 118. (I) are not barred by ſuch fines if the patron and ordinary join not with them. Weſt's Symb. ſ. 181. cites Pl. C. 538. a. 20 Eliz. 375. b. 11 Eliz.

S. P. and ſo of *warden and chaplains contra* of an *abbot or biſhop*; for they are ſole ſeiſed in fee in right of the church.

5. If a *dean* be *ſeiſed of* certain *lands*, *as of his diſtinct poſſeſſions*, the dean may make conuſance; *but* if he be *ſeiſed jointly with his chapter*, he and the chapter cannot levy a fine; *ſo* it is of a *mayor* and *commonalty*, and of all other *joint corporations* they cannot make any conuſance. But otherwiſe, it is of all *ſole corporations*; and the reaſon is, becauſe *none can make conuſance by attorney*; and corporations aggregate of ſeveral cannot appear in proper perſon. Co. R. on Fines 8.

But a parſon cannot diſcontinue; for he *is not ſeiſed in fee to all intents.* Br. Diſcontinuance de Poſſeſſion, pl. 22. cites 21 E. 4. 86.

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* Hill. 15. Car. B. R. 60. 452. Mayor of London v. Alford. Wood's Inſt. 243.

6. A * *corporation* that has abſolute eſtate and authority of itſelf, is bound by 4 H. 7. 24. of fines. But biſhops, deans and chapter, that cannot bind their poſſeſſion without *aſſent of others*, and ſo parſon, vicar are not. But by ſome of the juſtices though every *biſhop's ſucceſſor*, &c. ſhall have 5 years to claim, or enter, yet every one that ſuffers the 5 years to paſs ſhall be *bound during his time*: but though he is bound, his ſucceſſor ſhall have other 5 years by the ſaving and proviſo in the act; ſo of *officers for life*, as parker, foreſter,

*

foreſter, gaoler, &c. Pl. C. 538. b. Trin. 20 Eliz. Croft. v. Howell.

7. Deviſe was to a corporation upon limitation, that they ſhall pay ſo much to a charitable uſe; a *ſtranger enters* into the land, and levies fine with proclamations and 5 years paſs; and tota curia agreed, that this ſhall bar the *corporation, though they have no notice of the deviſe.* Hill. 15 Car. 1 Jo. 452. the Mayor and Commonalty of London v. Alford.

(W) Statute 27 *E.* 1. *Cap.* 1.

1. 27 *E.* 1. *cap.* 1. § 1. Enacts, that *foraſmuch as fines levied in our court ought and do make an end of all matters, and therefore are called fines principally, where after waging of battail, or the great aſſiſe, in their caſes, ever they hold the laſt and final place.* The *miſchief before* this ſtatute was, that when the *conuſance de droit*, &c. was made *to him that had never any thing before*, and the *conuſee* granted, and *rendered* the ſame *back again*, at the ſame inſtant *to the conuſor for life, or in tail*, with *remainder over to one*, who always was ſeiſed, and *in poſſeſſion* of the land; privies (by colour that there was *no tranſmutation of poſſeſſion*) were, againſt law, permitted to avoid fines by the averment aforeſaid. 2 Inſt. 254.—— Co. R. on Fines, 15.

So where tenant in fee had accepted an eſtate by fine from him, that had nothing, *for life*, or *in tail*, ſo that by the law the conuſee and his heirs are concluded, and eſtopped for ever to claim other eſtate; yet before the making of this ſtatute, *the ſaid averment was received* in avoidance of ſuch fines, and for thoſe two cauſes, and in affirmance of the ancient common law of England, this ſtatute was made. Co. R. on Fines, 15.

But it ſeems to me, that the firſt of the ſaid two errors, or miſpriſions of the law, permitted and ſuffered before this ſtatute was made, was *very abſurd*, and manifeſtly contrary in itſelf; *for* the heir of the conuſor endeavoured, by ſuch averment, to avoid the particular eſtate re-taken by his anceſtor by the render; becauſe he, that rendered, had nothing, but, as I think, *in endeavouring to gain the fee ſimple he loſes not only* the fee ſimple, but alſo *the eſtate for life, or other particular eſtate*, which alſo was rendered; for though the render was void, as then nimus juſte was allowed, yet the fine ſur conuſance de droit come ceo, &c. was good, and then the ſaid fine being good (for the imperfect or inſufficient render cannot impeach it) and the render being void, the recogniſee ſhall retain the land, *and the heir* of the recogniſor is *utterly barred* for ever; and therefore the words of this ſtatute are true, viz. that ſuch averments were contra leges & conſuetudines regni noſtri antiquit. uſitat. and thoſe (as I think) were the cauſes of this ſtatute. Co. R. on Fines 15.

§. 2. *And now by a certain time paſſed as well in the time of king Henry of famous memory, our grandfather as in our time, the parties of ſuch fines and their* * *heirs contrary to the laws of our realm of ancient time uſed, were admitted to adnul and defeat ſuch fines, alledging, that before the fine levied, and at the levying thereof, and ſince, the demandants, or plaintiffs, or their anceſtors, were always ſeiſed of the lands contained in the fine, or of ſome parcel thereof, and ſo fines,* † *lawfully levied, were many times unjuſtly defeated and adnulled by jurors of the country falſly and maliciouſly procured.* 2 Inſt. 524. ſays, that this happened in the reign of H. 3. in the time of inſurrections and *civil wars* by the grandees of this realm, and that it was uſed *by the maintenance of the grandees*, that parties and privies might avoid fines by ſuch averments, which averments in the reign of Ed. 1. were continued until the making of this act.

* In this act *earum partium hæredes*, is to be underſtood of ſuch *heir, who claims the inheritance of that anceſtor who levied the fine.* Arg. 3 Rep. 89. in the caſe of fines.

Though this ſtatute ſaith, that the parties to the fines and their *heirs* ſhall not have averment againſt fines levied, &c. viz. that they, or their anceſtors were ſeiſed, &c. yet our books are adjudged, that againſt a fine levied by my father, I ſhall ſay, that before the fine, and at the time of the fine and after, I myſelf was ſeiſed, and ſo avoid the fine; for as I have ſaid before in this caſe, I am not heir to my father; for *hæres dicitur ab hæreditate*, and I do *not claim this land by inheritance.* Co. R. on Fines 15 ——This is *not intended of an heir in blood only*, but of the heir o the land of which the fine was levied, and not of land which he has otherwiſe than as heir. See 2 Inſt. 523.

This ſtatute is intended *of eſtates in fee ſimple only*, where the heir claims only by the ſame anceſtor; but, upon an eſtate tail, he claims by the gift, per Brooke. Br. Fines in pl. 35.

† A fine may be ſaid to be *rite levatus*, though partes finis nihil habuerunt; for rite levatus is, within the meaning of this act, the ſame as duly levied, that is *in due form of law*, and a fine may be ſaid to be levied in due form of law, though it be only *by way of concluſion*. Arg. 3 Rep. 89. in the caſe of fines.——Theſe words *rite levatus*, as to the *external form* of a fine, are to be taken as to a fine levied *coram Edmundo Anderſon* (viz. the name of the chief juſtice) *& ſociis ſuis*, where all the juſtices ought to be named; per Windham J. and ſo it ſeemed to Periam and Anderſon. Mich. 29 and 30 Eliz. Le. 85. in the caſe of Zouch v. Bamfield.

§. 3. *We therefore intending to provide a remedy in the premiſſes in our parliament at Weſtminſter, have ordained that ſuch exceptions, anſwers or inquiſitions of the country, ſhall from henceforth in no wiſe be admitted contrary to ſuch recognizances or fines. And further, we will, that this ſtatutes ſhall as well extend to fines heretofore levied, as to them that ſhall be levied hereafter.*

(W. 2.) Statute 24 *E.* 3. 16.

Before this ſtatute ſtrangers having preſent right ought to make claim, and their claim availed for all in remainder, or reverſion. For all had but one year by the common law after the fine levied, and this miſchief was a great reaſon of making this ſtatute. Arg. Pl. C. 359.——The ſtatute 4 *H.* 7. only intended to remedy the miſchief which this ſtatute 34 E. 3. 16. introduced. Jenk. 192. pl. 97.

1. 34 *E.* 3. 16. Enacts that *the plea of* nonclaim *of fines ſhall be no bar hereafter.*

This ſtatute ouſts nonclaim only to fines levied, and *extends not to a judgment in a writ of right* at this day, and therefore the common law in that caſe remains to this day, viz. that claim muſt be made within a year and a day after judgment. If a fine be levied without proclamations, or without ſo many as the law requires, then this ſtatute extends to ſuch a fine. A *feme covert* had no privilege of nonclaim, as ſome have ſaid; for ſhe had a huſband, that might make claim for her. Alſo, they in *reverſion or remainder expectant upon any eſtate of freehold* were barred by the common law, and yet they could make no claim; for it belonged to the particular tenant and not to them; becauſe their entry was not lawful, which was one of the principal *cauſes of making this ſtatute*; but theſe caſes of coverture and of them in remainder or reverſion are now holpen, and their rights and titles ſaved by ſtatute 4 H. 7. 24 as by the ſaid act appears. Co. Litt. 262. a. b.

(W. 3) Statute 1 *R.* 3. 7.

Per Dyer. This ſtatute has all the words of 4 H. 7. touching the purvieu & body of the act, but the word (*firſt*) which is added to 4 H. 7. Pl. C. 372. b.

1. 1 *R.* 3. 7. Enacted that *fines ſhall be* proclaimed 4 *times*, 4 *ſeveral terms, and at the aſſiſes, &c.*

And that a fine ſo proclaimed ſhall conclude all perſons, both privy and ſtrangers (except women covert, *other then ſuch women as are parties to the fine*, perſons under age, *in priſon*, out of the realm, *or* not of ſound mind) *if they purſue not their right, title, claim, or intereſt, by way of action, or lawful entry, within* 5 *years after the proclamation ſo made and certified as aforeſaid.*

The right of ſtrangers which happens to come unto them after the fine is ingroſſed, *is ſaved, ſo that they lawfully purſue their right or title within* 5 *years after it ſo comes to them: and here an action againſt the pernor of the profits is maintainable.*

If the parties, to whom ſuch right or title comes, be covert, under age, in priſon, out of the land, or not of ſane memory, they or their heirs have time to purſue their right or title within 5 *years after ſuch imperfections*

perfections removed; ſo alſo, have they in caſe they had right of title at the time of the fine levied.

(W. 4) 4 *H.* 7. *Cap.* 24.

1. 4 *H.* 7. *cap.* 24. Enacts that *after ingroſſing of every fine, to be levied after the feaſt of Eaſter, that ſhall be in the year of our Lord* 1490, *in the king's court afore his juſtices of the common place of any lands, tenements* †, *or any other hereditaments, the ſame fine be openly and ſolemnly read and* proclaimed *in the ſame court, the ſame term, and in* 3 *terms* * *then next following the ſame ingroſſing, in the ſame court, at four ſeveral days in every term, and in the ſame time that it is ſo read and proclaimed,* all pleas to ceaſe.

This is an original, and not an explanatory ſtatute, per Hobert Ch. J. Winch. 123. in caſe of HILLIARD v. SANDERS.—It is ſaid in the preamble of this act, *that fines ought to be of the greateſt ſtrength to avoid ſtrifes and debates, &c.* and therefore this ſtatute does not extend to any fines levied by *covin.* See 3 Rep. 77. b. Former's caſe.

This ſtatute *extends* only to fines, and not to nonclaim on a *judgment in a writ of right.* Co. Litt. 262.

So it extends not to land in *ancient demeſne*; for the lord may avoid ſuch fine by writ of deceit. Pl. C. 370. b.

And it does not extend to *Lancaſter.* Arg. 1 Roll. R. 305. Holland v. Lee.

The Lord Keeper's opinion was, that howſoever 4 H. 7. was, at the making thereof, as to barring, or not barring an eſtate tail, yet when 32 H. 8 comes, and declares upon 4 H. 7. now all fines are good to bar eſtates tail. Skin. 97. Hill. 35 Car. 2. in the E. of Derby's caſe.

This ſtatute enures and operates *by way of bar to the right,* which anſwers SAUL and CLERK's caſe. Jo. 210, 211. 2 Salk. 422. Hill. 1 Annæ, B. R. in caſe of Hunt v. Bourne.

* If one of the terms limited by this ſtatute be *adjourned,* (becauſe the ſtatute ſays, *then next enſuing*) all the proclamations before are void, till the ſtatute 1 Mar. 7. Raſtal, Fines 12. becauſe the time limited by the act, ought to be purſued, and once *attached in part ought to be continued.* Pl. C. 371. b.

See words *(Term adjorned.)*

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§. 3. *And the* ſaid *proclamations* ſo had *and made, the fine to be a* * *final end, and conclude as well* privies as ſtrangers *to the ſame, except women covert, other than being parties to the ſaid fine, and every perſon then being within age of* 21 *years in priſon, or out of this realm, or not of whole mind, at the time of the ſaid fine levied, not parties to ſuch fine.*

* By theſe words it binds *eſtates tail,* per Pemberton Ch. J. Skin. 95. Hill. 35 Car. 2. B. R. in E. of Darby's caſe.

Per all the judges but 3, the iſſue of tenant in tail was barred by a fine levied by his anceſtor, by virtue of the ſtat. 4 H. 7. before the ſtatute of 32 H. 8. Hill. 31 and 32 Car. 2. in Scacc. Rayn. 359. Murray v. Eyton, & al.

The fines levied according to this ſtatute are, ab initio, as ſtrong againſt entails, as 32 *H.* 8. Hob. 332. Mackwilliams's caſe.——And therefore if a woman be *tenant in tail,* having *iſſue a ſon and a daughter,* and the *ſon* (being the firſt iſſue of the entail) *levies a fine, living the mother, and dies,* and ſhe ſurvives him, this ſhall not bar the daughter, to whom the land entailed deſcends immediately from the mother, adjudged by 3 judges againſt 1. Hob. 332. Mich. 19 Jac. Markwilliams's caſe. ——*But* in caſe of *collateral iſſues* it is otherwiſe.——Ibid. 333. S. C.——Jo. 32. S. C.

Tenant in tail, having iſſue, levies a fine, and *dies before all the proclamations are made,* and afterwards (the iſſue being beyond ſea) the proclamations are all made, and then the iſſue claims; and it was reſolved by all the judges, that though a right deſcended to the iſſue, becauſe the father died before all the proclamations, and a fine without proclamations, or proclamations without a fine, will not bar the iſſue in tail, and though there was no fine with proclamations levied after the death of the father, yet, as he claims as heir by force of the eſtate tail, he is barred by the words of the ſtatute. 3 Rep. 84. Paſch. 44 Eliz. the caſe of fines.

Neither this ſtatute, nor the 18 *E.* 1. of fines, ſays, in expreſs words, *that fines with proclamations ſhall bar the intail*; theſe ſtatutes only ſay, that fines with proclamations *ſhall be bars to all parties and privies, and to ſtrangers, if* the ſtranger doth *not* bring his action, or *make* his *claim within* 5 *years after*

after ſuch fines levied with proclamations; and the true intention of the 4 H. 7. was to take away the ſtatute of nonclaim enacted the 34 Ed. 3. ch. 16. and not to bar the eſtate tail any more than 18 Ed. 1. had done; as appears by the ſtatute of 32 H. 8. 36. which ordains fines levied ut ſup. & nonclaim ut ſup. to bar the tail. Jenk. 87. pl. 68.

As the ſaving is general *to all perſons and their heirs*, notwithſtanding nonage, infanity, &c. ſo is the condition general, to all heirs whatſoever they are, the words being, *ſo that they purſue their title, claim, &c. within 5 years after proclamations*; for otherwiſe the ſaving ſhall be for all heirs, and the *(ſo)* ſhall be of all heirs within age, and then the *(ſo)* is not ſo large as the ſaving; and ſo the heir within age is bound to the condition of the firſt ſaving, as well as he is ſaved in the ſame. Pl. C. 171. a.

Heir *in tail and heir in fee are all one* by this ſtatute. 3 Le. 227. pl. 304. Anon. M. 31 El. C. B.

Tenant in tail levies a fine with proclamations, and the 5 *years paſs in his life* time, and he dies; and per 5 judges againſt 3. his iſſue ſhall be barred by this fine. D. 3. pl. 3.——cited 3 Rep. 87. in the caſe of fines.——S. P. Br. Tail & Dones, &c. pl. 2. cites 19 H. 8. 6. that by the beſt opinion, the iſſue ſhall be bound by the ſtatute of 4 H. 7. c. 24. Brook ſays, and ſo ſee that this ſtatute, and the new ſtatute of 32 H. 8. 36. are of one and the ſame effect, except that the *one is an explanation of the other*, and by the one and the other, *privies ſhall be bound immediately after proclamations* which may be finiſhed in 4 terms, quod nota, *and the 5 years is for ſtrangers*.

§. 4. *And* ſaving *to every perſon or perſons, and to their* * heirs, *other than the parties in the ſaid fine,* † *ſuch right, claim and intereſt as they have to, or in the ſaid lands, tenements, or other hereditaments at the time of ſuch fine ingroſſed*; ſo that *they purſue their title, claim or intereſt by way* ‡ *of action, or lawful entry within 5 years next after the ſaid proclamations had and made.*

* Hobert Ch. J. ſaid that it was adjudged in the caſe of GODFREY v. WADE, that the fine of the *youngeſt ſon may not bar the eldeſt*; and yet, within the words, the *eldeſt is heir to him*; but he ſaid that this word (heir) ſhall be expounded as *(his heir)* and that ſo they uſe to expound this ſtatute which binds parties and privies, and that in ſuch caſe the *eldeſt is not privy to the youngeſt*; *for he claims before him.* Winch. 123. Hill. 22 Jac. C. B. in caſes of Hiliard v. Sanders.——2 Roll. R. 500. 501.

Such right, claim, and intereſt, &c. It was reſolved that theſe words extend to the intereſt of a *leſſee for years*, tenant by *ſtatute merchant, ſtatute ſtaple, elegit, guardian by chivalry, executors having lands till debts and legacies paid*, and every other ſuch intereſt. Paſch. 3 Jac. C. B. 5 Rep. 124. Saffyn's caſe.——cites Pl. C. 374. a.

Copyhold lands are within the words and meaning of this act. Paſch. 10 Jac. 9 Rep. 105. Podger's caſe.

A fine with proclamations and 5 years bars all *corporations*, which have *abſolute eſtates in their own right*, and their *ſucceſſors*, for ever, (by equity of this ſtatute though it ſpeaks only of men and their *heirs*) as mayor and commonalty, dean and chapter, &c. but it is otherwiſe of corporations which have *not abſolute eſtate*, without others, as biſhop, dean, parſon, &c. but *themſelves* ſhall be barred by *nonclaim* by 5 years, and every ſucceſſor, ſhall have a new 5 years. Pl. C. 538. Trin. 20 Eliz. Croft v. Howell.

So an *officer* having *land pertaining to his office*, as a parker, &c. ſhall be barred by a fine levied by his diſſeiſor and 5 years paſſed; but not his *ſucceſſor*, unleſs 5 years paſs in his time. Ibid.

It was reſolved, that this act ſhall bar a woman of her *dower* by a fine levied by her huſband with proclamations, if ſhe does *not bring her writ* of dower *within 5 years after the death of her huſband.* 13 Rep. 20. in Canc.——cites Hill. 4 H. 8. Rot. 344. C. B. 5 El. D. 224.——Pl. C. 373. b. Roll. R. 306. Arg. cites 15 El. D. Graves's caſe.

If the 5 *years commence in the life of the anceſtor*, the heir, though within age, muſt claim within thoſe 5 years, or he ſhall be barred; adjudged. Trin. 20 Eliz. Pl. C. 356. Stowell v. Zouch.

A. *leſſee for life*, remainder in *fee to B.*——A. levies a fine, B. ſhall have 5 years for the title, and the forfeiture, and after the death of A. he ſhall have other 5 years for the title to him accrued by the death, and determination of the eſtate of A. D. 3. b. Marg. pl. 5. cites 32 El. Davies's caſe.

Tenant for 99 years, if he lives ſo long, levie a fine, and dies; and it was reſolved, per Cur. that he in reverſion ſhall have 5 years after the death of the tenant to avoid the fine, and per Hale Ch. J. there can be *no difference between* a fine levied by *tenant for life and for years*, the reaſon being the ſame in both caſes; and ſaid that Lord Coke's opinion, 9 Rep. PODGER's caſe was made to be a queſtion. Trin. 24 Car. 2. B. R. 2 Lev. 55. Whaley v. Tankard.——Raym. 219. S. C. acc.——2 Vent. 241. S. C. 3 Keb. 30. S. C.——2 Vent. 334. in caſe of DIGHTON v. GREENVILL, Ventris J. in his argument cites both the caſe of PODGER, and this caſe of WHALEY v. TANKARD, and ſays, that though he admits this caſe to be good law, yet he obſerves that it is a reſolution carried *beyond the words* of the ſtatute; for the right is not purſued within 5 years after it firſt came, and

ſays it is only a conſtruction by equity, and that he ſhould not have gone ſo far, if not led by authority.

§. 5. *And alſo ſaving to all perſons ſuch action, right, title, claim and intereſt in, or to the ſaid lands, tenements, or other hereditaments, as firſt ſhall grow, remain, or deſcend, or come to them, after the ſaid fine ingroſſed, and proclamation made by force of any gift in the tail, or by any other cauſe or matter, had and made before the ſaid fine levied: ſo that they take their action, or purſue their ſaid right and title, according to the law, within 5 years next after ſuch action, right, claim, title or intereſt to them accrued, deſcended, fallen, or come.*

§. 6. *And that the ſaid perſons and their heirs may have their ſaid action againſt the pernor of the* profits *of the ſaid lands, and tenements, and other hereditaments, at the time of the ſaid action to be taken.*

§. 7. *And if the ſame perſons at the time of ſuch action, right and title accrued, deſcended, remained, or come unto them, be* covert de baron, *or* within age, in priſon, *or* out of this land, *or* not of whole mind, *then it is ordained by the ſaid authority, that their action, right and title, to be reſerved and ſaved to them and to their heirs unto the time they come and be at their full age of 21 years, out of priſon, within this land, uncovert, and of whole mind,* ſo that *they or their heirs, take their ſaid actions, or their lawful entry, according to their right and title, within 5 years next after that they come and be at their full age, out of priſon, within this land, uncovert, and of whole mind, and the ſame actions purſue, or other lawful entry take according to the law.*

But if ſtranger to the fine who is *of good memory, becomes of not good,* or is *impriſoned in the* 3d *year after* the proclamations made, *and ſo continues* till the 5 years are expired, and after he *recovers* his memory, or is out of priſon, he *ſhall not be barred*; for laches cannot be aſſigned in ſuch caſe. But if in the 3*d* year the ſtranger to the fine *goes beyond ſea, or takes baron* and ſo continues till the 5 years are paſt they ſhall be bound; for *theſe are voluntary acts*, which the other are not; per Browne and Saunders J. Pl. C. 366. a. in caſe of Stowell v. Zouch.

* Though the *iſſue in tail be beyond ſea*, yet inaſmuch as *he is privy and out of the ſavings* of the 4 H. 7. he is bound notwithſtanding. As if the iſſue in tail be *within age, or under coverture*, or *non compos*, or *in priſon*; reſolved by all the J. 3 Rep. 91. the 5*th* reſolution in the caſe of fines.—And the reporter infers, that if infancy coverture, non ſanæ memoriæ, or impriſonment of the heir in tail, ſhould give him power, in ſuch caſe to avoid the fine, no man could be aſſured of the land conveyed to him by any fine, and denies what is ſaid by the counſel, Pl. C. 430, in SMITH and STAPLETON'S caſe. 3 Rep. 91. b. Paſch. 44 Eliz. in the caſe of fines.

But if the *diſſeiſee dies, the ſome enſeint with* a ſon, and *the diſſeiſor levies a fine*, and after the ſon *is* born, now he is not excepted by the letter of the act; for the act excepts no infant but ſuch who at the time of the fine levied was within the age of 21 years; and none is within the age of 21 years but only ſuch who is in rerum natura, and the ſon in this caſe was not born, nor in rerum natura at ſuch time, nor could he ſay, that he was within the age of 21 years at the time of the fine levied; for his age is accounted from the time of his birth. And he was not born at this time, and ſo he is *out of the letter*, but yet is *within the intent*, and ſhall be aided by the exception. Pl. C. 366. a. 366. b. Stowell v. Lord Zouch.

A. tenant for life, remainder *in tail to B.*—B. being *beyond ſea*, and leaving a ſon *within age* in England, A. levies a fine; B. never returned, but died, immediately after the fine, abroad; and it was agreed by the whole court, that the ſon was not barred; for though the condition of the ſaving is that the party purſue his right within 5 years after his return, and this condition was never performed, becauſe he never returned, yet there was no default in him to exclude him from the ſaving, and then the ſon is aided by the other ſaving which relates to infants. Trin. 32 Eliz. Sav. 128. Sir Robert Cotton's caſe.——Le. 211. S. C.——And. 264.

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§. 8. *And alſo, it is ordained by the authority aforeſaid, that all ſuch perſons as be* covert de baron, *not party to the fine, and every perſon being* within age *of 21 years*, in priſon, *or* out of this land, *or* not of whole mind *at the time of the ſaid fines levied and ingroſſed, and by this*

* So that a fine with proclamations binds ſuch only as

have title to the land, and *binds not ſuch as have rent, common, eſtovers, way* or the like *out of the land*, ſo that they ſhall not be concluded of their rent, common, eſtovers, way, or the like, though they claim not within the 5 years. For the ſtatute ſpeaks only of binding the lands, and ſays nothing of the *profit apprender* out of the land. Br. Fines, pl. 123.

*this ſaid act afore excepted, * having any right or title, or cauſe of action, to any of the ſaid lands, and other hereditaments, that they or their heirs, inheritable to the ſame, take their ſaid actions, or lawful entry, according to their right and title within 5 years next after they come and be of age of 21 years, out of priſon, uncovert within this land, and of whole mind, and the ſame actions ſue, or their lawful entry take and purſue according to the law.*

So of an *authority to ſell land*, he who has ſuch authority, may ſell after the 5 years after proclamations; for he has no intereſt in the land, but has power only to ſell it. Br. Fines, pl. 123.

If tenant in tail levy a fine, the *iſſue in tail* is privy, and therefore barred of averring quod partes finis nihil habuerunt, adjudged, per tot. Cur. Le. 85. Mich. 29 and 30 Eliz. C. B. Zouch v. Bamfield. —— cited 3 Rep. 88. in the caſe of fines. —— Mo. 250. S. C. —— Iſſue in tail is privy; becauſe if the fine be erroneous, he may have writ of error, which he could not have, if he was not privy. And. 171. S. C. Arg. cites 19 H. 8. 6.

§. 9. *And if they do not take their actions and entries as is aforeſaid, that they and every of them, and their heirs, and the heirs of every of them be concluded by the ſaid fines for ever, in like form as they be that be privies or parties to the ſaid fines.*

This ſtatute *ſays, that immediately after the fine levied by any perſon, and proclamation paſſed the conuſors and their heirs are barred*; yet if the *father eſpouſe his ſon*, and levy a fine, and proclamation paſs, and the father dies within the 5 years, the ſon is not barred; for *he is not heir* to his father, *as to this land*; for *hæres dicitur ab hæreditate*. Co. R. on Fines 16.

§. 10. *Saving to every perſon or perſons, not party nor privy to the ſaid fine, their* exception *to void the ſame fine, by that that thoſe which were parties to the fine, nor any of them, nor no perſon or perſons to their uſe, nor to the uſe of any of them* had nothing in the *lands and tenements compriſed in the ſaid fine, at the time of the ſaid fine levied.*

§. 11. *And it is ordained by the ſaid authority, that every fine, that hereafter ſhall be levied, in any of the king's courts, of any manors, lands, tenements, and other poſſeſſions, after the manner, uſe, and form, that fines have been levied afore the making of this act be of like force, effect and authority, as fines, ſo levied, be or were afore the making of this act. This act, or any other act in this ſaid parliament made, or to be made notwithſtanding.*

[264] §. 12. *And every perſon ſhall be at liberty to levy any fine hereafter, at his pleaſure, whether he will after the form contained and ordained in and by this act, or after the manner and form aforetime uſed.*

(W. 5) 32 *H.* 8. *cap.* 36.

This ſtatute *is not properly a ſtatute*, nor do fines receive any ſtrength or virtue by it; but it is only

32 *H.* 8. *cap.* 36. §. 1 Enacts, that *all fines levied before the juſtices* (viz. of the common place) *with proclamations, according to the ſtatute*, (viz. 4 H. 7. cap. 23.) *by perſons of full age of lands * before the fine levied intailed to the perſons levying the fine, or to any anceſtor of the ſame perſon, ſhall be, after the fine levied, ingroſſed, and proclamations made, a bar againſt the perſons and their heirs claiming the*

the ſaid lands by force of ſuch intail, and againſt all other perſons claiming the ſame to their uſe, or to the uſe of any heir of the bodies of them. *a conſtruction of 4 H. 7.* and whereas this ſtatute conſtrues 4 H. 7. to extend to fines levied by tenant in tail, the eſtate tail ſhall be adjudged in law, to be bound by 4 H. 7. and not by the ſtatute, which is rather a judgment upon 4 H. 7. than any new ſtatute. Per Periam J. Le. 76. Mich. 29 and 30 Eliz. C. B. in the caſe of Zouch v. Bampfield.

* W. *deviſed lands* to J. *when he ſhould come to the* age of 25 *years*; J. *after* 21 *and before* 25 *years, levies a fine* with proclamation, and then attains to the age of 25 years, and had iſſue M. and died; and the queſtion was, whether the *eſtate tail in futuro*, and contingency, at the time of the fine levied, was barred or not; and it was reſolved that it was, and yet the conuſor had but a *mere poſſibility*, to have the eſtate tail, at the time of the fine levied, and though he was not ſeiſed by force of the tail, at that time, yet by force of the words *(before the fine levied in any wiſe entailed)* eſtate tail in futuro is comprehended; but no judgment was entered. Per Warburton J. 10 Rep. 50. in LAMPET'S CASE. cites Hill. 29 El. Rot. 824. Grant's caſe.——Raym. 150. S. C. cited.—— *Poſſeſſion in the conuſor* is not requiſite to the fine's being a bar of an eſtate tail. See Fines (D. 2)——By the words of the ſtatute, a fine doth bar the entail in many caſes *where the conuſor cannot give the land*, becauſe he has it not. Per Hobart Ch. J. Hob. 258. Mich. 16 Jac. in the caſe of Duncombe v. Wingfield.

Tenant in tail *diſcontinues and diſſeiſes the diſcontinuee, and levies a fine* with proclamation to A. ſur conuſance de droit come ceo, &c. and *takes back an eſtate in fee by render*, in the ſame fine. The *diſcontinuee before all the proclamations are made, claims*, and after the *proclamations paſs*, and *within a year after he claims*; and after, *tenant in tail dies ſeiſed*; and by all the juſtices of C. B. the *heir is not remitted* to the ſaid lands: and this was by virtue of this ſtatute, which bars tenant in tail and his heirs by the ſaid fine. Kelw. 210. b. pl. 17 Trin. 4 Eliz. Anon.

A. before this ſtatute gave lands in tail, *remainder to the king* in fee; *tenant in tail* had iſſue 3 daughters; *one of the daughters, in Q. Eliz.'s time, levies a fine of her part* with *proclamations*, and *they are had during her life*, and *ſhe dies without iſſue*; and it was adjudged, that this fine, by force of this ſtatute barred the daughters and their heirs, and yet it did not make any diſcontinuance. Mich. 15 and 16 Eliz. Bendl. 223. pl. 254.——Tenant in tail, *remainder to the king*, levied a fine, had iſſue, and died; and it was adjudged, that the iſſue was barred, and yet the remainder, which was in the king was not diſcontinued; for by that fine, an eſtate in fee ſimple, determinable upon the eſtate tail, paſſed unto the conuſee. Mich. 16 Eliz. C. B. 3 Le 57. Jackſon v. Darcy.—— The ſtatute 34 H. 8. 20, has a proviſo generally, that no act done by tenant in tail ſhall prejudice the iſſue; but this ſhall be intended where the king is donor, and not otherwiſe, as appears by the preamble of that ſtatute; and therefore the general words in that act cannot reſtrain the general law, made by 32 H. 8. and this ſtatute ſays nothing of *reverſions*, but only of *remainders*. Mo. 115. S. C.——And. 46. pl. 118. S. P. and ſeems to be S. C.

It was reſolved by all the judges of C. B. that this ſtatute extends to *fines levied by concluſion*, and ſhall bind the eſtate tail, *though parties finis nihil habuerunt*. 3 Rep. 90. in the caſe of fines, cites Paſch. 28 El. Rot. 13. Zouch v. Bampfield.——Le. 84. S. C.

Tenant in tail to him and his heirs male, the *reverſion* being *in the king*, ſuffers a common recovery, or levies a fine, and by the opinion of the judges, the heir is barred, though it be no diſcontinuance of the tail, nor againſt the king, of the reverſion; and Englefield ſaid, that he had known this caſe, and the caſe was held by good advice to be a bar; but Shelley doubted. D. 32. a. pl. 1.——It was reſolved that if tenant in *tail, of the gift of the king*, levies a fine, and ſuffers a recovery of the eſtate tail, it is no bar; for 34 *H.* 8 ſaves it: but otherwiſe if the *king for money grants in tail*, per Coventry, Hide and Richardſon. Ibid. in Marg. cites Hill. 5 Car. in Canc. E. of Nottingham v. Ld. Munſon.

Paſch. 28 H. 8. Fine levied by tenant in tail, the *reverſion in the crown*, bound the iſſue by 4 *H.* 7. and 32 H. 8. provides, that the ſame ſtatute ſhall not extend to fines levied by tenant in tail, the reverſion in the crown; but that the ſame ſhall be of like force, as they ſhould have been, if that act had not been made, which amended not their caſe. Whereupon in STAFFORD'S CASE, the judges deviſed to help that ſlip, by a very oblique and indirect ſtrain, upon the ſtatute of 34 H. 8. 20. whereby it was provided that no common recovery in that caſe ſhould bind the iſſue but that he might enter after the death of tenant in tail, the ſaid recovery, or any thing done or ſuffered by or againſt ſuch tenant in tail, to the contrary notwithſtanding. 8 Rep. 78. Stafford's caſe ‡ and Notley's caſe.——Per Hobart, Hob. 332, 333. Mich. 19 Jac. in Mackwilliams's caſe.——‡ Sav. 105.

A point intended for a ſpecial verdict was, whether a non-claim for five years after the fine, ſhould † *bar the iſſue that omitted to claim*, ſo as to bind him for his life, though it would be no bar to his iſſue. But the jury found a claim by him, and ſo the point came not in queſtion. See Sid. 166. Loyd v. Pollard.——and 1 Keb. 620. S. C.——and cites Cro. E. 595 where it is the opinion of ſome of the judges, that ſuch fine ſo levied by diſſeiſor, &c. ſhall bar the tail, and that it is caſus omiſſus out of the ſtatute, and according to it this caſe is cited 1 Inſt. 373. a. but ſeems that it is not law; and ſo held Levins in the caſe of the E. OF DERBY, in the Exchequer Chamber. Sid. 166. Mich. 15 Car. a. B. R. in caſe of Loyd v. Pollard.

†[265]

A. a woman tenant for life, remainder to B. in tail. A married, and then ſhe and her huſband levied a fine to B. the remainderman, and took back, by *render, a rent-charge*; A. and B. die, and the iſſue in tail enters; and by the opinion of the judges, the grant and render by the ſaid fine is out of this ſtatute, and ſhall not bind the iſſue in tail. But the parties agreed. Kelw. 210. Parker v. Paynet.———The Lord Keeper's opinion was, that howſoever 4 H. 7. was, at the making thereof, as to barring or not barring an eſtate tail; yet when 32 H. 8. comes, and declares upon 4 H. 7. now all fines are good from 4 H. 7. to bar eſtates tail. Skin. 92. Hill. 35 Car. 2. B. R. in the Earl of Derby's caſe

§. 2. *Provided that this act ſhall not bar any perſons by reaſon of any fine* levied by any woman *after the death of her huſband* contrary to *the ſtatute* 11 H. 7. cap. 20. *of lands of the inheritance or purchaſe of the huſband, or his anceſtors, aſſigned to any ſuch woman in dower, for term of life or in tail.*

§. 3. *Provided alſo, that this act do not extend to any fine* levied *of lands, the* owners whereof, by *any expreſs words in* any act of parliament *made ſince the* 4 H. 7. are reſtrained from making any alienations.

In two caſes this ſtatute ſeems to weaken the ſtatute of 4 H. 7. in the caſe of fine by *tenant in tail by act of parliament*, and tenant in tail with *reverſion in the crown*.

§. 4. *Provided, that this act ſhall not extend to any fine to be levied by any perſon of any lands, before the levying of the ſame fine, given to the perſons ſo levying the ſame, or to their anceſtors*, in the tail, by letters patent, or *by* acts of parliament, the reverſion whereof, *at the time of the fines levied*, being in our ſovereign lord, his heirs or ſucceſſors.

Per Hobert Ch. J. Hob. 332. Mich. 19. Jac. in Mackwilliams's caſe.———See the notes againſt ſect. 1.———See (D. a. 2) pl. 5.———Recovery.

See more matter, as to the ſtatutes relating to fines, under the proper diviſions of this head of fines.

(X) What may be *given by* a Fine.

1. A Man cannot give *a right* by a fine, unleſs to him, who has the poſſeſſion. Arg. Godb. 304. cites 27 H. 8. 20. per Montague.

(X. 2) Privity. Barr. In What Caſes a Fine ſhall be no Bar for Want of *Privity*.

1. If my *uncle diſſeiſe my father*, and levies a fine with proclamations, and my *father dies*, and then my *uncle dies within the 5 years*; I am not barred to claim, though I am heir to him that levied the fine; for my title is not as heir to him, but as heir to my father. Arg. Lat. 66. cites 19 H. 8. D. 3.

2. Land is given *to the eldeſt ſon of J. S. in tail, remainder to J. S. in fee*, or in tail. If the *eldeſt ſon levies a fine, and dies without iſſue*, and the *father dies*; this is no bar to the 2d ſon. Arg. Lat. 66. cites 2 Eliz. Dal.

[See (D. a)]

(X. 3) Paſs. What *paſſes by* a Fine.

1. If a man levies a fine ſur conuſance de droit *come ceo*, &c. *and does not limit to the conuſee, and to his heirs*; yet the *conuſee has fee ſimple*. Co. R. on Fines, 4.

2. *But*, if he levy ſuch fine with *expreſs limitation to* the conuſee, and *his heirs of his body*; this limitation is a qualification of the general intendment. Co. R. on Fines, 4. [266]

3. A *fine of itſelf is ſufficient to paſs an eſtate* without the aſſiſtance of any other conveyance; and ſo it appears by the pleading of a fine, which is *quidam*; *finis ſe levavit*, and *ſince the ſtatute of uſes it veſts immediately*; if no conſideration, then to the uſe of the conuſor; but if a conſideration, then to the uſe of the conuſee, per Pemberton Ch. J. Skin. 184. Trin. 36 Car. 2. C. B. in caſe of Herring v. Brown.

(X. 4) Paſs. *How much* paſſes by the Fine.

1. If a fine be levied *of the manor of D. in D.* and the manor *extends into other vills*; nothing paſſes but that which is in D. only. The ſame law ſeems of a leaſe, and ſuch like; contra if it had been *of the manor of D.* there all paſſes. And if feoffment be made of all his tenements in D. and there is a manor which *extends into D. and S.* nothing paſſes in S. and ſo ſee that a manor may paſs by the word tenementum. Br. Fines, pl. 66. cites 9 E. 4. 6.

So where it *extends into A. B. and C.* and the fine is levied of the manor *in A. and B.* no more paſſes than what lies in A. and B. Br. Fines, pl. 89. cites 5 E. 4. 103.

2. The *tenant levies a fine to the lord of his chief rent, he ſhall render two rents.* Br. Fines, pl. 97. cites 18 E. 4. 22.

3. A. and his wife were ſeiſed of certain lands in S. in the county of W. called Kirkian, in tail general, of the gift of the father of the ſaid wife in 11 H. 8. Afterwards in 25 H. 8. *R. S. the ſon and heir of J. S. the donor*, levied a fine ſur conuſance de droit come ceo, &c. *with proclamations to A. of the manor of Dowman, and* 100 *acres of land*, 300 *of meadow*, 300 *of paſture, and* 1000 *acres of furze and heath in D. S. and T. and ſeveral other towns* named in the fine; and *A. rendered* the ſame back *to R. S. in tail with diverſe remainders over.* After which the poſſeſſion continued with A. and his heirs according to the firſt entail; and the manor of Dowman, and the remainder of the lands in thoſe towns, which were [limited] to A. and his heirs by the render, [continued in the poſſeſſion of A.] until about 9 years paſt, when, by niſi prius in the country, upon the opinion of Manwood late Ch. B. the land called *Kirkian was recovered againſt the heir of the ſaid A.* by virtue of the ſaid fine and render, becauſe all the land which the ſaid R. S. and the ſaid A. alſo had in all theſe towns named in the fine, were *not ſufficient to ſupply the contents of acres compriſed in the ſaid fine*; and what the law

law was in this case, was referred to the Chief Justices the Master of the Rolls, Egerton, and the now Ch. B. out of the Chancery, who all agreed upon all this matter appearing, that * *nothing shall be said* to be *rendered, but that which indeed was given by the fine*, and Kirkian does not pass to the said A. by the fine; for as to that, the fine is but as a release of R. S. to him, and therefore shall not be said to be rendered to the said R. S. by the fine, where no matter appeareth, whereby it may be known, that it was the *intent of the parties*, that this shall be rendered; and it was decreed in Chancery accordingly. Poph. 104. Kellie's case.

* *More* acres of land do *not* pass by a fine *than the fine mentions although the indenture* that leads the uses of it *mentions more*, than are in the fine; for the fine is the foundation of the estate, and the estate ought to rise out of it. Jenk. 254. pl. 45.

4. *And therefore*, if a man be to *pass his manor of D.* to another *by fine executory*, and he *levy the fine* to him, *by the name of the manor of D. and* of *so many acres* of land *in D. and S.* (being the *towns in which the manor lies*) after which the *conusor purchaseth other lands* in these towns; the fine, before the statute of uses, should not be executed of these lands purchased after the conusance; and the [267] fine should work to those, which he had power and intent to pass, and no further. Per Popham Ch. J. 205. in Kellie's case.

D. 251. b. Marg. pl. 92. says it was cited by Yelverton, Pasch. 40 Eliz. C. B. to have been adjudged in 21 Eliz. that the lands of J. S. should pass, and that Crew, in the argument of the case of DUN v. BURCRELL. Mich. 16. Jac. 1. cites this case also to be adjudged; but that, upon a like case verbatim between KELLIE and DOWNHAM, Hill. 38. Eliz. referred out of chancery to the two Chief Justices and Chief Baron and the Master of the Rolls; and by them resolved, that the land which the conusee himself had in this vill, shall not pass to supply the small number of acres, of which the conusance was made; for this render is a release to the conusor, and no intent appears to pass the land of the conusee himself.

5. *And* therefore, suppose *I have* 100 *acres* of land *in a close in D. and J. S. hath* another 100 *acres in the same close and town, and* J. S. hath 100 *acres* of land *in the same town, not in this close*; and my intent is to *levy a fine to J. S. of the whole close, by the name of* 200 *acres* of land, *with a render*, as before, and I levy it accordingly; shall the render enure to the land which J. S. had in the same town? It is clear, that it shall not, although it be without deed; why then shall the fine here be taken to work rather to the land called Kirkian, than to any other lands, which any other had in the same towns, when it appeareth plainly, that it never was the *intent of the parties*, that the fines should extend to those lands called Kirkian; (and it was decreed in Chancery accordingly.) per Popham Ch. J. Poph. 105. in Kellie's case.

(X. 5) Passes. How much. Where the Things lie in *several Counties*; and where there must be one only or several Fines and Recoveries.

1. A Fine may be levied of *shares in the New River water*, and wherever a fine and recovery are necessary for cutting off the entail and remainder of such shares, one fine or recovery only is not sufficient, in regard the New River water *runs through* 3 *counties*, viz. Hartford, Middlesex, and London, *there must be* 3 several fines and

and recoveries paſſed as to any of theſe ſhares (viz.) *a fine and recovery in each county.* This is a note in 2 Wms's Rep. 128. in the caſe of Drybutter v. Bartholemew.

(Y) Barred, what. *Copyhold.*

1. IF I *ouſt a copyholder*, it is a diſſeiſin to the lord, and if I levy a fine of ſuch lands, and 5 years paſs, not only the lord is bound, as to his freehold and inheritance, but alſo the copyholder for his poſſeſſion. Arg. per Popham, Att. Gen. Le. 99. Mich. 30 Eliz. in Scacc. in caſe of Suliard v. Everard. S. P. Of copyholder for life, or in fee, and the lord, in ſuch caſe, ſhall not have 5 years after the death of the copyholder for life. per Coke, in a note, 9 Rep. 105. b. Paſch. 10 Jac. in Podger's caſe.——The right of the copyhold does not paſs by the fine, but it is barred by the fine. Cart. 24. Paſch. 17 Car. 2. C. B. in the caſe of Taylor v. Shaw.

2. *So*, If a copyholder makes a *feoffment in fee*, and the *feoffee levies a fine* with proclamation, and 5 years paſs, the lord is barred. *But* if a *copyholder levies a fine*, and 5 years paſs, the lord is not barred; for the fine levied (the copyholder having no franktenement) is utterly void. Coke's Cop. f. 55.

3. *Copyhold was granted to A. B. and C. to hold ſucceſſively* for their lives; the lord grants the *freehold to A.*——A. levies a fine, and 5 years paſs; it ſeems no bar to the remainders. See Brownl. 181. Trin. 9 Jac. Bicknall v. Tucker. 2 Brownl. 134. Mich. 9 Jac. S. C.

4. *But*, if a *copyholder for years* be put out of poſſeſſion, and a fine levied, and no entry by him, he is barred by the ſtatute (but in the caſe above, the remaindermen were not out of poſſeſſion). Brownl. 181. Trin. 9 Jac. Bicknall v. Tucker. [268]

5. A copyhold eſtate is not barred by fine and 5 years nonclaim. Noy. 23. Mich. 15 Jac. in caſe of Archbold v. Cook. S. C. cited Vent. 81. Trin. 22 Car. 2. in the caſe of FREEMAN v. BARNES, where Twiſden ſaid, that he wholly rejected that authority; for it was but an abridgment of caſes by Serjeant Size, who, when he was a ſtudent, borrowed Noy's Reports, and abridged them for his own uſe.

[See Copyhold.]

(Y. 2) Barred, what. *Entry.*

1. *Forfeiture for diſcontinuance by* 11 *H.* 7. 20. Afterwards, and before entry, the remainderman in tail levies a fine. He cannot now take benefit of the forfeiture; nor can the conuſee; for it was a *fine by eſtoppel* only, and no intereſt paſſed. Paſch. 5 Jac. B. R. Noy. 123. Ward v. Matthew alias Walthew. Becauſe the tenant in tail in remainder had nothing at the time of the fine, nor the conuſee; yet the heir has given his right to the entail, and concluded himſelf, that he cannot enter; and the conuſee cannot enter, becauſe he has nothing, but by eſtoppel, and no reverſion.——But in Sir G. BROWN'S CASE, where the heir in tail had a reverſion in fee expectant, and by his fine gave that reverſion to the conuſee, he had the reverſion of the conuſor's eſtate, and might well enter in regard of the prejudice. Cro. J. 175. Ward v. Walthew.——Yelv. 101. S. C. & P.

2. Feoffment to *A. and his heirs quouſque* ſuch ſums be paid, and on failure, the feoffees to enter, &c. There is a *failure*; feoffor levies a fine, and 5 years paſs; feoffees enter not; the fine barrs. Cart. 82. Trin. 18 Car. 2. C. B. Thomaſin v. Mackworth. ——Before the fine levied, A. makes a leaſe and releaſe, then A. levies a fine, and 5 years paſs; per Bridgman Ch. J. by the leaſe and releaſe the eſtate is now turned to a right. For after failure, A. is but tenant at ſufferance, and his making a leaſe is a diſſeiſin, and ſo the eſtate turned to a right; and alſo by the releaſe which was a medling with the land; and being ſo turned to a right, fine and non-claim barrs. Ibid.

3. *Feoffee upon condition is diſſeiſed*, and a fine levied, and 5 years paſs; then the condition is *broken*; the feoffor may enter; for the diſſeiſor held the eſtate ſubject to the condition, and ſo did the conuſee; becauſe he cannot be in of a better eſtate than the conuſor was himſelf. Mod. 4. Mich. 21 Car. 2. B. R. Medlycott v. Joyner.

(Y. 3) Barred, what. *Error* and Pleadings.

1. 23 Eliz. 3. *This act ſhall not bar any from a writ of error upon any fine or recovery heretofore had, and purſued within 5 years after this parliament, or which, before the firſt of June* 1582, *was exemplified under the great ſeal, nor a feme covert infant, non compos mentis, one in priſon, or beyond ſea, ſo as they or their heirs purſue ſuch writ within 7 years after ſuch imperfection, reſtraint, and abſence removed, and if any of them happen to die hanging the ſuit, their heir may undertake it within one year after the 7 years; and if the heir be under age, then within one year after his full age.*

2 Le. 211. S. C —— 3 Le. 232. S. C.

2. A. tenant in tail had iſſue two ſons B. and C. and dies. B. levies two fines of the land, and dies without iſſue. C. brings two *writs of error* on theſe fines. Defendant, to the firſt fine, *pleaded* the ſecond fine not reverſed; and to the ſecond, he pleads the firſt not reverſed. Per. Cur. you may plead that the ſaid fine pleaded in bar, is alſo erroneous, and ſo aid yourſelf. Cro. E. 151. 31 & 32 Eliz. B. R. Molton's caſe.——cites 7 H. 4. 39.

An *erroneous* recovery ſhall bar a writ of error of an *erroneous fine*, until it be reverſed, but a *void* recovery is no bar. Cro. E. 390. Paſch. 37 Eliz. B. R. Barton v. Lever & al.——* Roll. 788, 789. pl. 14.

3. Tenant in tail levied an erroneous fine, and afterwards ſuffered a *common recovery*, *in which he came in as vouchee*, and vouched over, &c. This † is a bar to the iſſue, to bring writ of error, to reverſe ſuch fine. Mo. 365. Barton v. Lever and Brownloe.—— cites * Carington's caſe.

†[269]

4. A *ſecond fine* rightly levied is a bar to a writ of error upon the firſt fine. Mo. 366. Barton v. Lever and Brownloe.

Cro. J. 332. Bartholmew v. Blowfield. S. C.——2 Bulſ. 244. S. C. by name of Bartholemew v. Belfield.

5. Fine, and 5 years non-claim will bar *writ of error* brought to reverſe an erroneous recovery. Roll. R. 37. Trin. 12 Jac. B. R. Benfield v. Bartlemew.

6. *Infant*

6. *Infant* levied a fine, and before reverſal came to full age; if he levies a ſecond fine of that land to another, it is an *extinguiſhment* of his title of *error*, per Popham, but Gawdy, contra, (but the other juſtices ſeemed to agree with Popham) Noy. 59. Hart v. Ameredith. But the 2d. fine muſt be pleaded. Roll. 788. pl. 13. S. C.

7. A fine with proclamation and 5 years paſt doth bar the lord in *ancient demeſne of his * writ of diſceit*; and likewiſe a *writ of error* is alſo thereby barred. 2 Inſt. 518. The perſon who had right to the lands in ancient demeſne ſhall be barred, yet the *lord* ſhall not be barred to defeat it; for *his intereſt comes after the fine levied*. And. 74. cites it as ſo held in Plowden in Stowell's caſe.——So * And. 172. S. P. Becauſe the lord does not claim the land, but to correct diſceit to him done. Paſch. 28 Eliz. in the caſe of Ld. Zouch v. Baimfield.——S. P. That a fine levied in ancient demeſne ſhall not be pleaded in bar to a writ of diſceit brought by the lord. Skin. 14. Mich. 33 Car. 2. B. R. in caſe of Cockman v. Farrer.——S. C. Raym. 462. where 2 Inſt. 518. is cited, and ſays it is intended another fine, and not the ſame which was firſt levied.

8. A fine *upon a grant and render* was *levied in the time of E. 4.* upon which afterwards a *ſcire facias* was brought, and *judgment given* and a writ of *ſeiſin awarded, but not executed.* Afterwards a fine *ſur conuſance de droit come ceo, &c. with proclamations was levied*, and 5 *years paſſed*, and now another ſcire facias is brought to execute the firſt fine, to which the fine ſur conuſance de droit come ceo is pleaded; ſo as the only queſtion is, whether the fine with proclamations ſhall bar the ſcire facias, or not? and it was ſaid by the judges, that here is no avoiding of the fine, but it ſhall ſtand in force; but yet, notwithſtanding, it may be barred; and they all ſaid, that he, who hath judgment upon the ſcire facias upon the firſt fine, might have entered; and they ſtrongly inclined, that the ſcire facias is barred by the fine, and doth not *differ from the caſe of a writ of error*; but they delivered no opinion. Mar. 194. Paſch. 18 Car. Apſly v. Boys.

9. *Conuſor tenant in tail after conuſance* by dedimus poteſtatem, and *before return of the writ of covenant, dies without iſſue.* Proclamations are made, and 5 years paſs, after death of the conuſor, yet *he in remainder may have error* to reverſe this fine. 2 Jo. 181. Mich. 33 Car. 2. B. R. Cockman v. Carrer. Raym. 461. S. C.—2 Sid. 94, 95. per Cur. Row v. Evelyn.

10. Where there is *error in the fine*, 5 years poſſeſſion cannot be pleaded in barr. Raym. 462. Mich. 33 Car. 2. B. R. Cockman v. Carrer. Skin. 13. S. C.—— 2 Jo. 181. S. C. adjudged in both reports.——The court inclined, but adjournatur. Vent. 353. Anon. ſeems to be S. C. S. P. and

(Y. 4) Barred what. Infant and Truſt.

1. A Fine, ſuppoſed to be levied by an infant, was examined in chancery *after it had been allowed by examination of the juſtices of the Common Pleas*; but whether theſe and ſuch other may ſeem rather to examine the *manner*, than the very *matter* and ſubſtance of the thing adjudged, it is worthy of conſideration. Cary's Rep. 5. cites Ann. 3. and 13 Eliz. D. 201 and 301.

Cro. C. 109. Iſham v. Morris.

2. Fine *of a leaſe* made to the conuſor's uſe is ſufficient to bind the *truſt*. 6 Car. 1. fol. 644. Chan. Rep. 51. Earl of Newcaſtle v. Earl of Suffolk.

3. An *eſtate* is made to friends *in truſt, to the uſe of the woman, to commence after her huſband's death*; ſhe joins in a fine with her huſband of the land leaſed in truſt; this fine ſhall cut off the truſt. Toth. 148. cites Trin. 15 Car. Liſter v. Yelverton.

Chan. Caſes 213. in caſe of WASHBORN v. DOWNS, it was ſaid, that this caſe was

4. The fine or recovery of a ceſty que truſt ſhall bar and transfer the truſt, as it ſhall an eſtate in law, if it were *upon a conſideration*: but otherwiſe, Windham J. doubted of it; for he looked upon the court of chancery as remedial to thoſe, that come in upon a conſideration. Reſolved Chan. Caſes 49. Paſch. 16 Car. 2. Goodrick v. Brown.

without a precedent, and that the plaintiff did not rely on his decree, but the matter was afterwards compromiſed.

5. Fine and non-claim will bar *a truſt*, if *levied by a ſtranger*, and not by the truſtee himſelf; for then the truſt will go along with the land. Hard. 512. Trin. 21 Car. 2. in Scacc. Woolſton v. Aſton.

A fine with proclamation and nonclaim will bar a truſt, per Ld. Keeper, who ſaid it was ſo reſolved in the Exchequer. Mich. 27 Car. 2. Chan. Caſes

6. Fine and non-claim bars *all truſt* and *equity*, per Finch C. who ſaid, it was ſo reſolved, by all the judges, in the caſe of CARY v. THINN, where the equity was of a practice in gaining a conveyance of lands, and ſince reſolved in the exchequer, where a truſt was barred; elſe no man could know, when he was ſure of an inheritance. *But* this is on *two differences*——1. Where the equity *charges the land*, as in the aforeſaid caſes, there the fine bars; but where it *charges the perſon in reſpect of the lands*, it does not bar, as the Ld. Knowls's caſe.———2. If the equity or truſt be *created by the fine*; that fine ſhall never bar the equity, which it created. Tr. 28 Car. 2. Chan. Caſes, 278. Saliſbury v. Baggot.

268. in caſe of Clifford v. Aſbley.———A *title in equity* or a *truſt*, is and ſhall be barred by fine and non-claim, but that muſt be where the perſon, to whom the fine is levied, has *no notice*, and in ſuch caſe, the claim muſt be in a proper way; if it be of a truſt or title in equity, it cannot be by entry, but by *ſubpœna*; and if he have title by writ at the common law, and that his entry is not lawful, an entry is not good to ſave the right, per Finch C. Mich. 34 Car. 2. 2 Chan. Caſes, 126. Bovy v. Smith and Bony.——See Vern. 144. 150. S. C.

7. A. ſeiſed in fee *deviſed portions* to ſeveral of his children or friends *payable at ſeveral times by* 50 *l. per ann.* with which ſums he charged his lands to be thereout paid and died;—50 *l.* one payment incurred due, and then the lands were aliened by fine with proclamations;——5 years paſſed—deviſee ſued in chancery for the whole—decreed for the plaintiff for what grew due after the fine was barred by the fine, but not the 50 *l.* due before. For a truſt is barred by fine, &c. Hill. 31 Car. 2. 2 Chan. Caſes, 247. Wakelin v. Warner.

It is the ſame of a *fine by truſtee*, per Finch. C. 2 Chan. Caſes 125, 126. S. C.

8. The Ld. Keeper put the following caſe. A. ſeiſed in fee, in *truſt for B.* for full conſideration conveys to *C.* the *purchaſor having notice* of the truſt; and afterwards C. to ſtrengthen his own eſtate, levies a *fine*; and the counſel were all of opinion, that the ceſty que truſt was not bound to enter within 5 years; for that here C. having purchaſed with notice, notwithſtanding any conſideration paid by him,

him, is but a truſtee for B. and ſo the *eſtate not being diſplaced*, the fine cannot bar. Hill. 1682. Vern. 149. in caſe of Bovey v. Smith.

9. Fine and non-claim bar a *term in truſt* for ſecuring children's portions. Cumb. 67. 3 Jac. 2. B. R. Hanmer v. Eyton.

Cro. C. 110. in caſe of Iſham v. the leſſor or

Morris ——— The truſtees of a *term, to attend the inheritance*, are barred by a fine, by purchaſor, and can never afterwards claim any thing: *but* yet the term is not ſo barred, but that *poſtne incumbrances* may be let in upon the purchaſor; for a fine ſhall barr no eſtates, but thoſe which were intended by the parties to be barred. Per Holt Ch. J. Carth. 103. Mich. 1 W. & M. B. R. in caſe of Smith v. Pearce.

10. A. *deviſes* lands *to truſtees till debts paid*, and then *to J. S. an infant, and his heirs*; defendant entered on the eſtate, and levied a fine, and non-claim paſſed. J. S. when of age, brought ejectment, but was nonſuit by the fine and non-claim, the truſtees (in whom the legal eſtate was) not entering as they ſhould have done; yet being then an *infant*, and having as ſoon as of age made his entry, and brought ejectment, and alſo his bill, *before 5 years incurred after his full age*, the court decreed him the poſſeſſion, and an account of the profits, declaring the fine and non-claim ſhould not run upon the truſt in the infant's minority, and he *ſhall not ſuffer for the laches of his truſtees*. Mich. 1699. 2 Vern. 368. Allen v. Sayer.

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Note, it did not appear whether the debts were all paid, nor whether the plaintiff became intitled to the poſſeſſion. Ibid.

(Y. 5) Barred what. Leaſes.

1. Where one is leſſee for years, and *aſſigns over* his leaſe *in truſt for himſelf, and then purchaſes the inheritance*, and occupies the land, and then levies a fine with proclamations, and the *truſtee does not claim* his leaſe within the 5 years, the truſtee is barred; for the conuſor has the poſſeſſion, by reaſon of the truſt, and this truſt is included in the fine, and the truſtee's intereſt barred by his nonclaim. Cro. C. 110. Paſch. 4 Car. C. B. Iſham v. Morris.

2. A *ſleeping leaſe* which the leſſee never knew or accepted of, and of which he never was in poſſeſſion, is bound by fine and nonclaim. 8 Car. 1. Chan. Rep. 66. Harding v. Counteſs of Suffolk.

Show. 74. S. P. per Holt Ch. J. in the caſe

of * Pierce v. Smith. Mich. 1 W. and M. that where there are acts done, and a poſſeſſion continued againſt a termor, a fine may bar; but where another perſon continued the poſſeſſion for 5 years, it may be a quære, ut ante. —— * S. C. argued. Carth. 100.

3. ‡ *Leaſe to begin at Eaſter next* is not barred by a fine levied in the mean time; for leſſee could not enter, his right being future. But if the leaſe had been in * poſſeſſion, though the leſſee had never entered, yet he had been barred. Brownl. 181. Bicknall v. Tucker.—155. S. C. and P. —— Cro. J. 60. † Saffin v. Adams. S. P. —— 5 Rep. 124. S. C. —— Arg. 2 Le. 157. cites the caſe of Saunders v. Starkey. —— Cart. 82. Bridgman Ch. J. cites Saunders's caſe. —— Cro. J. 60. cites it as adjudged, M. 21 and 22 Eliz. in B. R. in caſe of Saunders v. Stanford.

Le. 99. per Popham. Att. Gen. S. P. but he ſaid, if the ſame point was to be handled again, the law would be taken otherwiſe.

—— But if he makes not his *claim within 5 years after his title comes in eſſe*, he ſhall be barred. Adjudged per 3 J. againſt 2. Cro. J. 60. Saffin v. Adams. —— * Cart. 196. Arg. cites Cro. E. 5. Bruerton v. Rounsford. —— † cited per Hale Ch. B. Hard. 413. in caſe of Edwards v. Slates. —— Show. 40. Arg. —— ‡ Goldſb. 171. cites Stamford's caſe. S. P.

This case was denied by Twisden J. who said that this report of Noy, was but an abridgment by Serjeant Size, who when a student borrowed Noy's Reports, and abridged them for his own use; and that this is directly against the resolution in SAFIN's case, and relied on the case of Cro. C. 109, 110. ISEHAM v. MORRIS, and adjudged accordingly, though the case there was much stronger, Vent. 81. Trin. 22 Car. 2. B. R. Freeman v. Barns.

4. *A. leased for years to B. but* yet *A. continued the possession*; and afterwards A. levied a fine with proclamations, &c. It was said by Warburton, Winch and Hutton, that it is no bar to the lessee for his term, but only as a grant of the reversion by A. But *otherwise of a lessee in possession.* Mich. 15 Jac. Noy. 23. Archbold v. Cook.

5. 4 *H.* 7 of fines, *extends* to bind a right of a *term*, if the *lessee were or might have been* ever *in possession, before the fine.* per Anderson. Goldsb. 171. Cootes v. Atkinson.

* Vent. 80. S. C.—— Cart. 161. 195. S. C. in C. B.— Sid. 349. 458. S. C. Vent. 55. 80. S. C.

6. *Lease for* 100 *years in trust for* him in *reversion*, (* to attend the inheritance. Lessee enters; then he in reversion enters and leases to W. for 5 years, and at the end of the 5 years, he *makes a lease for* 50 *years to another*, and levies a fine to corroborate; and 5 years pass; resolved, the *first lease is devested by making the* 3*d*, but *at the election of* him in *reversion* †; and that the lease for 100 years is barred by the fine, because this was turned to a right, by making the †[272] lease for 50 years before the fine, and 5 years nonclaim; and the Chief Justice said, and it was not denied, that *incumbrances kept on foot by purchasors*, shall not be barred by fines; nor where mortgagor retains possession, and pays the interest, a fine *by mortgagor*, so holding the possession, shall not bar mortgagee. 1 Lev. 270. Trin. 22 Car. 2. B. R. Freeman v. Barnes.——And so judgment in C. B. was affirmed. Ibid.

7. *Devise of a term for payment of debts, remainder in tail*; he in *remainder enters* with consent of trustees, and levies a fine, and settles the land on his wife for life, and dies; the wife survives, the debts unpaid; quære whether this term is barred by fine and nonclaim? 3 Mod. 195. Pasch. 4 Jac. 2. B. R. Smith v. Pearce.

8. In an ejectione firmæ for lands in Wales, the case upon a special verdict was, that a *man seised in fee* of lands, *for the continuance of them in his name, and for the maintenance of his brother makes a lease for* 500 *years, in trust, that himself should receive the profits during his life*, and that afterwards *his brother should* enjoy them, with some other trusts; and *afterwards being in possession* according to the trust, *he covenanted with other persons* (not with the lessees) *to stand seised* of the said lands *upon the same consideration*, as was mentioned in the lease, *to* the use of *himself for life* with *remainders over*, according to the trusts; *and* further, *that the said lease and all estates made, or to be made by himself, should be*, and enure *to the same uses*; *and levies a fine*, and 5 *years passed*, the *lessor being in possession* according to the trust, and enjoying the profits during his life; afterwards the *lessor dies*, and *one of the lessees enters into part* of the lands *in one county, which was not comprised in the fine, claiming all* the lands *in the other county.* Hale Ch. B. held, that nothing had been done here to displace the estate of the lessee; for the lessor continued in possession by the lessee's leave and permission, as must be presumed, and

and ſo is a tenant at will, as Littleton ſays. Hard. 401. Paſch. 17 Car. 2. in Scacc. Focus v. Saliſbury.

9. *So* if leſſee for years be, the remainder over for life; and leſſee for years levies a fine, and 5 years paſs; the leſſor is not barred by any nonclaim, becauſe the fine operates nothing, and partes ad finem nihil habuerunt may be pleaded to it; *otherwiſe* it is where *tenant for life* levies a fine; for he has a freehold; and his fine diſplaces the remainders; and therefore an entry is requiſite within 5 years after the death of the tenant for life; for which reaſon when a leſſee for years or at will is to levy a fine, it is uſual for the leſſee to make a feoffment firſt, to diſplace the other eſtates. But here the *leaſe for years is antecedent to the eſtate of the leſſor*, who levies the fine, and he has a freehold expectant upon the leaſe, and not precedent to it, per Hale Ch. B. Hard. 401, 402. Focus v. Saliſbury.

10. *And* a fine with 5 years nonclaim muſt bar an *eſtate precedent* to the fine, *not ſubſequent* to it. And there is here a *privity* betwixt the leſſor and the leſſee, and therefore the fine ſhall not bar; as in caſe of a mortgage, where the mortgagor continuing in poſſeſſion, levies a fine, per Hale Ch. B. Hard. 402. Focus v. Saliſbury.

11. *And* this very caſe was adjudged in terminis for 2 reaſons, 1ſt, By reaſon of the *privity* betwixt the perſons. 2dly, Becauſe the leſſor was in the nature of a *tenant at will*, and there was a *mutual confidence* betwixt the parties, per Hale Ch. B. Hard. 402. cited it as the Dutcheſs of Richmond's caſe.

(Y. 6) Barred what. Legacies and Deviſes.

1. A. deviſed land to B. an infant 3 years old in fee, and dies. The heir of A. enters and levies a fine with proclamations. B. dies within age, leaving M. his ſiſter an heir; *deviſee* never entered; M. was a *feme covert*; five years paſſed. Reſolved that the baron of M. was bound, and all claiming under him; but M. ſhall have 5 years after baron's death to claim. Cro. C. 200. Mich. 6 Car. B. R. Hulm v. Heylock. [273]

2. A. deviſed *lands to B. in truſt*, remainder to C. in truſt, *ſubject to the payment of legacies*. C. levies a fine, and 5 years nonclaim paſs, and then mortgaged the land. Fine and nonclaim is no bar of the legacies. C. having no title but under the will, the mortgagee muſt be *ſuppoſed to have notice* of the will, per Cowper C. Tr. 1710. 2 Vern. 662. Draper's Company v. Yardley.

(Z) What *Things* are *barred* by Fine.

1. IF *falſe recovery* be had againſt tenant in tail, and the *recoveror levies a fine*, the iſſue ſhall not reverſe this after five years. D. Marg. 3. pl. 2. cites 34 Eliz. B. R. Holme v. Gee.

2. Baron had a *power to declare that his feme ſhall have an eſtate for life* in certain land; but, before any ſuch declaration was made,

the baron and feme levied a fine come ceo, &c. This *poſſibility* of the feme was included in the fine. 7 May, 41 Eliz. in Canc. Mo. 554. Poole v. Veere.

3. Feoffment by A. to the uſe of himſelf for life, *remainder to ſuch, as feoffor ſhould name at his death, in fee.* A. and the feoffees levy a fine for good conſideration to a ſtranger, and afterwards A. names and dies. The party named ſhall have the land, notwithſtanding the fine. Arg. 3 Le. 253. cites it as adjudged in B. R. in Ld Paget's caſe.

Per Holt Ch. J. Carth. 103. in caſe of Smith v. Pierce.

4. *Attending term*, by fine and nonclaim by him that has the inher tance, and is in poſſeſſion of the land, is barred. Cro. C. 110. Pa.ch. 4 Car. C. B. in caſe of Iſham v. Morris.

5. *Ceſſavit* is not barred by a fine and nonclaim, becauſe the title is puiſne to the fine. Arg. Roll. R. 306.

6. *Collateral uſes*, not depending on the other eſtates, may be deſtroyed by fine, if they are *contingent remainders*. But if there be a *coll teral clauſe*, by which a uſe limited, as proviſo, if 100 *l.* be not pai l, it ſhall be to ſuch uſe; that contingent remainder is not deſtroyed by fine. Arg. Het. 98. cites 1 Rep. 130, 134. Chudleigh's caſe.

So, if there be iſſue in tail with remainder in fee to him, the *election* and power, which he has *to avoid a leaſe of his anceſtor* tenant in tail, is deſtroyed by a fine with proclamations. Hill. 4 W. and M. B. R. Carth. 259. Simmonds v. Cudmore.

7. A *thing, that will not paſs by a fine*, may be barred by a fine; as a *right to a copyhold*; and ſo of a *rent charge*, by levying a fine of the land, as is CONINGSBY's caſe. And ſo of a *truſt*, as feme covert has a truſt, ſhe cannot transfer it; but if ſhe and her huſband levy a fine of the land, as the rent is gone by way of diſcharge, ſo the truſt is gone by way of diſcharge; per Bridgman. Ch. J. Cart. 24. Paſch. 17 Car. 2. C. B. in caſe of Taylor v. Shaw.

But a right to an eſtate by extent will be barred by a fine and nonclaim, per Ventris J. 2 Vent. 329. cites 5 Rep. 123. Saffin's caſe.—If one, that has *intereſſe termini*, enters after the term commences, and *is ouſted*, then it is not any intereſt in him, but a right. Cro. J. 61. Hill. 2 Jac. B. R. in Saffin's caſe v. Adams.

8. Fine and nonclaim ſhall not bar an *eſtate*, that is *not* * *turned to a right*. Cart. 82. 18 Car. 2. C. B. Thomaſin v. Mackworth.

* The law conſtrues ſuch acts to *amount to* a deveſting or not deveſting, as is *moſt agreeable to the intention of the parties, and the right of the thing*. per the Chief Juſtice. Vent. 81. in caſe of Freeman v. Barnes.——Vern. 149. Hill. 1682. Bovey v. Smith.

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9. Thoſe that have *neither preſent, nor future right, nor poſſibility of right* to the lands, &c. in the fine at the time of levying it, but a right to ſomething iſſuing out of the ſame, as rent, common, a way, &c. are not bound at all. For the fine extends only to ſecure the right or title of the eſtate, but does not bind the profits to be taken out of the eſtate. Wood's Inſt. 246.

S. C. cited 2 Vern. 190.

10. Fine with proclamation according to the 4 *H.* 7. by deviſee on condition of non-payment of money to her, (and the condition not being performed) will bar an *equitable power of redemption*, as well as a right of action; per Hale. Hard. 512. Trin. 21 Car. 2. in Scacc. Sir N. Wooliſtan v. Aſton.

11. *But*

11. *But* fine by *mortgagee* will not bar equity of *redemption.* Hard. 512 Woolſton v. Aſton. Vern. 132. Hill. 1682. Welden v. Duke of York.——Fine levied on the mortgaging the eſtate, and to ſtrengthen the mortgagee's ſecurity, is no bar to the equity of redemption. For the very eſtate which then paſſed by the fine was a redeemable eſtate, per Lord Hutchins. Mich. 1690. Lingard v. Griffin. 2 Vern. 190.

So of a fine levied *by mortgagor.* Sid. 460. it was ſo ſaid for law, in caſe of Freeman v. Barnes.

12. *Lands extended* upon elegit are bound by fine and nonclaim within 5 years; otherwiſe, if the land had not been actually extended. 1 Mod. 217. Trin. 28 Car. 2. C. B. Ognel v. Ld. Arlington & al. *But* if a man has *judgment in debt*, on which he may have an elegit, and after judgment the defendant aliens the land by fine with proclamations, and 5 years paſs, the plaintiff may have *ſcire facias & elegit*, per Lord Keeper. Ch. Caſes, 268. Mich. 27 Car. 2. in caſe of Clifford v Aſbley.

13. If an *inquiſition upon an elegit* be found, the party before entry has the poſſeſſion, and a fine with nonclaim ſhall bar his right; for *before actual entry*, he may have ejectione firmæ or treſpaſs, and ſo not like an *intereſſe termini.* Ch. Caſes, 268. in caſe of Clifford v. Aſbley.

14. *Dignity of peerage* is not barrable by fine. Parliament Caſes 11. The King v. Ld. Purbeck. But Wood's Inſt. 44. ſays that a baronet by deſcent levied a fine of his honour to another who enjoyed it, and took place in ſeniority from the date of the patent, as if his anceſtors had been *baronets.* [But ſee the caſe above contra.]

15. A fine ſhall bar *no eſtates, but thoſe which were intended by the parties to be barred.* per Holt Ch. J. Carth. 103. Mich. 1 W. and M. B. R. in caſe of Smith v. Pierce.

16. A fine and nonclaim is a good bar to a *bill of review*, per Hutchins commiſſioner. Mich. 1690. 2 Vern. 190. in caſe of Lingard v. Griffin.

17. A *reverſion* may be barred by fine and nonclaim. Arg. Show. 42. cites Pl. C. 374. Adjudged. Mich. 39 and 40 Eliz. C. B. Cro. E. 594. Edwards v. Peel.

18. One *coparcener* in conſideration of 4000 *l.* paid to her by C. who was about to marry B. her ſiſter, joined with B. in a conveyance to *B. and C. for their lives*, remainder *to the iſſue of the marriage*, remainder *to the right heirs of C. Provided if no iſſue be living at the death of the ſurvivor of B. and C. and that the heirs of B.* within 12 months after the deceaſe of B. and C. *ſhall pay* 4000 *l. to the heirs or aſſigns of C.* then *the remainder to C. to ceaſe*, and the premiſſes to remain *to the right heirs of B. for ever.* B. and C. levied a fine to extinguiſh this proviſo, and declared the uſe to C. and his heirs and directed the truſtees to convey accordingly. B. and C. died without iſſue; a bill was brought by the heir of B. to have a conveyance on paying the 4000 *l.* but was diſmiſſed by the Maſter of the Rolls, but was afterwards reverſed. Paſch. 1697. Ch. Prec. 72. Sir Evan Loyd v. Carew. But afterwards the reverſal was reverſed in the Houſe of Lords. Ch. Prec. 106. S. C. ——Parl. Caſes 137. S. C.

(Z. 2) Bar. In what Caſes *in General.*

1. When an *eſtate* is *put to a right*, and then comes a fine and nonclaim; it is a perpetual bar. Cart. 82. in caſe of Thomaſin v. Mackworth.—But where the eſtate is not turned, a right, it is no bar. Cart. 164. Arg. cites SAFFIN's caſe, and 9 Rep. 106. Marg. PODGER's caſe, and 8 Rep. SYMMES's caſe, and Pl. C. Stowell v. Zouch.

(Z. 3) Good. In Reſpect of the *Form.*

See Le. 85. contra.

1. Fines levied in C. B. *without ſhewing in the fine the names of the juſtices*, is good. Denſh. R. on Fines, 4.

2. And note, that the form in *C. B. and* the form *in other courts, where fines may be levied, is all one*, and no other words in the one, than was and is in the other; but the one part of the fine ſhall be ſent into the treaſury, and the other delivered to the parties, and ſhall be indorſed *deliberatur per proclam,' &c.* and a record of this is put in bank. Denſh. R. of Fines 4.

* The word [not] ſeems omitted.

3. And if it be levied *before J. D. and others, who are juſtices*, it is void; *but if* it be *before the juſtices, and others who are* * *juſtices:* it is good; and the *names of others void.* Denſh. R. of Fines 4.

* The word [not] ſeems omitted.

4. And if the fine be *levied to one of the juſtices, he ſhall be named in the coram, &c.* and among the juſtices by the conuſance now uſed; yet albeit he be * named, (as to me ſeems) the fine is good. Denſh. R. of Fines 4, 5.

5. The ſtatute of 4 H. 7. 24. does not alter the form and ſubſtance of the fine, but the *ancient form* remains. per omnes J. Mich. 4 and 5 Eliz. B. R. Pl. C. 265. b. Fiſh v. Brocket.

(Z. 4) Good. In Reſpect of the *Deſcription.*

Br. Partition, pl. 24. cites S. C. and per Belk, it *ſhall be intended*, that every one ſhall have one fourth part *in equal value*, and *not according to the quantity*; for one 4th part may be in

1. In aſſiſe againſt A. of the 4th part of a mill, defendant ſaid, aſſiſa non; for ſuch a day and year before Herle, fine was levied between A. B. plaintiff, and C. F. deforceants of the manor of G. with the appurtenances, of which the mill was parcel; by which *A. acknowledged the manor to be the right of C. come ceo*, &c. and C. *granted and rendered* the manor to A. and the heirs of his body; the remainder of the *fourth part* of the manor, *againſt the weſt, to Alice the now tenant and her heirs*; and another *fourth part* of the manor *againſt the Eaſt, to J. the plaintiff*; and another *fourth part againſt the South* to remain to Richard in the ſame manner; and the *remainder of the fourth part againſt the North*, to remain to *W. and her heirs*; and that after, A. died without iſſue of his body, by which Alice entered into the fourth part againſt the Weſt, as in her remainder

remainder in which the mill is; and the plaintiff entered into the 4th part againſt the Eaſt, as in his remainder; and the plaintiff, ſuppoſing that the mill was in his part, entered, and the tenant re-entered, judgment if aſſiſe. And the plaintiff ſaid, that after this, partition was made, and the mill allotted to the plaintiff, who was ſeiſed thereof, till diſſeiſed by the defendant; and the other ſaid, that at the time of the partition, ſhe was covert baron, and her part was too little; and the aſſiſe was awarded. Br. Fines, pl. 83. cites 44 Aſſ. 11.

value of 2 fourth parts; per Tank, this is true, *where it is limited by moieties*, 3 *parts or* 4 *parts without other determination*, but when it is ſaid, the part againſt the Eaſt to the one, and the part againſt the Weſt to another, &c. there it *ſhall be intended according to the quantity*, and not according to the value. Brook ſays, *quære*, for the aſſiſe was awarded.

2. Where a fine and recovery is *of ſo many acres in D.* the parties intereſted ſhall have their *election*, in what part of the eſtate it ſhall operate. MS. Rep. ſaid to be Ld. Harcourt's cites 27 March 1723. Ld. Blaney v. Mahon.

(Z. 5) *Limitations* in Fines. What good or allowable. [276]

1. *Two acknowledged a fine of four acres to be the right of W. and granted that the tenements aforeſaid, which N. held for his life, and which, after his death, ought to revert to them, to remain to P. and his heirs*; and the court would not accept it without limiting the *fee in one of the conuſors certain*; by which they acknowledged the tenements to be the right of W. and granted, that the ſame tenements, which N. held for his life, and which after his death ought to revert to them and to the heirs of one of them, ſhould remain to P. and his heirs; and this fine was accepted. Br. Fines, pl. 46. cites 21 E. 3. 13.

2. In dower, *rent* was granted by fine, *with condition, that when any heir is within age*, that *the rent ſhould ceaſe during the nonage*; and the feme recovered dower during the nonage, & ceſſet executio till the full age of the heir. Nota. Br. Judgment, pl. 41. cites 24 E. 3. 61.

3. A man acknowledged the tenements in the writ, to be the right of one A. *come ceo*, &c. *except four acres* of the land, *and granted that the four acres (which J. S. held by recognizance, till* 10*l. was levied)* after they ſhould revert to him, *ſhould remain* to the ſaid A. and his heirs for ever; and the fine was received. Br. Fines, pl. 19. cites 44 E. 3. 21.

4. A man cannot by fine, *by way of remainder, reſerve a leſs eſtate to himſelf, than fee.* And therefore if A. acknowledge a fine to B. in fee, and he render to A. in tail, the remainder to himſelf for life, this remainder is void; for A. had fee ſimple before. Weſt's Symb. ſ. 30. cites * 24 E. 3. 28. 14 H. 4. 31.

If A. levy a fine, *remainder in tail to himſelf*, remainder *to B. in fee*; this remainder in tail is void; for he cannot give to himſelf. Br. Fines, pl. 113. cites 14 H. 4. 31. and †42 E. 3. 5. where he ſays it is not adjudged; yet he ſays it ſeems to be a void remainder.—* Br. Fines, pl. 61. cites S. C. Br. Eſtates, pl. 23. cites S. C.——† Br. Eſtates, pl. 66. S. C.

5. Though

5. Though a fine be acknowledged *to ſeveral*, yet *the right ſhall be limited to one of them only, and the heirs of one*, and not to the heirs of all. Br. Fines, pl. 7. cites 9 H. 6. 42.

6. A. B. C. and D. were ſiſters and coheirs of J. S. and A. B. and C. and their huſbands brought writ of covenant to levy a fine againſt D. and her huſband. And thereby D. and her huſband acknowledged the tenements to be the right of A. as thoſe which her huſband, and ſhe, and the other two huſbands and their wives, had of the gift of D. and her huſband, and further releaſed accordingly. A. B. and C. rendered to D. in tail, to hold of the chief lord by ſervices due *et ſi contigerit ipſam obire ſine hærede de corpore, &c. tunc poſt deceſſum ejus præd' tenementa integra remanerent præd'* A. B. & C. *& hæredibus de corporibus earum legitime procreatis tenendum, &c. remanere ulterius rectis hæredibus J. S. defuncti.* D. died without iſſue, and A. B. and C. and their huſbands brought a *ſcire facias* to execute the ſaid remainder in tail to them as above; and the writ was *oſtenſur' &c. quare tenementa præd' poſt mortem præd D. præfatis A. B. & C.* and their huſbands, as in the right of their wives, *remanere non debeant juxta formam finis præd. Eo quod præd' D. mortua eſt ſine hærede de corpore ſuo exeunte, &c.* Paſch. 29 H. 8. D. 69. a. b. pl. 32, 33.

7. A fine *ſur conuſance de droit come ceo* que il ad de ſon done *generally implies a fee ſimple*; but it is only *by implication*, and therefore there is *no repugnancy to limit an eſtate for life* to the conuſee; for the precedent donation or feoffment, which is ſuppoſed, might be for life only, or * in tail, and the general intendment of the conuſans, may be *qualified by an expreſs limitation.* 1 Salk. 340. Hill. 1 Annæ, B. R. Hunt v. Bourne.———cites 41 Ed. 3. 14. Co. Litt. 9. b.

* Br. Fines, pl. 12. cites 41 E. 3. 14.

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(A. a) Extinguiſhed. What.

D. 157. pl. 28. S. C. confines the ſtate of the caſe to one and the ſame manor. And ſo where it is cited in Mo. 106. 384. and 2 And. 85. and 2 Rep. 73. (d). and Palm. 506. there is no mention of more than one manor.

1. A. Seiſed of *divers manors* in the counties of *B. and C.* by *indenture enrolled* in chancery for 200 *l.* did *demiſe*, grant, and to farm let *to D.* and his heirs his ſaid manors, *rendering thereout annually* to the ſaid A. and his heirs *a rent, with diſtreſs and reentry for non-payment*, and covenanted to do all acts, which ſhould be deviſed, for aſſurance of the ſaid manors, to the intents and uſes aforeſaid; after which, *by other indenture* between them, it was covenanted that the ſaid A. ſhould *levy a fine* to the ſaid D. of the ſaid manors, and that the ſaid fine and all other aſſurances to be made of the ſaid manors, by the ſaid A. to the ſaid D. ſhould be *to the uſes or intents contained in the firſt indenture, and to no other uſes or intents*; after which the ſaid A. infeoffed the ſaid D. to the uſes and conditions in the ſaid firſt indenture mentioned; and after the ſaid A. at requeſt of the ſaid D. and to the uſes in the ſaid firſt indenture, levies a fine to the ſaid D. of the manors in the county of C. and upon all this matter found by office in the court of wards it was, by the opinion of the juſtices, ruled that the rent remained not extinguiſhed by

by the fine, and yet the *fine* is only *of part, viz. in the county of C.* and *not purſuant to the indenture*; for that is, that the fine ſhould be *of manors in the ſaid counties*, &c. Note, a ſtrange caſe, but it ſeems that this is law by branch of 27 H. 8. which ſee 2, 3. P. M. Cur. Ward. 1 And. 18. Puttenham's caſe.

2. A. ſeiſed of a manor, made a *leaſe for years rendering rent*, with clauſe of *re-entry*; and afterwards levied a fine ſur conuſance de droit *to the uſe of himſelf and his heirs*. The rent, being demanded, is behind. Per Dyer Ch. J. A. cannot re-enter; for though in right the rent paſſes without attornment, yet he is without remedy. For it is without attornment, and it would be hard *without attornment* to re-enter. Per Manwood J. though the conuſee himſelf could not, yet the conuſor being ceſty que uſe, who is in by the act of law, ſhall avow, and ſhall re-enter without attornment; for the conuſor is in by the 27 H. 8.—Per Harper J. The heir of the conuſee ſhall avow and re-enter before attornment. 3 Le. 103. pl. 152. Paſch. 26 Eliz. C. B. Anon. 4 Le. 34. S. C.

3. A fine *by one jointenant to his companion* enures by way of releaſe. Mich. 21 Jac. B. R. 2 Roll. R. 398, 444, 472, 485. Euſtace v. Scowen.

4. If I have *land* covered with water, and another has *liberam piſcariam* in it to him and his heirs; clearly if he joins in a fine with me of the land, this extinguiſhes the fiſhery, per Hobart. 2 Roll. R. 500. Hill. 22 Jac. B. R. in caſe of Foliot al. Heliar v. Sanders.

5. Where a fine is levied by him who hath the fee and freehold in him, whatever *right, eſtate, or intereſt*, there is in him beſides, paſſes incluſively in the fine, not by way of transferring the intereſt, but (as it were) *conſolidating with the fee, ſo as to determine and extinguiſh ſuch intereſt*. per Ventris J. 2 Vent. 332. in caſe of Dighton v. Greenvill. Skin. 260. S. C. Knight v. Greenvill.

6. *A term* was *veſted in truſtees for raiſing* 1000 *l. payable to J. S.* who afterwards levies a fine of the land, or ſuffers a recovery of it; this is an extinguiſhment of the charge. 2 Wms's Rep. 605. Trin. 1731. in caſe of D. of Chandois v. Talbot.

(A. a. 2) *Relation* of Fines to what Time, *to avoid Meſne Incumbrances*, &c.

1. It is no plea to plead a fine in bar and *the eſtate of the plaintiff meſne between the conuſance of it, and the execution*; for it ſhall not have relation before the execution; quod nota. Br. Relation, pl. 27. cites 21 H. 6. 17. 8 E. 3. [278]

2. *A. covenants* with B. *to levy a fine, Oct. Mich.* 1 *Car. A. acknowledges a ſtatute to C.* 8 *Oct.* the ſame year; the fine is levied according to the covenant, and the *conuſance taken the* 12*th Oct.* aforeſaid. This conuſee ſhall *avoid the ſaid ſtatute*, by relation to the day of the *eſſoin*, which was before the ſaid 8th Day of October. Mich.

Mich. Term now begins the 23d October by an act made 16 Car. 1. Then the eſſoin was 7th October, and the firſt day of full term the 9th. Jenk. 250. in pl. 40.

(B. a) Of what a Fine may be levied.

S. P. and yet no præcipe lies of it. Co. R. on Fines, 11. cites 19 Aſſ. 12. but it ſhould be 9 Aſſ. 12.

1. FINES have been levied heretofore of a *boilloury of ſalt*, and by ſuch name the profit of the franktenement paſſed. Br. Aſſiſe, pl. 145. cites 9 Aſſ. 12.

2. Fine has been levied of a *common*, and of a *corody*; & ſci. fa. lies of it and execution accordingly. Br. Common, pl. 45. cites 4 E. 4. 1, 2.

3. 32 *H.* 8. 7. *ſ.* 7. Directs writs of covenant, and other writs for fines to be levied, and other aſſurances to be had and made *of parſonages, vicarages, and other profits called ſpiritual*, to be deviſed and granted in chancery, as have been uſed for fines and aſſurances of other lands.

So of an *annuity*; and yet it is a thing perſonal. Co. R. on Fines, 11. cites 11 H. 4. But ſee pl. 11.—Covenant was brought of a *market*, and Keles would have drawn the precipe, and the court would not receive it; for præcipe lies not of it. Co. R. on Fines, 11. cites 13 E. 3. Tit. Fines, 68.——* Denſh. R. on Fines, 14. e contra.——Wood's Inſt. 242.

4. A fine may be of a * *rent-charge de novo*, which had no being before. 21 Ed. 3. 44. Or of a *chief rent*, or other *rent in being*. 18 Ed. 4. 22. Or of a *ſeignory*. 48 Ed. 3. 23. Or of an *acquittal*. 50 Ed. 3. 23. Or of a *chauntry*. 37 Ed. 3. 33. Weſt. Symb. ſ. 25.

S. P. For that ſhould be a wrong to the lord of whom the land is holden, for by the fine it ſhould become frank fee, and not impleadable in his court. 2 Inſt. 513.

5. *But* fines may not be levied of *lands in ancient demeſne*; for if any fine be levied of ſuch lands, it may be reverſed by a writ of diſceit brought by the lord of ancient demeſne; and thereby he ſhall be reſtored to his ſeigniory; and it ſeemeth to be *void between the parties*, becauſe coram non judice. 7 H. 4. 44. 8 H. 4. 23. 21 Ed. 3. 20. Reg. fol. 13. b. de fine adnullando, &c. Yet it is holden good to *bind the parties*, 17 Ed. 3. 3. and 7 H. 4. [44] Bro. Fines, 101, which ſeemeth not to be law. *But if* ſuch fine be *of lands in ancient demeſne, and of lands at the common law*, it ſhall be ſtill good for the lands at the common law. Weſt. Symb. ſ. 25. cites 7 H. 4. 44.

Fines may be levied *of all things inheritable*, being * *in eſſe tempore finis* and certainly expreſſed in the writs. Weſt's Symb. ſ. 25. cites 18 E. 4. 22.——* S. P. Br. Fines, pl. 97. cite. 18 E. 4. 22.

6. Regularly a fine may be levied *of any thing, whereof a præcipe quod reddat or faciat lies*, as the writ of cuſtoms and ſervices; or whereof a præcipe *quod permittat*, as to have common, a way, &c. *or* to be ſhort, where præcipe *quod teneat* doth lie, as the writ of covenant to levy a fine and the like. 2 Inſt. 513.

7. *But in ancient times* fines were levied *of other things, than will be at this day allowed*; and yet thoſe fines ſhall be holden now as available,

available, as they were taken to be, when they were levied. 2 Inſt. 513.

8. Tenant in tail of a *rent* or *common* levies a fine with proclamations; it is very clear that the iſſues ſhall be barred thereby; per Walmſley J. 2 Le. 158. 21 Eliz. C. B. in the caſe of Segar v. Bainton. Jenk. 275. pl. 96.

9. Of a *leaſe for years*, the fine is void as to any ſtrangers; for a freehold muſt be in the cognizor or cognizee; however it may be *good betwixt the parties* by way of eſtoppel, ſo as to conclude them. Wood's Inſt. 242. [279]

10. A fine cannot be levied *of money agreed to be laid out in a purchaſe of land to be ſettled in taile*. But a decree can bind ſuch money, equally as a fine alone could bind the land in this caſe, if bought and ſettled. per Cur. Wms's Rep. 130. Mich. 1710. Benſon v. Benſon. S. P. in a MS. report ſaid to be Ld. Harcourt's of caſes in the Houſe of Lords, ſaid there to be decreed. 24 Feb. 1723. Lady Warwick v. Edwards.

11. Of an *annuity* to a man and his heirs, no fine can be levied. Parliament Caſes 1. Arg.—becauſe it is a thing perſonal. Arg. 3. in caſe of the King v. Ld. Purbeck. Of an annuity *in eſſe* it is good. Otherwiſe not.

12. A fine may be and uſually is, levied of *ſhares in the New River-water*. 2 Wms's Rep. 128. Paſch. 1723. Drybutter v. Bartholomew. Denſh. R. on Fines, 14.

13. Fines may be levied of *all things* in being *which are inheritable*, whether eccleſiaſtical and made temporal, or temporal; as of an *advowſon*, *rectory*, *portion of tithes*, &c. of an *honour*, *manor*, *barony*, *leet*, *meſſuage*, *dove-houſe*, *garden*, *orchard*, *land*, *meadow*, *paſture*, *wood*, *underwood*, *office*, *fiſhing*, *warren*, *fair*, *toll*, *waifs*, *ſtrays*, *&c.* *rent*, *common*, *a hundred*, &c. *And * as fines may be levied of things in poſſeſſion, ſo may they be levied *of a remainder* or *reverſion*, or of a *right in futuro*, or of a *poſſibility*. Wood's Inſt. 242. So of a *way*. Denſh. R. of Fines, 15.—So of *free chapel*. Ibid.—Not of a *court baron or pie-powders*. Ibid.—They are leviable of *all things whereof a præcipe quod reddat lies*. Weſt. Symb. ſ. 25.—Co. R. on Fines, 11. S. P.—And of ſome things whereof *no præcipe lies*, as of *paſture for two oxen*. Co. R. on Fines, 11. cites 4 E. 4. 2. 27 H. 8. 12.——*So* of an *office*. Ibid. cites 19 Aſſ. 12.——*So* of *common of paſture*. Ibid.——*So* of a *way* in a quod permittat. Ibid. cites 2. *E.* 13.——*So* of a *rent newly created*. Ibid. cites 22. E. 4.——So of *eſtovers*, *houſeboot*, *hayboot*, *plowboot*, *and fireboot*. Denſh. R. on Fines, 14.——So of an *office in eſſe*. Denſh. 15.——So of a ‡ *bailywick or wardſhip of a foreſt*. Ibid.——So of *any profit apprender*, which is *certain*; but not where it is *uncertain*, as common ſans number, &c. Such things cannot be granted by fine, becauſe finis finem litibus imponit, and that cannot be where the thing is not certain. Ibid.—It may be of *ſo many loads of boſbues* in fee, or for life, to be taken annually in ſuch a wood. But then this muſt be *in eſſe*, and one of the parties poſſeſſed thereof before the fine. Ibid.——*Weſt. Symb. ſ. 25. cites 42 E. 3. 7. 44 E. 3. 45.——‡ Co. R. on Fines, 11. cites 27 H. 8. 12.

(Ba. 2) *Of what Eſtate* a fine may be levied, in Reſpect of its *having been in* Poſſeſſion of *the King*.

1. Where the *king is intitled by a diſſeiſor or other, who has a defeaſible title*, and the *hands of the king are amoved by due means*, and

§ *after*

after a fine is levied, and then the land is *reſeiſed*; yet the fine is good. Br. Fines, pl. 102. cites 24 E. 3. 65.

2. *But* where the king amoves his hands by *undue means*, and after a fine is levied, and after the king for cauſe re-ſeiſes; this ſhall avoid the fine, by the beſt opinion. Br. Fines, pl. 102. cites 24 E. 3. 65.

(C. a) Of what a Fine may be. By what *Name*.

1. A *Manor* may paſs by the name of a *tenement*. Br. Fines, pl. 66. cites 9 E. 4. 6.

2. The thing of which a fine is to be levied, *ought to be in eſſe* at the time of the fine, *and expreſſed in the fine directly, or by implication*. Br. Fines, pl. 97. cites 18 E. 4. 22.

But where the writ is of a *manor*, the fine cannot be levied *of a houſe*.

3. *As* where the writ is quod teneat *conventionem de* tali *terra*; there upon conuſance of right of the land by him to another, the other may grant and *render a rent, common, &c.* For it is implied; becauſe it *is iſſuing out of the ſame land as is in the writ*. Br. Fines, pl. 97. cites 18 E. 4. 22.

And where it is of *land in D.* fine cannot be levied *of land in S.* Br. Fines, pl. 97. cites 18 E. 4. 22.

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4. An *honour* may paſs *by the name of a manor*, or by its proper name; as de honore de Tickhill, or de manerio de Tickhill. Weſt. Symb. ſ. 26.

For if any of the towns, into which the manor extends, be omitted, nothing of the manor in that town paſſes. Weſt's Symb. ſ. 26. cites 5 E. 4. 103.

5. It ſufficeth alſo to demand a *manor* by his proper name, *without naming the town wherein it lieth*; for it may be out of any town, or extend into ſeveral towns and counties, as de manerio de D. cum pertinentiis; yet it ſeems *beſt to expreſs all the ſeveral towns*, into which it extendeth; as de manerio de S. cum pertinentiis in D. & E. Weſt. Symb. ſ. 26. cites 19 E. 4. fo. 9. a. 43 E. 3. fo. 9. a. Bract. lib. 4. c. 31. § 3. 9 Ed. 4. fo. 61. 9. a. 16. a. 17. b. 11 H. 7. fo. 22. b. 49.

6. A *caſtle* or an *hundred* may be parcel of a manor, and paſs by the name of the *manor, whereof they are parcel*, 26 Aſſ. 54. And one manor may be parcel of another, 2 Ed. 3. fo. 36. And a *caſtle* may be demanded *by his proper name*, as de caſtello de B. cum pertinentiis, 1 E. 3. fo. 4. and an *hundred* may be demanded *by itſelf*, as de hundredo de S. 27 H. 6. fo. 2. Weſt. Symb. § 26.

7. A *chapel* or an *hoſpital* muſt be demanded by the name of a *meſſuage*. Weſt. Symb. § 26. cites 13 Aſſ. 2.

8. *Molendinum* is good, *without* adding *ventriticum or aquaticum*; albeit the latter be more uſual. Weſt. Symb. § 26. cites 44 E. 3. 13.

In ſci. fa. it was agreed, that a fine is good to *paſs a reverſion in tail, without expreſſing the reverſion*; for it was levied by him in reverſion in tail *ſur conuſance de droit* to two, and they rendered again to the conuſor in tail, the remainder to the

9. Of a *reverſion* by the name of the *land*, or otherwiſe. Weſt's Symb. § 26. cites 43 Ed. 3. 22.

the plaintiff in the ſci. fa. and he ſued execution & habuit; quod nota: and yet Thorp dixit pro lege eodem anno, fo. 15. that where a fine is levied ſur conuſance de droit, or by grant and render, *by him who hath nothing but the reverſion*, the conuſee ſhall not have action thereof, where there is no *mention of the reverſion*; ſc. it is not * compriſed, but it ſeems clearly that by fine levied *ſur conuſance de droit come ceo*, &c. it is good to paſs the reverſion. Br. Fines, pl. 18. cites 43 E. 3. 22. pl. 39. cites 37 H. 6. 5.—Br. Fines, pl. 97. cites 18 E. 4. 22.——* The larger edition of Brook in folio is (e contra), the ſmaller in folio is (examin); the 4to edition is (exie).

10. Land is to be demanded *by the certain meaſure of the ſuperficial quantity* thereof, hida, carucata, bovata, virgata, acra, roda terræ. And in like manner, boſcus, ſubboſcus, bruera, mora, juncaria, mariſcus & alnetum, & ruſcaria, may be demanded by the number of acres thereof. 16 Aſſ. 9. Weſt. Symb. § 26.

11. *Turbary* may be demanded by the name of *moore*. Weſt. Symb. § 26.

12. *Houſeboot*, *hayboot*, *and plowboot*, may be demanded by the name of *eſtovers*: thus, de rationabili eſtoverio in boſcis, viz. in decem acris boſci ipſius A. in D. &c. Weſt. Symb. § 26.

13. *Parſonages*, *rectories*, *advowſons*, *vicarages*, *or tythes impropriate*, paſs not by the name de advocatione eccleſiæ, but *de rectoria eccleſiæ* de S. *cum pertinentiis*. *But* when it is only of *a preſentation*, it muſt be *de advocatione* eccleſiæ de S. and *not cum pertinentiis*. Weſt. Symb. § 26.

And of all *vicarages endowed* the writ muſt be *de advocatione* vicariæ eccleſiæ de S. and *not cum pertinentiis*. And where *no vicarage is endowed*, it paſſes under theſe words *de advocatione eccleſiæ de S.* &c. Weſt. Symb. ſ. 26.

14. If an entire manor, meſſuage, or other *entire thing* be *divided* or parted, and after a *fine* is *to be levied of ſome of the parts* of the thing ſo ſevered, then *muſt not* the fine *be de medietate*, or *quarta parte*, or other part of the manor, meſſuage, or other thing; *but* ſuch part muſt be demanded *by the name of the whole thing*. Weſt's Symb. ſ. 26.

As if the *manor* of D. be *divided into 2 parts*, the fine of the one part (if the diviſion be ſo made, that the manor of that part be not extinct) muſt be *de manerio de D.* Weſt Symb. ſ. 26.

15. *So* if a *meſſuage and 20 acres of land be parted into two parts*; the fine of the one part muſt be *de uno meſuagio & decem acris terræ*, &c. and not de medietate unius meſuagii, & 20 acrarum terræ; for the things new divided from the reſt, are now become whole things by themſelves, though leſs in quantity than the whole was before diviſion thereof made. If a thing be twice named in a writ of covenant, it hurteth not, as a manor and a hundred, parcel of the ſame manor. Weſt. Symb. § 26. cites 27 H. 8. 2.

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16. A fine was levied *de duobus tenementis*, and for that reaſon was reverſed; for the word tenement does not comprehend any certainty; for it takes in meſuage, land, meadow, paſture, &c. and whatſoever lies in tenure; and it will paſs rent or common. Le. 188. Trin. 31 Eliz. B. R. Steed v. Courtneys.

17. A *manor in reputation*, which is not a manor in truth, does not *paſs* by the name of a manor *in a fine or recovery*, for they are grounded on original writs, which ought to be certain, and not to be taken by intendment; but otherwiſe of a grant, or feoffment; for there the intent of the parties ſhall help it. Noy. 7. Johnſon v. Heydon.

A manor, in reputation only, will paſs by the name of a manor, though not demandable by it. Lat. 63. in caſe of Hems v. Stroud.——Cro. E. 524, 707. Mich. 38 and 39 Eliz. B. R. Mallet v. Mallet.——Lev. 28. * THINN v. THINN, contra to Noy. 7. the indenture to lead the uſes,

uſes, ſhewing the intent to paſs the manor and all land parcel——and by the grant of ſuch a reputed manor, an *advowſon* ſhall paſs as appendant. Mich. 32 and 33 Eliz. C. B. Le. 207. Long v. Hemmings.———Dod. of Adv. 28.———See Preſidents (B).——S. P. Savil. 113. Paſch. 28 Eliz. Thetford's caſe.———* S. C. adjudged accordingly. Vent. 51.——— And Sid. 190. Paſch. 16 Car. 2. B. R.

For rent is a *collateral thing*, and the fine is not levied of it. See Cro. J. 60.

18. A fine of *land* will not be a bar of * *rent*; as leſſee for life, remainder for life of rent; the firſt leſſee purchaſeth the land, and levies a fine of that; this ſhall not bind him in remainder of the rent, per Winch J. 2 Brownl. 155. in caſe of Bicknell v. Tucker. ——cites Palmer's caſe, † and Smith and Stapleton's caſe.

——The ſame of *common*. Ibid.———But where the rent was granted in tail, and iſſuing out of a manor, a fine of the *manor*, with an *averment that the agreement was to bar the rent*, per Hobert Ch. J. and Harvey J. v. Hutton J. is a bar of the rent, Cro. J. 699. Hill. 22 Jac. B. R. Helliar v. Sanders.——2 Roll. R. 500. Foliot v. Sanders. S. C.———Winch. 109. 121. adjudged by two J. againſt Hutton. S. C. by the name of Hilliard v. Sanders.

* Jenk. 275. pl. 96. contra. cites it as adjudged, that by fine with proclamations the rent paſſes incluſively. 20 Jac. 1. Hilliard's caſe.———† Pl. Com. 435.

Winch. 123. S. P. per Hobert.

19. If tenant in tail of any *office* levies a fine of *land belonging* to the office, this ſhall bind his iſſue; yet the land was not entailed, but the office; per Hobart Ch. J. 2 Roll. R. 500. Hill. 22 Jac. in caſe of Folliot v. Sanders.

20. A fine may be levied of a *ſhare in the New River water*, by the deſcription of *ſo much land, aqua coopert.* 2 Wms's Rep. 128. Paſch. 1723. Drybutter v. Bartholomew.

(D. a) Who ſhall be barred by the Fine.

1. IF one hath a *remainder, or a reverſion*, depending *upon an eſtate for years*, or by ſtatute *ſtaple*, ſtatute *merchant*, or *elegit*, and the *termor be diſſeiſed*, and a fine levied, &c. and 5 years paſs; they be all barred thereby: for that *theſe termors might preſently have entered*, and *he in the reverſion* or remainder, for ſuch diſſeiſin *might have had an aſſiſe*. So that the ſtat. 4 H. 7. 24. ſeems to bar the termors through negligence, by this word intereſt, which comprehends a term. Weſt's Symb. ſ. 183. cites Pl. C. 374. a.

Vid. (H. a) —2 Inſt. 519. S. C. by the name of Punie v. Howes.—Cro. E. 219.

2. If an *infant heir of one beyond ſea* dying there, makes not his claim within 5 years after the death of his father, being of full age, and without any *impediment*, &c. he ſhall be barred; per Anderſon, Ch. J. Le. 215. Mich. 32 and 33 Eliz. C. B. in Cotton's caſe.

S. C. by name of Smy v. June alias Chown.

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3. *Deviſee* is barred by fine, though *levied before his entry*. Cro. C. 201. Mich. 6 Car. B. R. Hulm v. Heylock.

4. Fine and non-claim bars not a man in *Ireland*; but not becauſe Ireland is not a member of England, but *becauſe of abſence*, as in caſe of impriſonment. Arg. Cart. 187.

S. C. cited Arg. Show. 40.

5. If there be *tenant by elegit* of land, and a fine be levied of that land, and 5 years with non-claim paſs; the intereſt of the tenant by elegit is bound, according to SAFFYN's caſe. 5 Rep. 124. Otherwiſe if the land had *not been actually extended*; and if an inquiſition upon

upon an elegit be found, the party before entry has the poſſeſſion, and a fine with non-claim ſhall bar his right; for before actual entry, he may have ejectment or treſpaſs, and ſo not like to an intereſſe termini. Mod. 217. Trin. 28 Car. 2. C. B. Ognel v. Ld. Arlington & al.

6. A fine and 5 years non-claim will bar the intereſt of tenant by *ſtatute ſtaple*, *after liberate*, before entry. See 2 Vent. 321, &c. Dighton v. Greenvill. Show. 36. Trin. 1 W. & M. S. C. debated.

——Skin. 260. Knight v. Greenvill S. C.

7. A fine *by mortgagor to a ſecond mortgagee* will not bar the *firſt mortgagee*, though more than 5 years paſs; the mortgagor being all that time in poſſeſſion, and paying the intereſt, and ſo was tenant at will to the firſt mortgagee. Carth. 414. Trin. 9 W. 3. B. R. Hulm. v. Hatton.

(D. a. 2) *Barred.* Who. Iſſue in Tail. Where Tenant in Tail is Cognizee.

1. A. by fine gives an eſtate tail to B. remainder in tail to C. afterwards A. the *donor*, *by another fine limits*, *(vice verſa)* viz. *to C. in tail*, *remainder to B. in tail*; yet the firſt intail ſtands unaltered. For the fine being levied to the tenants in tail, the words were all the words of A. and not of B. and C. and though B. and C. could be eſtopped, yet their iſſue ſhould be remitted. Br. Fines, pl. 73. cites 8 Aſſ. 33.

2. Where a *fine for life is levied to tenant in tail on* [*grant and*] *render*, his eſtate by this is changed. But Brook makes a quære, and ſays, that it ſeems the beſt opinion is contra, unleſs it be a *fine executed*; but a fine ſur grant and render, &c. which are not executed, is no diſcontinuance nor concluſion to the heir in tail; nor does the ſtatute de finibus of averments hold place, but of fee ſimple, and where he claims as heir; but the heir in tail claims by the donor, therefore it ſeems, his entry is lawful. Br. Eſtoppel, pl. 60. cites 8 H. 4. 7.

3. *No fine* levied by tenant in tail barreth his iſſue immediately, *but where the tenant in tail is cognizor.* Weſt's Symb. ſ. 180.

4. *As* if tenant in tail bring a writ of *covenant againſt a ſtranger*, and he recognize the land to be the right of the tenant in tail, as that which he hath of his gift, &c. and the *tenant in tail grants and renders* the land *to the cognizor for years*, yielding rent, &c. and dies; this fine is void againſt the iſſue in tail. Weſt's Symb. ſ. 180. cites M. 10 and 11 Eliz. Dy. 279. pl. 7. 36 H. 8. Br. Fines, 118. After the death of the tenant in tail, the iſſue accepted the rent. The queſtion was, if this ſhould bar the iſſue of his entry? D. 279. pl. 7. but no judgment.

5. *A. and M.* his wife were *ſeiſed for life of the wife*, as in her right, the *remainder to E. C. in tail*, the remainder *to the ſaid E. C. in fee*. *A. and M.* his wife *levied a fine* ſur conuſance de droit, *come ceo, &c. to the ſaid E. C.* with proclamations, who *granted and rendered rent of* 27 *l.* 10 *s. to the conuſors for term of their lives*, with S. P. and ſeems to be S. C. D. 213. b. pl. 41. Paſch. 4 Eliz. by the beſt opi-

nion. But says, that the case was never argued.—Kelw. 216. pl. 15. S. C. by name of Parker v. Payne.—And. 6. pl. 11. S. C.—West's Sym. S. 180. cites Pl. C. 425. b. 15 Eliz. per Thornton.——S. P. Jenk. 275. pl. 96.

clause of distress; and after *E. C. dies*, and the land descended to H. C. her son and heir in tail, who leases the land to one P. for years, and after M. dies; A. distreined * for the rent, and he brought replevin; and in this case 2 points were resolved and adjudged. 1. That, against such fine accepted by tenant in tail, the *issue may aver continuance* of the seisin by force of the tail, and the issue in tail is not estopped by the admittance and acceptance of his ancestor. 2. That the grant and render of the rent was not within the act of 4 H. 7. or 32 H. 8. because the fine was not levied of the land itself, that was intailed, but of the rent newly created out of the land. 3 Rep. 89. b. 90. a. cites it as adjudged M. 3 and 4 Eliz. C. B. Rot. 1483. Conisby's case.

6. Grandfather, father and son; the grandfather by indenture makes *feoffment in fee rendering rent* to him and his heirs, and dies; the father *accepts* the rent; the feoffee levies a fine with proclamation; 5 *years pass*, and then the father dies. The point was, whether the acceptance of the rent by the father had extinguished his right to the intail, or whether it is an estoppel only? for if he is only estopped, then he having a right at the time the fine was levied, and the 5 years incurring in his time, the son was barred; but if he had extinguished his interest, then the son, being the first to whom the right came after the fine levied, is not barred by the 5 years incurred in the life of the father. It was adjudged per Walmsley and Clench J. at Lancaster assises, that the issue was barred. But the court here thought that he is not barred. Because the *acceptance is a conclusion only, and does not extinguish the right*. Mo. 301. Pasch. 33 Eliz. Hulme v. Jee, alias Ice.

7. If a fine be *levied to tenant in tail*, and he grants and *renders* the land *to him and his heirs*, and *dies before execution*, this is no discontinuance; otherwise it is, if it had been executed in the life of the tenant in tail. Co. Litt. 333. b.

8. If tenant in tail *accepts a fine, with render to another for years*, this shall bar him, because it works a discontinuance; but otherwise, where it is *for life*; per Hutton. J. Winch. 123. Hill. 22 Jac. B. R. in case of Hilliard v. Sanders.

9. Tenant in tail *accepts a fine sur conusance de droit come ceo*, and then suffers a recovery; this makes no alteration of his estate. Vent. 257. Pasch. 26 Car. 2. B. R. Anon.——Per Hale Ch. J. Mod. 117. Green v. Proud. S. C.

(E. a) Of Lands, &c. in *Lieu Conus*.

1. ASSISE of tenements in W. the defendant *pleaded estoppel by fine* levied *of the same tenements* by the ancestor of the plaintiff in O. *Judgment, if the plaintiff shall say that they are in W.* and the *plaintiff said that O. is a hamlet of W.* and a good plea; by which they pleaded over. Br. Brief, pl. 292. cites 28 Ass. 6.

2. Assise

2. Aſſiſe brought in *nova foreſta* is good, and yet no vill nor hamlet. Co. R. on Fines 12. cites 18 Libr. Aſſ. 30.

3. And yet in ſcire facias to execute a fine levied *of lands in D.* the tenant *ſhall not ſay that there is no ſuch vill.* Co. R. on Fines 12. cites 18 E. 4. 51.

4. A fine may be levied of a *caſtle or* of a *manor, without expreſſing in what vill, or hamlet.* Co. R. on Fines, 12.

5. A fine is good in a * *hamlet.* 38 Ed. 3. fo. 19. 18 Ed. 4. fo. 6. and 7 Ed. 6. Br. Fines 44. and 91. or in a *town decayed*, 7 Ed. 6. Br. Fines 91. Nevertheleſs it is alſo *good to name the town wherein* the hamlet is, as it ſeemeth; and that *with addition* for diſtinction, if there be divers towns of the ſame name in the ſame county, Weſt's Symb. ſ. 27.

Co. R. on Fines, 12. ſeems to think fine of lands in a hamlet, ought not to be ‖ receiv-

ed, but if it is received, then it is good.——Hale ſaid in 1 H. 8. 9. a. That if a fine be levied in A. B. and C. and none of them is a vill nor hamlet, but *certain manſions, or houſes*, if it be accepted it is good. Co. R. on Fines, 12.

A *ſcire facias* lies on a fine levied in a *hamlet* which proves ſuch fine to be good. Br. Fines, pl. 93. cites 8 E. 4. 6.——* Co. R. on Fines, 12. cites † 38 H. 3. 20. per Thorpe, and 8 E. 4. 6.——† This ſhould be 38 E. 3. 20. a. in principio.

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6. If a *manor extend into* divers towns, as *A. B. C.* it is good to expreſs all or none: as *de manerio de S. in A. B. C.* for if any of the towns be omitted none of the manor in that town paſſeth. Yet a fine of a manor, *cum pertinentiis* would have *carried the whole manor.* 9 Ed. 4. 6. Weſt's Symb. ſ. 27.

But if a man have *divers manors of one name:* as *South S. and North S.* it is good, in a

writ of one of the ſame manors, to expreſs certainly which of them is intended to be paſſed, 47 Ed. 3. 12 H. 7. 6. Albeit it is thought good enough by the name of the manor of S. without addition; for certainty is always beſt. Weſt's Symb. ſ. 27.

7. An action of covenant was brought upon an indenture of feoffment by defendant's wife before marriage of *lands* lying *in Ilton in the pariſh of Marſham*, whereby ſhe covenanted to aſſure, &c. the plaintiff aſſigns a breach, that he *tendered a note* of a fine to the defendants, before certain commiſſioners, *of lands in the pariſh of Marſham*, and requeſted the defendants to acknowledge the fine, but that the defendants refuſed. To this defendants plead, that *they were ſeiſed of other lands, in the pariſh of Marſham, no part whereof were contained in the deed*, and becauſe thoſe lands not contained in the deed, were contained in the note of the fine, therefore they refuſed to acknowledge it. To this the plaintiff demurred. But after argument, the court were of opinion for the defendants; for though a man is not obliged in a fine, to ſet out the parcels exactly agreeable to the deed, and it is uſual to put in rather more, leaſt in caſe of a miſtake, he may loſe part of the land; yet here the covenant was, to levy a fine of lands in Ilton, in the pariſh of Marſham, and the note tendered, is of lands in the pariſh of Marſham. Now a fine may be levied of lands lying in a vill; and therefore thoſe not being lands in the vill of which defendant covenanted to levy the fine it ſeems a good excuſe, and thereupon judgment was given for the defendants, unleſs cauſe, &c. before the end of the term. Paſch. 12 Geo. 2. C. B. Danby v. Gregg and Ux.

(E. a. 2) Of Lands in ſeveral Vills, &c.

1. A fine was levied of lands *in Blandford Forum.* Reſolved that this ſhall not paſs lands in a *hamlet in that town, there being conſtables diſtinct* in Blandford Forum from others that were in the hamlet; ſo that they were as 2 vills. Vent. 143. Trin. 23 Car. 2. B. R. Anon.

But where in the hamlet there was *only a tything-man and the conſtables of the vill exerciſed authority in the hamlet*, (which proves it to be but as a hamlet) it was reſolved that the fine conveyed the lands in the hamlet. *A pariſh* may contain ten vills, and if a fine be levied of lands in the pariſh, this carries whatſoever is in any of the vills. *So* where there are *diverſe vills*, if the *conſtablewick of one*, * *goes over all the reſt*, that is the ſuperior or mother vill, and the land which is in the other, ſhall paſs *per nomen* of all the lands in that. But if found that they had diſtinct conſtables, and could not interfere in their authority, it would be otherwiſe. Vent. 170. Mich. 23 Car. 2. B. R. Waldron v. Ruſcarrit.——Mod. 78. S. C.——* In ſuch caſe theſe may go for ſeveral vills, or one vill. per Hale, Ch. J. Mod. 117. in caſe of Green v. Proude.

If the *pariſh of D. contains* 10 *villi*, and a fine or recovery is had *of land in D.* this does not extend to the lands in the other vills out of the vill of D. Trin. 4 Jac. B. R. Cro. J. 120. Stork v. Fox.——S. C. cited and agreed. Sid. 10. in caſe of Weſton v. Carter.

If there be a *vill called R. within the pariſh of R.* and a recovery is ſuffered of *lands in R.* and ſays not in the pariſh of R. but in the deed, to make the tenant to the præcipe, and in which he covenanted to ſuffer the recovery, the lands were mentioned to be in the pariſh of R. the lands in the pariſh of R. do paſs; for the indenture and recovery make but one conveyance; and it was found by verdict, that the intention of the parties was to paſs both. And as to this purpoſe, the court was all of opinion, that there was no difference between a fine and a recovery. 2 Mod. 233. Trin. 29 Car. 2. C. B. Addiſon v. Otway.

[285] 2. *But* if a fine be levied *of lands in a* * *pariſh*, it ſhall extend to all the vills in that pariſh. Vent. 143. Anon. ut ſup.

* The curſitors of late have been directed to make out writs of lands in parochia. 2 Vent. 32. in Sir John Otway's caſe.——2 Mod. 238. S. C.

(E. a. 3) Claim, or Entry to avoid a Fine. Made How. Entry into Part of the Land, &c.

1. If a *diſſeiſor of* 2 *acres levies a fine of both*, the diſſeiſee may enter into one acre only, and this ſhall not be an entry into both, though they are *in the ſeiſin of one and the ſame perſon, and of one and the ſame title.* Co. R. on Fines 13.

2. *But* if the diſſeiſor *leaſeth for* 20 *years part of the land*, whereof the diſſeiſin was committed, and the *diſſeiſee* afterwards *entereth into the land*, which continueth *in the poſſeſſion of the diſſeiſor, in the name of the whole*, the ſame entry ſhall not extend to the land leaſed; for here the leſſee is in by title. Le. 51. Paſch. 29 Eliz. C. B. Potter v. Steddal.

3. *But* if *tenant for life*, of land, *leaſe parcel* thereof to hold *at will*, and being in poſſeſſion of the reſidue *levies a fine of the whole*; the leſſor *enters into the land*, which was *let at will*, in point of *forfeiture* in the name of the whole; it was holden, that the ſame is a good entry for the whole; for in this caſe he is *not in by title*; becauſe when tenant for life leaſeth it at will, and afterwards levies

 a fine,

a fine, the ſame is a determination of the will. Le. 51, 52. Paſch. 29 Eliz. C. B. Potter v. Steddall.

4. If diſſeiſor, &c. make *ſeveral leaſes of ſeveral parcels*, viz. of diverſe houſes, *for years to ſeveral perſons*, the entry into one, in the name of all, is good for all. *But* otherwiſe it is, if the leaſes were *for lives*. D. 337. b. Marg. pl. 37. cites M. 42 and 43 Eliz. B. R. Goodman v. Gerners.

If the ſeveral leſſees of the ſeveral parcels *claim under the ſame title*, the entry upon one parcel, in the name of all, is good for the whole. D. 337. b. Marg. pl. 37. cites M. 42 and 43 Eliz. B. R. Dalton v. Hammond.

In the caſe of leaſes for years (as above) of lands in the ſame county, it was held good by Jones, Doderidge and Crew, becauſe the *freehold is in one and the ſame county*. D. 337. b. Marg. pl. 37. cites Hill. 22 Jac. B. R. Rot. 133. Argoll (Lady) v. Cheyney.——Lat. 71. S. C. Palm. 402. S. C.

(E. a. 4) Claim or *Entry* to avoid a Fine. How, *into Part. In Reſpect of the Place where.*

1. In an ejectione firmæ for lands in Wales, the caſe upon a ſpecial verdict was, that a *man ſeiſed in fee* of lands, *for continuance of them in his name, and for the maintenance of his brother, makes a leaſe for* 500 *years in truſt, that himſelf ſhould receive the profits during his life*, and that afterwards, *his brother ſhould* enjoy them; with ſome other truſts. And *afterwards being in poſſeſſion* according to the truſt, he *covenanted with other perſons*, (not with the leſſees) *to ſtand ſeiſed* of the ſaid lands, *upon the ſame conſiderations* as were mentioned in the leaſe, *to* the uſe of *himſelf for life*, with *remainders over*, according to the truſts; and further, *that the ſaid leaſe and all eſtates made, or to be made by himſelf*, ſhould be and enure *to the ſame uſes*; *and levies a fine*, and 5 *years paſs*, the *leſſor being in poſſeſſion* according to the truſt, and enjoying the profits during his life; afterwards the *leſſor dies*, and *one of the leſſees enters into part* of the lands *in one county (which was not compriſed in the fine) claiming all* the lands *in the other county*. It was inſiſted among other things, that this claim was not well made, being *in another county*. And Hale, Ch. B. ſaid, that if a claim had been requiſite in this caſe, (which *he thought it was not) there was no colour whereby to make this claim good. Hard. 400, 401. Paſch. 17 Car. 2. In Scacc. Focus v. Saliſbury.

Diſſeiſee of lands in the counties of A. B. and C. entered by attorney into the lands in B. and C. in the name of all the lands in A. B. and C. The court held that this was not a good entry for the lands in A. becauſe ceſty que uſe, who is the conuſee, is in by title, &c. wherefore the plaintiff had judgment to recover. D. 337. b. pl. 37. cites 9 H. 7. accordingly.

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(F. a) *Claim* to avoid Fines. *When* to be made. And in what Caſes it may be made at any Time.

1. 1 *R.* 3. 7. *Confines the claim of all perſons, both privy and ſtrangers, (except women covert not parties to the fine, perſons under age, in priſon, out of the realm, or not of ſound mind) to* 5 *years after proclamation.*

Strangers, to whom a right comes after the fine ingroſſed, muſt claim within 5 *years after ſuch right accrues.*

Baron feiſed in fee levied a fine with proclamations, and then was *outlawed of treaſon*, and died, the feme living. The conuſees conveyed the lands to the queen. The 5 years paſs after the death of the baron. The *attainder is reverſed for error* by the heir of the baron. It was reſolved, that the feme was not aided by this clauſe to demand her *dower*; for in reſpect of the baron's attainder, ſhe had no right of dower after the death of her huſband, nor can have action to recover it according to the ſaving. But by the former clauſe ſhe is to be aided; for in this caſe the action and right of dower accrued to her after the reverſal of the attainder, by reaſon of a title of record before the fine, becauſe of the ſeiſin in fee, and the marriage before the fine levied. 13 Rep. 19. Ninian Menvil's caſe.—— 3 Inſt. 215. S. C.——Mo. 639. S. C.

Femes covert, &c. or their heirs muſt claim within 5 years after ſuch imperfections removed.

3. The *year and day*, in which a ſtranger was to make his claim at common law, was to be computed *from the time of the fine levied*, and *not from the execution ſued*. Co. R. on Fines, 13.

So it is of *an infant being party* to the fine, *and having a preſent right*; if he *die during his infancy*, he or his heirs may enter or take his action at any time. 2 Inſt. 519.

4. For that *perſons out of the realm, at the time of the fine levied*, amongſt others *having a preſent right* are excepted out of the body of the act, (which worketh the bar;) therefore, where he that is beyond ſea at the time of the fine levied, and never returns, is within the exception of the act, he and his heirs *may enter or take his action at any time*; but in caſe he *doth return*, he and his heirs muſt enter, or take his action *within 5 years after his return*. 2 Inſt. 519.

So it is of a perſon that is *non compos mentis* which is by the act of God, if he *die while he is non compos* mentis. 2 Inſt. 519.

Or a *man in priſon*, which is by act in law, if he *die in priſon*. 2 Inſt. 519.

Or a *feme covert*, (which is by her own act) if ſhe *die* while ſhe is *covert*, being no party to the fine; for all theſe are within the reaſon of the caſe adjudged of him that is out of the realm (which going out of the realm was his own act) and never returned. 2 Inſt. 519, 520.

2. Weſton J. ſaid, that upon the word *(accrue) in the ſtat.* 4 *H.* 7. if the *father die ſeiſed*, and his *eldeſt ſon be in religion*, and the *youngeſt ſon* [enters and] *is diſſeiſed*, and then a *fine is levied* with proclamations, and 5 years paſs, and *after the five years the eldeſt is deraigned*, he ſhall be aided by the 2d ſaving. Pl. C. 373.

2. If the *tenant ceaſe one year, part whereof was before the fine*, and proclamations paſſed, *and another year ended after the proclamations*. Now thoſe two years are but one cauſe or matter which gives the ceſſavit, and not two matters, and therefore the *lord ſhall have his ceſſavit* 20 *years after* the proclamations, and ſhall not be bound to 5 years. For the purview was not againſt him, he having no right at the time of the fine, nor was this title in eſſe at the time, though the *ceſſer commenced before the fine*, but the title accrued all after, viz. at the end of the 2 years. Pl. C. 373. a. b. a nota of the Reporter.

Weſt's Symb. 60. a. b. ſ. 188. cites Pl. C. 373.

9. Thoſe that have *neither preſent nor future right, but only a poſſibility* at the time of levying the fine, *or* whoſe right *groweth either entirely after the proclamations*, or *partly before and partly after*, may enter and claim when they pleaſe. As if the huſband doth levy a fine of his lands, whereof his wife is dowable, and dies, and then 5 years paſs, &c. Yet the wife is not barred of her *dower*. For before his death the wife had only a *poſſibility of dower, and not a title* to it. Wood's Inſt. 246.

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10. A

10. A *man ſeiſed in fee* of lands, *makes a leaſe for* 500 *years in truſt, that himſelf ſhould receive the profits during his life*, with remainders over, and *afterwards being in poſſeſſion*, according to the truſt, *he covenanted with other perſons*, (not the leſſees) *to ſtand ſeiſed* of the ſaid lands, *upon the ſame conſideration*, as was mentioned in the ſaid leaſe, *to* the uſe of *himſelf for life*, with *remainders over*, according to the ſaid truſts, *and* further, *that the ſaid leaſe, and all eſtates made, or to be made by himſelf, ſhould be*, and enure *to the ſame uſes, and levied a fine*, and 5 *years paſſed*, the *leſſor being in poſſeſſion* according to the truſts, and enjoying the profits during his life; afterwards the *leſſor dies*, and *one of the leſſees enters into part* of the lands *in one county not compriſed in the fine, claiming all* the lands *in the other county*. It was inſiſted among other things, that this claim was not well made, being *after the death of the leſſor*, and Hale Ch. B. ſaid that if a claim had been requiſite in this caſe, (which he thought it was not) there was no colour whereby to make this claim good. Hard. 400, 401. Paſch. 17 Car. 2. In the Exchequer. Focus v. Saliſbury.

11. A. deviſed lands *to B. for life, and if B. leave iſſue male, then to ſuch iſſue male and his heirs for ever*, and *if B. leave no iſſue male, then to C.* in fee, remainder over. *B. ſuffered a recovery* to the uſe of him and his heirs and died. Ld. C. Parker held, that upon this recovery by B. he being but tenant for life, and the heir of A. having the reverſion deſcended to him, he had a *right of entry commenced on B.'s ſuffering the recovery, but had no new right of entry on B.'s death*; and that this was not like the common caſe of tenant for life with reverſion in fee to J. S. where reverſioner may ſtay until the death of tenant for life; but that here, *the only title which the heir could poſſibly have, muſt be by the forfeiture of B.* For if there was no forfeiture, the remainder muſt go, upon B.'s death, either to B.'s iſſue, if any, or if none, then, to the remainder man. Wms's Rep. 505, 506. 520. Mich. 1718. Carter v. Barnardiſton.

(F. a. 2) *Claim* or Entry to avoid a Fine. *By whom* to be made.

1. *Ceſty que uſe in tail, remainder over in tail*, after the ſtatute of 27 H. 8. levied a fine with proclamations, and had iſſue and died within 3 years after the fine levied. And the iſſue after dies without iſſue, before any entry made by the feoffees; and after, *within 5 years a ſtranger*, (friend to the remainder man,) *without any warrant, requeſt, or commandment of the feoffees*, or any of them, *entered pro* * [*et in*] *nomine of the ſurvivor, or the heir of the ſurvivor of the feoffees*, to the intent to revive the uſe of the remainder man, *without naming the ſurvivor in certain, who he was*. This was found ſo by ſpecial verdict. And the queſtion was if good or not? See D. 312. Trin. 12 Eliz. pl. 87. Anon.

Bendl. 305. ſeems to be S. C. ſays, that he was of counſel with the demandant, and that no judgment was given. —D. 312. b. Marg. pl. 87. ſays the verdict was uncertain and void, becauſe the entry was uncertain. Ld. Sands v. Brav.——Br. Entre Cong. pl. 123. S. P. cites 31 H. 8. that it is good and ſhall avoid the fine; for that the frank-tenement is in the feoffees

feoffees until they disagree, or until another enters. But vid. Postea Ld. Awdley's case.—*Bendl. 307. *Pro & in nomine hered. præd. W. episcopi L. tunc defuncti si idem episcopus fuit superviviens eorundem, &c.*

This fine is not avoided; for by the express words of statute of 4 H. 7. *a fine shall bind unless avoided by entry, claim, or action of him who has right thereto, within the 5 years.* And

2. It was agreed by the Ch. Justices, that if the disseisor levy a fine with proclamations according to the stat. 4 H. 7. and a *stranger* within 5 years after the proclamations *enter in the right of the disseisee*, without the privity or consent of the disseisee, that this shall not avoid the bar of the fine, *unless* that *he assent* to it *within the 5 years*; for the words of the statute are *so, that they pursue their title, claim*, or interest, *by way of action, or lawful entry within 5 years, &c.* And that, which is done by * another without their assent, is not a pursuing by them according to the intent of the statute; for otherwise, by such means against the will of the disseisee, every stranger may avoid such a fine, which is not the intent of the statute. Poph. 108. Pollard v. Luttrell.

it is not sufficient for a *stranger* to enter, unless it be *by command of him that has the right.* But Gawdy J. said, that peradventure the *agreement of disseisee within the 5 years* after such entry made in his name would serve. But agreement afterwards would not. Quære. Popham, Ch. J. said, that all the justices in Serjeant's-Inn were of the same opinion in the principal case. Cro. E. 561. Ld. Audley v. Pollard.———This was an ejectment, and in evidence in B. R. it was directed by all the justices, Popham, Gawdy, Clench and Fenner, that if one be seised of land, to which another has right of entry, and the tenant in possession levies a fine with proclamation, that he, who right has, ought to enter in person, or make warrant special or *commandment to one to enter for him*, otherwise he does not preserve his right; for though he has right of entry, which naturally by the common law may be reduced into possession by the entry of a *stranger* in his name, yet it is not so of a claim to avoid a fine. Because *the body of the statute of fines binds the right, unless the party claims within 5 years*, by which election is given to him that has right at the time of the fine to claim, or not, and so he ought to determine whether he will claim or not; and a stranger cannot make this *election* without his direction. And Popham, Ch. J. said that it was so resolved, about the 4 Eliz. in the Ld. STURTON'S CASE. Mo. 450. Luttrell's case. ———Mo. 457. is, that Ld. Audley the disseisor levied a fine with proclamations in 5 Eliz. the disseisee not knowing thereof, and a stranger entered to the use of the disseisee before the proclamations and *5 years expired. And now the disseisee agrees to the entry.* And Popham and Gawdy reported, that it was the opinion of all the justices of England, that this agreement is not sufficient to make the entry so perfect to avoid the fine. Because the *statute of fines is to be taken strictly*, being for repose and tranquility. Ld. Awdley's case.———The entry by the stranger was *without any commandment, precedent, or assent subsequent within the 5 years*, and it was resolved that this entry will not avoid the fine; for the saving in the said act has *appropriated the pursuit, by way of action or lawful entry, to him that right has, either by command precedent, or assent subsequent within the 5 years.* Omnis enim *ratihabitio* retrotrahitur, & mandato æquiparatur. 9 Rep. 106. cited per Coke, who said, that Popham reported openly in court that such was the opinion of all the justices in Serjeant's-Inn in Fleet-Street, against the opinion in 31 H. 8. Tit. Entre Congeable. Br. 123.

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3. *Tenant for life is disseised*, a *collateral ancestor of him in reversion released to the disseisor with warranty*, he in reversion came to the land, and there he claimed his reversion to avoid the warranty; this claim shall not avail him. Co. R. on Fines 14.

4. *So* (as it seems) if *lessee for years be ousted*, and *he in the reversion* is disseised, the lessor cannot make continual claim; because *every continual claim ought to countervail in law an entry*, and *because his entry is not lawful, his claim is not good.* Tamen quære. Co. R. on Fines, 14.

(F. a. 3) Claim or Entry *by one*. In what Caſes it will ſerve *for another*, ſo as *to revive it* after a Lapſe.

1. *Two tenants for life are diſſeiſed by A. and B.* if one of the tenants for life releaſes to A. and the other tenant for life re-enters, he has the moiety in common with A. and he has reveſted the *entire reverſion* in him in whom the reverſion was before. Le. 264. per Manwood J. pl. 354. 19 Eliz. C. B. Anon. 4 Le. 217. S. C.

2. If a *diſſeiſor be diſſeiſed*, and the *ſecond diſſeiſor levies a fine*, in this caſe, if the *firſt diſſeiſor enter* within the year, this ſhall preſerve the right of the diſſeiſee; becauſe the firſt diſſeiſor by his entry avoided the whole eſtate given by the fine, and yet the diſſeiſee might have entered himſelf (& ſic de ſimilibus;) but it muſt not have been an empty fine that ſhould have barred the right of a ſtranger, but a *fine compleat*, as hath been ſaid. 2 Inſt. 518. If one enters lawfully, or recovers by action within the year and the day after the fine levied,

the fine is thereby defeated, not only againſt him that enters lawfully and recovers, but alſo againſt all thoſe who had more *ancient right* than he who entered or recovered. per Saunders. Pl. C. 358. a. in caſe of Stowell v. Zouch.——And Dyer accorded and ſaid, that if *lord by diſceit avoids a fine at common law*, he has reſtored the right to him who levied the fine, and ſo has he whoſe entry was lawful, deſtroyed, by his entry, the fine, and *ſet at large the former right of others*, which otherwiſe without claim or action within the year and day would be bound. Ibid. 358. b. ——Co. R. on Fines 13. cites 19 E. 2. Fitzh. Continual Claim.——Arg. Mo. 346. cites 6 E. 2. Fitzh. tit. Continual Claim.

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3. If a *diſſeiſor* had *made feoffment in fee upon condition*, and the *feoffee levy a fine*, and the year and day paſs, now the diſſeiſee is barred; but if the *feoffor enter for the condition broken*, now the diſſeiſee may enter upon him. Co. R. on Fines 13. cites Pl. C. Stowell's caſe. After the entry the heir may have aſſiſe of mort-

dance-ſtor againſt the abator, (diſſeiſor) and he has no defence againſt him; for he *cannot claim by the conuſee nor under his eſtate*, becauſe he has defeated his eſtate; and if he will plead the fine in bar of the aſſiſe, and that he has the conuſee's eſtate, the matter of the avoidance of the eſtate may be ſhewn in avoidance of the concluſion; for he cannot claim priviledge by the ſame eſtate which he has defeated. Pl. C. 358. b.

4. *Baron* ſeiſed in fee *levied a fine* and afterwards was *outlawed for treaſon*. The conuſee conveyed the land to the crown, and afterwards the daughters and *heirs reverſed the outlawry*. And 5 years after the outlawry and death of the baron, but within 5 years after the outlawry reverſed, the feme ſued to the queen for dower. Reſolved that ſhe is not barred by the 5 years after the fine or death of the baron, becauſe then the outlawry of her baron was a bar to her, but that ſhe might have 5 years after the outlawry reverſed. Mo. 639. 27 Eliz. in Chancery. Menvill's caſe. 13 Rep. 19. S. C. 3 Inſt. 215. S. C.

(F. a. 4) Claim

(F. a. 4) Claim or Entry, *at what Time* to be made where there are ſeveral future *Rights*, *by* ſeveral *diſtinct Titles*.

1. If *A. has eſtate for the life of B.* the remainder *to A. for the life of C.* the remainder *to A. for the life of D.* and *A. is diſſeiſed*, and *diſſeiſor levies a fine* with proclamations. Now for the preſent right he has 5 years by the firſt ſaving; and if after 5 years *B. dies*, A. ſhall have other 5 years for the next remainder, by the *ſecond ſaving, which gives them to other perſons who have future right*; and if after the 5 years C. dies, he ſhall have other 5 years for the ſecond remainder; per Walch, and Brown J. aſſented to it, and cited the rule, *Quando duo jura concurrunt in una perſona, æquum eſt ac ſi eſſent in duobus*, (or *diverſis*) and ſo of three ſeveral rights, &c. and ſo ſaid the others of this ſide. Pl. C. 368. a. Mich. 4 and 5 Eliz. in caſe of Stowell v. Zouch.

2. *Baron, ſeiſed* of land *in right of his wife, makes feoffment upon condition*, and the *condition is broken*, and after the *feoffee levies a fine* with proclamations, and the *baron dies, in the fourth year after the proclamations*, leaving iſſue by the feme, and after the *feme dies*, and the 5 years paſs, the heir is barred to enter for the condition broken, as heir of the part of his mother for her right. Per Bendloes. Pl. C. 367. b. in caſe of Stowell v. Zouch.

(F. a. 5) Claim, &c. at what Time. Where there are *ſeveral Impediments* or Defects.

Weſt. S. 185. 1. If a *feme* who had preſent right, or when the future right happened, was *covert, and within age, and of non ſanæ memoriæ, and impriſoned* at the time of levying the fine. Now if 1 or 2 or 3 of theſe defects or impediments be removed; as if the baron dies, and ſhe comes to her full age, and is let out of priſon, yet the 5 *years ſhall not commence till the laſt impediment is removed*; and when ſhe is void of all impediments, then the 5 years ſhall commence. Pl. C. 375. a.

Weſt. S. 185. 2. *But* if theſe impediments are all *once removed*, and any of them *happen again within a month after* ſuch removal, (as if ſhe be again impriſoned, or become non ſanæ memoriæ, and *ſo continue all the reſt of the* 5 *years, or* if at the end of the month ſhe *dies her heir within age,)* the 5 years once commenced ſhall proceed, and the
[290] non-claim within 5 years ſhall bind the party and her heirs, as well as if ſhe had been void of all defects or impediments during all the 5 years. Pl. C. 375.

3. *And though* the perſons compriſed in the exception of the act, as non ſanæ memoriæ, &c. were not under ſuch imperfections at the time of the fine levied, but *became ſo, againſt their wills after the*

the fine, and before the laſt proclamation, and ſo continued at the laſt proclamation, they are not bound to the 5 years next after the laſt proclamation, but ſhall have 5 years next after the impediments or imperfections removed. Affirmed by ſeveral juſtices, and denied by none. Pl. C. 375. in caſe of Stowell v. Ld. Zouch.

(G. a) What ſhall be ſaid, a Claim or Entry to avoid a Fine.

1. TO avoid fines *by the common law*, were 4 *claims*; viz. 2 *by record and* 2 by acts *in pais*: viz. *by record*, [one was] *a real action* brought within the year, according to the truth of the caſe; and the other was an *entry of the claim in the record at the foot of the fine*; *by pais*, [one was] a *lawful entry into the land*, by him who had right (and expulſion of the cogniſee, or tertenant) *the* other was *continual claim*. Pl. C. 359. Mich. 4 and 5 Eliz. in caſe of Stowel v. Zouch.

2. Claim to avoid a fine by *bill in Chancery* is not ſufficient, but *ought to be by action*, per Catlin. Dal. 116. pl. 9. 16 Eliz. Anon.

3. *But* if an *action* to recover lands, of which a fine was levied, be *brought and diſcontinued* by the demandant, this will not amount to a claim. Vent. 45. Mich. 21 Car. 2. B. R.

4. Note, it was agreed by all the juſtices, and by the prothonotaries, that if the diſſeiſor levies a fine, and the diſſeiſee in preſervation of his right againſt ſuch fine, *enters his claim in the record on the foot of the fine*, that the ſame is not any ſuch claim as ſhall avoid the ſtatute of 4 H. 7. 2 Le. 53. Mich. 29 Eliz. C. B. Braſier's caſe.

S. P. For by 4 H. 7. it muſt be by action or entry. 2 Inſt. 518. (b.)

5. Bringing a *writ of dower*, within the 5 years after the death of the huſband, is not ſufficient to avoid the fine, unleſs it be ſhewn, that the writ was returned by the ſheriff; and delivering the writ to him only, is not a *purſuing*, &c. within the ſtatute. Hill. 30 Eliz. C. B. 3 Le. 221. Fitzhugh's caſe.

6. If a *diſſeiſor make ſeveral leaſes for life, or feoffments* in fee *of divers parcels*, and the diſſeiſee *enters upon the diſſeiſor in name of all, or upon one leſſee or feoffee* in name of all, this ſhall not diveſt the franktenement, which is in the other perſon; though it is all of one and the ſame title. Co. R. on Fines, 13.

But if diſſeiſor be of 3 *acres* and *leaſes one* of them *to J. S. for years and another to J. N. for life, and the third he retains* in his poſſeſſion, and the diſſeiſee *enters upon the diſſeiſor in the name of all*; this ſhall veſt in him, as well the acre which was in leaſe for years, as the acre which was in the ſeiſin of the diſſeiſor; and the reaſon of this diverſity is, *becauſe every entry ought to purſue the nature of his action*, and as the diſſeiſee ought to have *ſeveral præcipes* againſt ſeveral tenants of the frank-tenement, ſo he ought to make *ſeveral entries*. Co. R. on Fines, 13.

7. If 2 *men diſſeiſe* me *of* 2 *ſeveral acres, ſeverally*, now the entry upon one cannot be the entry upon the other. Co. R. on Fines 14.

But if the *one diſſeiſe the other*, ſo that all *comes into one hand*, there the entry into one acre, in the name of both, is an entry into both; for he may have a præcipe. Co. R. Fines, 14. cites 9 H. 7. 25. ——— Co. Litt. 252. b.

8. But

Co. Litt. 252. b.

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8. But if I *enfeoff one upon condition of one acre, and after* I enfeoff him *of another acre* upon condition, and after *both the conditions are broken*, if the feoffor enters upon one acre, in the name of both, this ſhall not veſt both in him; for by one title the feoffor could not have an action, and always an *entry ought to purſue his action*. Co. R. on Fines, 14.

9. If I be *diſſeiſed of* 2 *acres*, which lie ſeverally, and *in ſeveral places or vills*, and I enter *generally* into one acre, it is not an entry into both. Co. R. on Fines 10.

10. *So* in all caſes, *when the frank-tenement is out of a perſon*, if the diſſeiſee enters *generally* into one parcel, this ſhall not re-continue *both*; for it *may be, that the diſſeiſor or the feoffee hath warranty*, and therefore the general entry into one parcel ſhall not defeat both. Co. R. on Fines, 14.

11. *But* if a man be ſeiſed of 1000 acres in fee, and dies ſeiſed, leaving iſſue a ſon and a daughter by one venter, and a ſon by another venter, and the *eldeſt ſon enters into one acre generally*, this ſhall cauſe *poſſeſſio fratris* in all; for *the whole frank-tenement in law, was in him before*, and no frank-tenement veſts out of any perſon in prejudice of him, by his warranty, or otherwiſe. Co. R. on Fines, 14. cites 21 H. 7. 33.

12. Continual claim made *out of the land*, when the party may enter without *fear of death, or battery*, is void. Co. R. on Fines 14.

13. *So* continual claim ſhall not avail the party, *when his entry is not lawful*, if it be not in ſpecial caſes. Co. R. on Fines, 14.

14. *As* if the diſſeiſee dares not enter without fear of death, or battery, and he comes within the view of the land, and claims the land, the claim is void; and yet livery may be of the land within the view, but nothing ſhall paſs, until the feoffee enters. Co. R. on Fines 14.

15. It is ſaid in our books, that if the diſſeiſee *dare not enter* into the land for fear of death or battery, yet *he ought to come within the view* of the ſame land, or otherwiſe his claim ſhall not avail him; and iſſue hath been taken in ſuch caſe if he was within the view, or not. Yet Littleton ſaid, that he ought to *go as near to the land as he dares*. 38 Aſſ. pl. 23. is that if the diſſeiſee dares not enter, *claim made among his neighbours* is good enough. Co. R. on Fines, 14.

16. A writ of *dower* was brought by A. *againſt the tenant* of the land, and *he pleaded a fine with proclamations levied by her huſband*, 14 *Jac.* in which year the huſband died, and the wife had not claimed within the ſtat. of the 4 H. 7. 24. the demandant *replied, that* 15 *Jac. ſhe brought* a writ of *dower againſt the now tenants, and* againſt *two others, and that* the *writ abated by the death of the two others*, and that ſhe brought a writ by *Journey's accounts*, the tenant replied that the others were not tenants, but one B. and it was moved that this rejoinder was evil, for they confeſſed that they themſelves are tenants, by which the writ is good againſt them at leaſt; per Hobart, if ſhe brought a writ of dower againſt one who is not tenant, that is not any claim within the ſtatute; but if ſhe brought

brought a dower againſt four, who are tenants, and two die, and ſhe bring a writ againſt the others by Journey's accounts, this is a good claim within the ſtatute, though the ſecond writ was after the time limited; but quære here, if the two who died were not tenants. Winch. 66. Paſch. 21 Jac. C. B. Summer's (Anne) caſe.

17. Entry in *ejectment* is not ſufficient to avoid a fine. Mich. 21 Car. 2. 1 Sand. 319. Clark v. Pywell. Arg. S. C. cited Show. 93. S. C. adjudged. Vent. 42. Clerk v. Philips & al.——Per Holt Ch. J. Comb. 249. Smart v. Williams.

18. Claim of an equity to avoid a fine can be made no other way but by *ſubpœna*, in caſes of lawful entry or action, equity makes not an entry lawful. Trin. 28 Car. 2. 1 Ch. Caſes, 278. Saliſbury v. Baggot. If it be of a *truſt* or *title in equity*, it cannot be by *entry*, but muſt be by ſubpœna. Per Finch C. 2 Chan. Caſes, 126. Mich. 34 Car. 2. Bovy v. Smith and Bovy. ——S. P. per Ld. Keeper, Mich. 27 Car. 2. 1 Chan. Caſes, 268. Clifford v. Aſhby.

19. *Entry of remainderman*, within 5 years after a fine levied by tenant in tail, will not ſave his right; for the fine being a diſcontinuance, he ought to make his claim by *action*; per North, K. Hill. 35 and 36 Car. 2. Vern. 212. Stapleton v. Sherard. [292] It muſt be *by formedon*. Ch. Caſes, 278. in caſe of Saliſbury v. Baggot. If a man has *title by writ at the common law, and his entry not lawful* an entry is not good to ſave the right. per Finch. C. 2 Ch. Caſes, 126. Mich. 34 Car. 2. Bovy v. Smith and Bovy.

20. *A. was leſſee for* 99 *years*, remainder *to B. for life*, remainder *to C. in fee*; *B. levied a fine*, and *living B. the leaſe determined*; on a trial at bar it was ruled that C. might enter, notwithſtanding the five years; for *A. continued the poſſeſſion*, which amounted to a continual claim by C. Arg. Skin. 262. in caſe of Knight v. Greenvil.

21. *Lands deviſed to* truſtees until debts paid, and then to an infant and his heirs, a *ſtranger enters and levies a fine, and non-claim* paſſed; at full age, he brought ejectment and was barred, becauſe the truſtees ſhould have entered. Within 5 years after age he brought his bill in equity, and the court decreed him the poſſeſſion, and an account of the profits declaring the fine and non-claim ſhould not run upon the truſt in the infant's minority, nor he ſuffer for the *laches of his truſtees*. Mich. 1699. 2 Vern. 368. Allen v. Sayer. At the end of the caſe is a note, that it did not appear whether the debts were all paid, nor whether the plaintiff became intitled to the poſſeſſion.

22. 4 *and* 5 *Annæ*, 16. *ſ.* 16. enacts, That *no claim or entry ſhall avoid a fine with proclamations within the ſtat.* 21 *Jac.* 1. *of limitations unleſs an action be brought within one year after the making thereof, and proſecuted with effect.*

23. A ſpecial verdict was found in ejectment, that the *leſſor* of the plaintiff, ſome time *after the entry in order to demiſe to the plaintiff*, had *entered to avoid a fine levied by the defendant*; and becauſe this laſt entry *ought to have been previous* to the former, in order to maintain the demiſe of the leſſor of the plaintiff, it was debated, whether the firſt entry in ejectment was not of itſelf ſufficient to avoid the fine. But reſolved per Cur. that it was not. For there muſt be an *actual entry*, made * *animo clamandi*, which, in caſe of an ejectment, there is not, but only a fictitious or ſuppoſed entry for the * 6 Mod. 84. Mich. 2. Annæ, B. R. Ford v. Ld. Grey.

the purpoſe of making a demiſe, and ſo the word *entry* in the ſtatute has been always expounded, and extends not to an ejectment; for the *ſtatute meant thereby only real actions*; whereas an ejectment is brought to recover a term only; and though the leſſor of the plaintiff is conſidered to ſome purpoſes, as the plaintiff himſelf, yet that is only by a fiction of law, and extends not to the preſent caſe. Berrington on the demiſe of DORMER v. PARKHURST & al. Hill. 11 Geo. 2. B. R. which judgment was afterwards affirmed in the H. of Lords, with the advice of the judges.

(G. a. 2) *Barr immediate.* In what Caſes the Fine ſhall be a preſent Barr.

1. By the ſtatutes, 1 *Ric.* 3. 7. & 4 *H.* 7. 24. *Privies in blood*, as heirs of the cogniſors, *claiming by the ſame title*, that their anceſtor had that levied the fine, be barred preſently thereby, whether they be void of impediments or no. Weſt's Symb. ſ. 182.

Dal. 225. pl. 257. Mich. 16 El. Anon. —Dal. in Kelw. 213. b. pl. 24. S. C. Anon. —And. 39. pl. 101. S. C. Anon.

2. *As* if land of *ſocage* tenure be given *to baron and feme in ſpecial tail* the remainder *to the right heirs of the baron in fee*, and the *baron alone levieth a fine with proclamations* to his own uſe in fee, and after deviſeth the ſame lands to A. in fee, and hath iſſue, and then the baron and feme die; the iſſue in tail is barred, becauſe he cannot otherwiſe convey himſelf to the title and deſcent in tail, than as the heir of the body both of his father and mother. Weſt's Symb. ſ. 182. cites Trin. 18 Eliz. Dy. fol. * 251. pl. 24. Anon. ‡ 9 H. 8. Dy. fol. 3. pl. 6. 32 H. 8. Br. Fines 109.

* It ſhould be (351. b.)

‡ It ſhould be (19.)

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3. *So* if huſband and wife, tenants in ſpecial tail, *have iſſue*, and the wife die, and the *huſband marries another wife, and has iſſue*, and levies a fine, ſur cognizance de droit come ceo, &c. *and by the ſame fine takes eſtate in ſpecial tail*, the *remainder over*, &c. *and* dies; the iſſue by the firſt wife is barred, becauſe he is privy in blood, the continuance of the poſſeſſion in the huſband notwithſtanding. Weſt's Symb. ſ. 182. cites 32 Ed. 3. * Dy. pl. 16. Eliz. f. 354. p. 31 and 32.

* It ſhould be 16 Eliz. Dy. 334. pl. 31.

4. *But* if my *father's brother diſſeiſe him and levy* a fine with proclamation, and my *father and uncle within* 5 *years after proclamation die, yet* may I avoid it by entry at any time before the end of the 5 years, notwithſtanding that I am privy in blood unto my uncle; for that *my title* to the land *groweth by my father*, and not as heir unto my uncle. Weſt's Symb. ſ. 182. cites Paſch. 19 Eliz. Dy. 9. pl. * 3.

• It ſhould be (pl. 2.)

5. *Nevertheleſs* if my *father diſſeiſe my grandfather of an eſtate in fee*, and thereof levy a fine with proclamations, and *firſt my grandfather and then my father dies*; I am now barred as privy; becauſe I *cannot otherwiſe convey* myſelf to the lands, *than as heir unto my father* the cogniſor. P. 19 H. 8. Dy. fol. 3. pl. 3. Weſt's Symb. ſ. 182.

6. Tenant

6. Tenant in tail *ſeiſed of* 300 *acres*, *levies a fine of* 100, it is no bar of all, or any part, till *election* made; and till election the lands remain entailed. Arg. 2 Ch. Caſes, 185 and 187.

(H. a) *How* the Five Years *Non-claim* and Entry to be *accounted*.

1. A. *tenant in tail*, *remainder to B.* in fee, A. levies a fine with proclamations, *B. dies*, *his heir within age*, ſc. of the age of 5 years; A. dies without iſſue; ſo that the infant may bring his formedon in remainder, but ſuffers 5 years more to paſs after the title accrued; yet he may have his action after, within age; notwithſtanding the 4 *H.* 7. 24. which ſaves and reſerves the action or claim of the *infant* until his full age, and that then he ſhall have 5 years. Mich. 3 and 4 P. and M. Dy. 133. pl. 2. Baſſet's caſe. Cro. E. 219. Hill. 33 El. B. R. Smy v. Chown.

2. A. *diſſeiſor marries* B. *the diſſeiſee*, and they have iſſue; *C. diſſeiſes A.* and levies a fine with proclamations, and A. dies in the fourth year after the proclamations, leaving iſſue of full age; afterwards B. dies; the 5 years paſs. The iſſue is bound as heir to A. his father; for in that reſpect he and his father had 5 years together. But as heir to the mother, he ſhall have 5 years from the death of his father; for though it is the *ſame land*, yet he has *ſeveral rights*; one as heir to his father, which is the laſt, and another, (which is firſt) as heir to his mother; and ſo has *ſeveral times*; per Walſh J. Mich. 4 and 5 Eliz. Pl. C. 367. b. in caſe of Stowell v. Zouch. If tenant in tail is diſſeiſed, and *diſſeiſor levies a fine* with proclamations, and 5 years paſs, and then *tenant in tail dies*, the iſſue in tail is barred. For after the fine levied, the tenant in tail himſelf had right, ſo that the iſſue was not the firſt to whom the right accrued and deſcended after the fine levied. 3 Rep. 87. b. Paſch. 44 Eliz. The caſe of fines.

3. *Two jointenants* are diſſeiſed, whereof *one is within age*; the diſſeiſor levies a fine with proclamations; 4 *years paſs* after the proclamations; and after the *jointenant*, *being of full age*, *dies before the* 5 *years paſs*, the other within age; the infant ſurvivor ſhall have 5 years after his full age, as well for the moiety, which was in his joint companion, who was of full age, as for the other moiety; for the right of this moiety, which was in his companion of full age, firſt accrued to him after the proclamations made by force of the cauſe or matter, viz. by the jointure made before; and ſo it is within the words and the intent of the branch, notwithſtanding that the moiety was in his companion before; for it is in him now in other form. per Bendloe. Serj. Pl. C. 367. in caſe of Stowell v. Zouch. [294]

4. A *diſſeiſor*, or a feoffee of a diſſeiſor *levies a fine* with proclamations, 4 *years paſs in the life of the diſſeiſee*; the diſſeiſee dies, his *heir* being *within age*; he *has only one year* to claim in; for ſuch fine with proclamations, without any claim in 5 years, is as a condition annexed to the eſtate; and although ſuch condition deſcends upon an infant, yet he is liable to the breach of it, as well as an heir of full age. *Expedit reipublicæ ut ſit finis litium.* By all the judges of England. Jenk. 266. pl. 74. cites 5 Eliz.

Pl. C. 375.

5. If a man has *many impediments*, he is not compellable to make his claim before all the impediments are *removed*; ſo if the *anceſtor* has one of the ſaid impediments, and dies before it be removed, and his *heir within age*, or hath other impediment, he is not bound to make his claim till 5 years after his impediment is removed. per Anderſon Ch. J. Le. 215. Mich. 32 and 33 Eliz. C. B. Cotton's caſe.

6. *Tenant for life and J. S. joined in a fine* ſur cogniſance de droit come ceo, &c. to a ſtranger, who rendered to J. S. for 80 years, remainder to the tenant for life in fee. Proclamations paſſed, and the 5 years paſſed without entry by him in the reverſion. *Tenant for life died*; the queſtion was, if he in reverſion ſhould have *other 5 years*, and it was adjudged he ſhould, and ſo it was adjudged in SOMES's CASE. 7 Eliz. Cro. E. 254. Trin. 33 and 34 Eliz. B. R. Laund v. Tucker.

* *To the father in tail.* Dal. 71. Cro. E. 370. Cro. E. 391. 5 Rep. 17. 3 Rep. 62. Mod. 182.

8. P. Fowle v. Doble.

7. Grandfather, father and ſon, the *grandfather* is *ſeiſed for life, the remainder to the* * *ſon in tail*, remainder *to the right heirs of the grandfather*. The *grandfather* covenants by indenture to make aſſurance to J. S. and that it ſhould be to the uſe of him and his heirs; and after he ſuffers a common recovery againſt him, and *levies a fine* to the ſaid J. S. *come ceo, &c.* and proclamations upon it, and *after the ſtatute of* 27 *H.* 8. is made, and the *grandfather makes feoffment to the ſon* and dies. It was held, that the entry of the father upon the ſon is lawful, and ſhall not be eſtopped upon the *warranty of the grandfather*; for this *is gone by the re-taking of the eſtate*; for *when the ſtatute veſts as high a poſſeſſion in him, as he had when he aliened, the warranty is extinct*; for the ſtat. of 27 H. 8. does not ſave the warranty. And there Dyer ſaid that though the 5 years are paſſed in the life of the grand-father, ſo that the entry which was given by *cauſe of forfeiture* is taken away, yet when the grandfather died, now he ſhall have other 5 years to make his claim or entry, for cauſe of the *title coming to him by remainder in tail*; and this by the ſtatute of 4 H. 7. Mo. 71. pl. 192.

* S. C. cited Arg. Godb. 301. that though 5 years paſs in the life of tenant in tail, yet the iſſue ſhall have other 5 years. For he is the *firſt to whom the right doth accrue after* the fine levied. For tenant in tail himſelf after his fine with proclamations hath not any right. But if *diſſeiſor* of tenant in tail levy fine with proclamations, and 5 years paſs and afterwards tenant in tail dies, the iſſue is barred; becauſe after the fine, the tenant in tail had right, and ſo the iſſue was not the firſt to whom the right accrued after the fine.—3 Rep. 87. a. b. caſe of fines.—Reſolved accordingly. Trin. 44 Eliz. C. B. Cro. E. 896. Peniſton v. Lyſter.—Pl. C. 373. b. 374.—* Arg. Godb. 313. Contra.

8. *Diſcontinuee* of eſtate tail *levies a fine*, the iſſue ſhall † not have 5 new years. D. 3. pl. 2. Marg. cites 34 Eliz. B. R. Holme v. Gee.—* Contra. per 5 J. againſt 3. D. 3. b. Paſch. 19 H. 8. Anon.

9. If a *lunatick, or non compos, levy a fine* of lands, the 5 years begin at his recovering his ſenſes, and he muſt bring his action within 5 years after; and in pleading he ſhall ſhew, that at the time of the fine, he was non compos, and all the ſpecial matter; but if he die without recovering his ſenſes, *his heir* ſhall have his action, or make his *entry* when he will; for he is *excepted out of the act*, and is bound to no time. So of *being over ſea*. 4 Rep. 125. b. Paſch. 1 Jac. B. R. Beverley's caſe.

10. A.

10. A. having an *intereſſe termini* died. The firſt term expired. Leſſor enters and levies a fine with proclamations, before any adminiſtration committed, and *after 5 years adminiſtration is had.* Reſolved that the adminiſtrator ſhall have 5 years; for none had title of entry before. Cro. J. 61. Hill. 2 Jac. B. R. cites it as the true ſtate of the caſe of Sanders v. Stanford.

11. *Infant in ventre ſa mere* has 5 years after he comes to full age. Weſt's Symb. ſ. 183.

12. *A. tenant in tail male*, remainder *to B. in fee, makes a leaſe for three lives, with warranty* againſt all perſons, which was *not warranted by the ſtatute* 32 *H.* 8. 28. and afterwards levies a fine with warranty againſt all perſons, and with proclamations, and dies without iſſue male, leaving M. a daughter. About 2 years after the fine levied, the leaſe for lives expired, and about 12 years after, B. died without iſſue, M. being heir at law to him as well as to A. Adjudged that M. was barred, and that B.'s claim muſt have been within 5 years after A.'s death, and not after the determination of the lives, at which time B. had no other title than he had before. For his title was by A.'s death, without iſſue male, and then he might have brought his formedon. Cro. C. 156. Paſch. 4 Car. B R. Salvin v. Clerk.———This differs from Seymour's caſe. For there the reverſion was not diſplaced, nor a *fee gained*, as in this caſe it was by the leaſe having in it a warranty againſt all perſons, and ſo not warranted by the ſtatute. Ibid. cites 10 Rep. 95, 96. Seymour's caſe.

Jo. 209 S.C. and P.—N. B. The leaſe was warranted, but becauſe it was with warranty that made it become not warranted.)—But Cro. E. 602. in caſe of Keen v. Cope is otherwiſe, viz. that it is warranted by the ſtatute.—Vaughan Ch. J. ſaid that this caſe is all falſe and miſ-reported; and that, 1. becauſe it ſays that the leaſe for lives was a *diſcontinuance of the reverſion*, and thereby a *new fee gained to tenant in tail*, which he paſſed away by the fine with warranty, which (he ſaid) could not be; for that it appears in the caſe, that the leaſe was warranted by the ſtat. 32 H. 8. 28. and ſo could make no diſcontinuance, nor no new fee of a reverſion could be gained, and then no eſtate to which the warranty was annexed, and that ſo it was reſolved 40 Eliz. KEENE v. COPE; and 2dly, that opinion was extrajudicial, it being concerning a point not in the caſe, but ſuppoſed; as ſuppoſing there had no proclamations been made, and no non-claim; and 3dly, it was reſolved upon the point of non-claim, and not upon the warranty which was not a point in the caſe. Vaugh. 383. Mich. 25 Car. 2. in caſe of Bole v. Horton.——The ſtatute of 4 *H.* 7. operates by way of *bar to the right* which anſwers Saul and Clerk's caſe. Jo. 210, 211. 2 Salk. 422. in caſe of Hunt v. Bourne.

13. A. *deviſed land to J. S. an infant in fee.* The heir at law of A. levies a fine and the *infant dies, leaving M. his ſiſter married* to W. R. who lets 5 years paſs without claim. Though W. R. and all claiming under him are bound, and the wife herſelf during the coverture; yet ſhe ſhall have a new 5 years after her baron's death. Cro. C. 200. Mich. 6 Car. B. R. Hulm v. Heylock.

Cro. C. 129. S. C. debated by name of Chamberlain v. Turner, but on a D. P.

14. *A. ſeiſed in fee, acknowledged a ſtatute merchant to B.* and after *a recognizance* in the nature of a ſtatute ſtaple *to C. and* then *another recognizance* of the ſame nature *to D.* and *E.—D. and E. extend and had a liberate*; and after *B. extends and has a liberate*; *and then C. extends and has a liberate*; *B. and C. aſſign to F.—A. being in poſſeſſion, levied a fine* with proclamations *to J. S. who* being ſeiſed in fee *deviſed* the lands in queſtion *to F. (who had poſſeſſion* of the lands *by* virtue of the *aſſignment of B. and C.) and to his heirs male, remainder to the daughters of A.*—And *F. being ſo ſeiſed levied a fine* with proclamations, *and died without iſſue male*; and L. and M. are the daughters and heirs of A. and alſo heirs to F.—5 *years paſs*;

paſs; and after the wife of the defendant, being *executrix* of the ſurvivor *of* E. and *D. took adminiſtration* de bonis non *to C. and acknowledged ſatisfaction upon record, to the ſtatute made to C.* and upon this the defendant entered, upon whom the plaintiffs (having married one the L. and the other M. the daughters and heirs of A. and heirs of F.) brought their ejectments, & ſi, &c. It was argued that B.'s ſtatute was extinct, and C.'s in eſſe, but this is by their coming both into the ſame hand, and not by the fine of A. For when both B.'s and C.'s ſtatutes are aſſigned to F. he is ſolely poſſeſſed by virtue of the ſtatute to C. becauſe B. had a ſurrenderable eſtate, and
[296] C.'s extent was of a reverſion, and capable of a ſurrender, and for this cited D. 280. CORBETT'S CASE, and that when the ſecond ſtatute is extended it is of a reverſion, and being after *in the ſame hand, is an extinguiſhment of the firſt*, and for this cites Cro. J. 424. FARRINGTON v. GARROWAY, and 4 Rep. 66. and further that B.'s ſtatute is drowned, and C.'s is not, but the intermediate eſtate of D. and E. prevents it, and if this is *in eſſe*, then *after ſatisfaction acknowledged a new 5 years accrued*; for acknowledgment of ſatisfaction is a natural way to determine a ſtatute. And judgment was given for the defendant. Skin. 260 to 264. Hill. 2 and 3 Jac. 2. B. R. Knight v. Greenvill.

15. *A. was leſſee for 99 years*, remainder *to B. for life*, remainder *to C. in fee*; *B. levied a fine, and living B. the leaſe determined*, it was ruled on a trial at bar, that C. might enter notwithſtanding the 5 years; for *A. continued the poſſeſſion*, which amounted to a continual claim by C. Arg. Skin. 262. in caſe of Knight v. Greenvil.

16. If *tenant for life* levies a fine, and he in reverſion does not enter or claim within 5 years, he cannot *enter* for that forfeiture; but *muſt ſtay till a new right of entry accrues* to him by death of the tenant for life. Arg. Show. 43. cites Pl. C. 573.

Leſſor has 5 years during the life of the leſſee for life to claim in; or 5 years after his death, at his election; for he *has* 2 *titles*, one after the death of leſſee for life, the other by the forfeiture of the ſaid leſſee; and if he does not claim within 5 years as above, after the ſaid *forfeiture* he ſhall have other 5 years after the *death* of the leſſee for life. Jenk. 254. pl. 45.

17. Leſſee for life is *diſſeiſed*, and a fine is levied, and 5 years paſs; the leſſee is barred, and the *remainder-man* has 5 years after the death of leſſee for life. But can the remainder-man have 5 years, if *leſſee for life ſurrenders*, or can he ſurrender after his eſtate is barred? per Pollexſen, Ch. J. Show. 46. Trin. 1 W. and M. in caſe of Dighton v. Greenvil.

18. If an *heir in tail brings a formedon within 5 years after fine levied by a diſcontinuee*, and pending the formedon, and after the 5 years, the iſſue *dies*; Holt, Ch. J. thought it reaſonable that the *next heir* in tail ſhould *have benefit* of this formedon, *by bringing a new one in convenient time*. But he ſaid that this has not been determined. And that it is plain that *Journey's accounts* will not lie; for that muſt be between the parties to the firſt writ; and the new writ muſt be the ſame as the former; and the writ, which lay for the anceſtor, is not the ſame, which lies for the iſſue, but is of another nature. 12 Mod. 572. per Holt Ch. J. Mich. 13 Will. 3.

19. He

19. He that has a *right of reverſion or remainder expectant on an eſtate tail, or for life*, ſhall have 5 years after their title come unto them, as appears by the 4th H. 7. 2 Inſt. 518.

20. Thoſe that have *no preſent, but a future right upon a precedent cauſe*, and whoſe right and title *comes to them after the proclamations*, ſuch ſtrangers to fines, being void of impediments, have 5 years after the coming of ſuch rights to enter and make their claim. (Vid. 1 Ric. 3. 7. 4 H. 7. 24.) *As* in the caſes of a * *remainder or reverſion.* But if theſe have impediments, they ſhall have 5 years too *after the impediments removed*, before their laches ſhall be prejudicial to them. Therefore if a wife does ſurceaſe her time, and 5 years paſs, after the death of the huſband; upon a fine levied of her inheritance or freehold, ſhe is barred of her right, and cannot enter by force of the ſtatute of the 32 H. 8. 28. Wood's Inſt. 246.

S. P. and ſo if a *mortgagee be diſſeiſed.* Weſt's Symb. ſ. 186.—* Pl. C. 374.

21. *And* if tenant for life *makes a feoffment in fee, (to one who has land in the ſame vill.* 3 Rep. 79. in Fermor's caſe.) and the feoffee levieth a fine with proclamations, it ſhall not bind the leſſor; but he ſhall have 5 years after the death of the tenant for life. Wood's Inſt. 247.

Where *leſſee for years makes a feoffment, and levies a fine*, and 5 years paſs, the

* court reſolved the leſſor ſhould have 5 years after the term expired, as well as where a fine is levied by leſſee for life, which differs not from this caſe; for there the leſſor may have his writ de conſimili caſu, as here he may bring his aſſiſe. Vent. 241. Hill. 24 and 25 Car. 2. B. R. Whaley v. Tancred.——2 Lev. 52. S. C.——Raym. 219. S. C.——3 Keb. 30. S. C.

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22. *But* upon a *diſſeiſin of tenant for life*, and fine levied, the leſſor and leſſee have but 5 years after the fine. For diſſeiſor comes in openly, and without the conſent of the leſſee. But quære; for the leſſor ſeems to be within the ſecond ſaving of the ſtatute of the 4 *H.* 7. *Saving to all perſons ſuch actions, &c. as ſhall come after the fine levied, &c.* And therefore he ſhall have 5 years after the action accrueth. Wood's Inſt. 247.

(H. a. 2) Barr by Non-claim. The *Eſtate being turned to a Right.* In what Caſes the Eſtate ſhall be ſaid to be turned to a Right.

1. It was agreed, that feoffment or fine *ſur conuſance de droit come ceo*, que il ad de ſon done, are diſcontinuances; for theſe are executed in themſelves, and are a tranſmutation of poſſeſſion; contrary of fine *ſur conuſance de droit tantum*, or fine *of grant and render.* Br. Diſcont' de Poſſeſſion, pl. 2. cites 8 H. 4. 7.

2. *Tenant in tail*, the *remainder in tail*; the *tenant* in tail *bargains and ſells* the land * to A. and *afterwards levies a fine* to A. ſur conuzance de droit come ceo *with warranty*; this warranty was made by the collateral anceſtor of him in remainder, whoſe heir he is, and therefore ſhall not bar him; for his *remainder was not diſplaced:* it had been *otherwiſe if* the fine had been levied by the tenant in tail *before the bargain and ſale*; for then it had been a diſcon-

* By indenture inrolled in chancery. 10 Rep. 95. b. Seymour's caſe. —— S. C. cited per Holt Ch.

J. thus, tenant in tail bargains and sells to B. and his heirs; and the court held that the bargainee had a defeendible estate, whereof his wife was dowable, and that by the bare bargain and sale; and though there was a *fine after*, which barred the issue, yet that *only excluded the issue in tail, but not enlarged the estate of the bargainee*; for if he had not a fee before, the fine could not have given it to him; for it did *not work by way of enlargement of an estate*. Farr. 24. In case of Machil v. Clerk ——Holt. Ch. J. held this case to be good law. 2 Salk. 619.——† Bulf. 162. Trin. 9 Jac. B. R. S. C. by the name of Heywood v. Smith.

discontinuance; but by the bargain and sale, made as above, the *bargainee had a fee determinable upon the entry of the issue*, and he in the remainder has his remainder open upon default of issue of tenant in tail, who in this case has *passed all his estate by the bargain and sale*, and has nothing more to pass, but to extinguish the estate tail, by way of release, and to leave the remainder untouched. Jenk. 51. pl. 97. cites 10 Rep. 95. b. Mich. 10 Jac. † Seymour's case.

3 Rep. 84. a. 2 And. 177. Sir Cha. Danvers's case. Mo. 628. S. C.

3. Tenant *for life*, *remainder in tail*; he in *remainder levies a fine sur conusance de droit come ceo*; tenant *for life dies*; he in remainder dies; his heir claims or brings a formedon *after* the proclamations and 5 years are passed: this fine bars the estate tail. If the *proclamations* had not been made, there would have been no discontinuance in this case; for he in remainder was *not seised* by force *of the intail*. *If* he had been *seised* by force *of the intail*; such fine *without proclamations*, had been a discontinuance. By all the judges of England. Jenk. 274. pl. 96.

4. If land is devised to A. and *before the entry of devisee, the heir at law levies a fine*, and 5 years pass without claim, yet this is no bar; for devisee not having entred the estate was not turned into a right. Cro. C. 200. Mich. 6 Car. B. R. Hulm v. Heylock.

Before the fine levied, *A makes a lease and release*, then A. * levies a fine, and 5 years pass. for *after failure*, *A. is but tenant at sufferance*; and his making a lease is a disseisin and so the estate turned to a right, and also by the release, which was a medling with the land, and being so turned to a right, fine and nonclaim bars. Cart. 82. Thomasin v. Mackworth.

5. Feoffment to *A. and his heirs, quousque* such sums be paid, and on failure, the feoffees to enter, &c. there is a *failure*; feoffor levies a fine, and 5 years pass; feoffees enter not; the fine bars. Cart. 82. Trin. 18 Car. 2. C. B. Thomasin v. Mackworth. Bridgman Ch. J held that by the lease and release, the estate is now turned to a right;

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6. The law construes such acts to *amount to* a devesting, or not devesting as is *most agreeable to the intention of the parties, and the right of the thing*, per the Ch. Justice. Trin. 22 Car. 2. B. R. Vent. 81. in case of Freeman v. Barns.

7. *A. seised in fee* of lands *makes a lease to W. R. and W. S. for 500 years in trust, that himself should receive the profits during his life*; and that afterwards *B. should* enjoy them, &c. *Afterwards A. being in possession* according to the trust, *covenanted with J. N. and J. D. to stand seised* of the said lands *upon the same considerations* as mentioned in the lease, *to* the use of *himself for life*, with *remainders over* according to the trust; *and* further *that the said lease, and all estates, made, or to be made by himself, should be* and enure *to the same uses*; *and levies a fine*, and *5 years passed A. being in possession* according to the trust, and enjoying the profits during his life; *A. dies*;

and

and *W. R. enters.* Hale Ch. B. held that nothing had been done here to diſplace the eſtate of the leſſees; for the leſſor continued in poſſeſſion by the leſſee's leave and permiſſion, as muſt be preſumed, and ſo is a tenant at will, as Littleton ſays. Hard. 401. Focus v. Saliſbury.

8. *So* if *leſſee for years* be, the remainder over for life, and leſſee for years levy a fine, and 5 years paſs; the leſſor is not barred by any nonclaim; becauſe the fine operates nothing, and partes ad finem nihil habuerunt may be pleaded to it. *Otherwiſe* it is where a *tenant for life* levies a fine; for he has a freehold, and his fine diſplaces the remainders; and therefore an entry is requiſite within 5 years after the death of the tenant for life, for which reaſon when a leſſee for years, or at will, is to levy a fine, it is uſual for the leſſee to make a feoffment firſt, to diſplace the other eſtates; but here the *leaſe for years is antecedent to the eſtate of the leſſor*, who levies the fine, and he has a freehold expectant upon the leaſe, and not precedent to it, per Hale Ch. B. Hard. 401, 402. Focus v. Saliſbury.

9. A fine with 5 years nonclaim muſt bar an *eſtate precedent* to the fine, *not ſubſequent* to it; and where there is a *privity* betwixt the leſſor and the leſſee, the fine ſhall not bar; as in caſe of a mortgage, where the mortgagor continuing in poſſeſſion levies a fine, per Hale. Ch. B. Hard. 402. Focus v. Saliſbury.

10. *And* this very caſe was adjudged in terminis for two reaſons, firſt, by reaſon of the *privity* betwixt the perſons; ſecondly, becauſe the leſſor was in the nature of a *tenant at will*, and there was a *mutual confidence* betwixt the parties, per Hale Ch. B. Hard. 402. cited it as the Dutcheſs of Richmond's caſe.

11. If I make a *leaſe for years* of my land, rendring rent, and a *ſtranger levies a fine* of the land; and the *leſſee* for years *payeth his rent to* me duly, I am not barred of my reverſion; becauſe I was always in poſſeſſion, and not put to a right only. Wood's Inſt. 248.

12. So if there is *tenant in tail, remainder in tail*, or tenant for life, remainder for life, and the firſt *tenant in tail*, or the firſt tenant for life doth *bargain and ſell* the land by deed indented and enrolled, *and after* doth *levy a fine* to the bargainee; in theſe caſes the remainders are not bound, though the 5 years paſs without claim; for the law adjudges them always in poſſeſſion. Ibid.

13. * *So* if *tenant for life and the firſt remainderman in tail levy a fine*; this is no diſcontinuance of the remainders after; for each paſſed only what he lawfully might. 1 Rep. 76. a. Bredon's caſe. [299]

But if tenant for life and the firſt remainder in tail *make a feoffment*, it is a diſcontinuance contra to that part of Bredon's caſe in 1 Rep. 76. b. and that it was ſo adjudged becauſe it is of a different nature from a fine. Sid. 83. cites the caſe of Baker v. Hacker. ——* Mo. 634. S. P. Peck v. Channell. ——Cro. E. 827. S. C. ——Ow. 129. S. C.

(I. a) *Enure.* How; *not* being *directed by deed* of Uſes.

1. A Fine *ſur releaſe* cannot be intended to the uſe of any other, but *of him to whom it is levied*, unleſs an uſe be expreſſed in the fine, or by another deed, per Catline. 3 Le. 36. Mich. 15 Eliz. B. R. in Ld. Windſor's caſe.

2. A. enfeoffs B. and it was covenanted between them, that *if A. pay B. at Midſummer* 47 *l.* then the feoffment ſhould be to the uſe of A. and his heirs, and *if A. fails and B. do not pay A.* 20 l. *at Michaelmas*, then alſo the feoffment to be to the uſe of A. and his heirs, and covenanted to make further aſſurance. A. and B. both failed of payment at the days, and afterwards in Hillary term next after both the feaſts, a fine is levied to B. and *no uſe expreſſed*, and all this was found by ſpecial verdict, and that the fine was only to the uſes of the indenture. The queſtion was if the conuſee of the fine, or the heir of the feoffor ſhould have the land? and it was adjudged for the heir of the feoffor. Cro. E. 32. Trin. 26 Eliz. B. R. Wencomb's caſe.

If the *conuſee* of a fine, levied of lands, do *pay money unto the conuſor* of the fine at the time of the fine levied, and there is no uſe declared to lead the uſe of the fine levied of theſe lands; the law will conſtrue the fine to be levied of theſe lands to the uſe of the conuſee, to whom the fine is levied; * *but if* there be *no money paid* by the conuſee, nor any uſe declared, the fine ſhall enure to the uſe of the conuſor that levied the fine. Paſch. 23 Car. B. R. For nothing appears whereby it can be ſuppoſed that the parties had any intention the eſtate in the lands ſhould be altered by the fine, but that the fine was levied for the corroboration of the title of the conuſor; but where money is paid, the law will intend that he that paid it, is to have benefit by the fine. L. P. R. 614.——See 2 Rep. 58. b. Beckwith's caſe.——Pig. of Recov. 53, 54.——* Per Vaugh. Ch. J. it is common experience. Vaugh. 43.

3. *A.* was ſeiſed in fee of land, and he, *and B. (a ſtranger*, and who had nothing in the land) levied a fine thereof to J. S. *without conſideration*; the uſe implied ſhall be to A. only, and his heirs; for an uſe is nothing but a truſt and confidence; and a thing in equity and conſcience ſhall be by operation of law *to him who in truth was owner of the land* without having regard to *eſtoppels*, or concluſions, which are contrary to truth and equity. 2 Rep. 58. b. Trin. 27 Eliz. in Beckwith's caſe.

4. A. levied a fine *to B. and C.* with *render to A. for* 80 *years, if* A. ſhould ſo long live, *remainder to D.* It was agreed per tot. Cur. that the conuſance muſt neceſſarily be intended to the uſe of the conuzees; becauſe otherwiſe, they could not render by the fine. But if the *render be void in all*, as it is in part, then they thought that the uſe of the conuſance would go *according to the intent of the render*, but not in the principal caſe, becauſe the render for the 80 years is good, which makes the conuſance of neceſſity to be to the *uſe of the conuſees*. Mo. 488. Paſch. 38 Eliz. Holcroft's caſe.

* D. 200. a. pl. 59. Paſch. 3 Eliz. Anon.

5. Fine was levied *to A. and B. to the uſe of A. B. and C.* they are all *jointenants* though A. and B. were in by the fine at common law. Noy. 124. Watts & Lee v. Ognell.——Says, it was adjudged on a feoffment. 21 El. cites * D. 200.

6. A

6. A fine, which *operates upon the poſſeſſion*, ſhall not *alter* the poſſeſſion upon which it works, and though there are *words contrary* in the fine, yet the ſame ſhall enure upon the eſtate precedent and not otherwiſe, per Yelverton J. Bulſ. 164. Trin. 9 Jac. B. R. in caſe of Heywood v. Smith.

7. If *tenant for life, and remainder-man in fee join* in a fine, but declare no uſes, each ſhall have the uſe, which the law veſts in them according to the eſtate, which they conveyed over. 2 Rep. 58. a. [300]

8. A fine was levied of a rent *to A. and B. and the heirs of A.* and the uſe was limited only by the fine itſelf, and there was *no deed to leaa the uſes*; adjudged, that A. and B. were in by the ſtat. 27 H. 8. of uſes, and were jointenants of the rent; for elſe there would be ſuch a fraction of eſtate that A. ſhould be in by the common law, and B. by the ſtatute, and that is not according to the ſtatute, which is, that where two or three are ſeiſed to the uſe of one or two of them, ceſty que uſe ſhall be adjudged to have ſuch eſtate in poſſeſſion, as they have in uſe. Trin. 8 Car. Hutt. 112. Purnell v. Bridges.

9. A fine, levied *purſuant to a decree*, for a particular end and purpoſe, ſhall not be ſuffered in equity to work farther than the decree intended it. Paſch. 16 Car. 2. 1 Chan. Caſes 49. Goodrick v. Brown.

10. Upon the trial of this cauſe at niſi prius in Middleſex, before Holt Ch. J. a caſe was made for the opinion of the court, viz. H. levied a fine, and afterwards ſuffered a common recovery, wherein the conuſee was tenant, and there being no deed in the caſe, it was objected that the uſe of the fine reſulted to the conuſor: and though the intent of the fine might be to make a *tenant to the præcipe*, yet no uſe or truſt can be averred, ſince 29 Car. 2. 3. Sed non allocatur; for *at common law* the uſe was always intended to be to the feoffee or conuſee, and in pleading never was averred. Co. Ent. 114. 273. Plowd. 477. But if it be to the uſe of the feoffor or conuſor, then it muſt be *averred*. 2dly, The court held the party *was in by the fine immediately*, and ſo there was a good tenant to the præcipe. 3dly, The *ſtatute extends not to uſes by operation of law, but to ſuch uſes as are to a third perſon*, and that neither the conuſor, nor the conuſee could aver the fine to the uſe of a third perſon ſince the ſtatute. 2 Salk. 676. Paſch. 8 W. 3. B. R. Ld. Angleſey v. Ld. Altham. Pig. of Recov. 54, 55. cites S. C.

11. Baron and feme levy a fine of the *wife's land*, and *no uſes are declared, or ſuch uſes* are declared *as are void* and can never take effect; ſuch fine is to the uſe of the wife and her heirs, and the eſtate remains as it was; or if the fine operates any thing, it will be for the benefit of the party, to whom it belonged before. Arg. Parl. Caſes, 106. Davis v. Speed.

(K. a) *Enure.*

(K. a) *Enure.* How. Where it is *levied to a particular Purpoſe.*

1. FINE levied by *feme covert to confirm a leaſe*; after the debt on the leaſe ſatisfied by the profits, no other debt ſhall bar her of her thirds. 15 Car. 1. Chan. R. 132. Naylor v. Baldwin.

2. An eſtate tail was *created by the crown*, and afterwards, ſome family diſputes ariſing, an *act of parliament, for confirming an award made for the peace and quiet of the family*, was aſſented to by the king, and afterwards one of the family, ſeiſed of an eſtate tail, levied a fine; yet the king's reverſion is not removed by the act, which was not as a new gift, nor did the king intend to paſs away any right; but his aſſent was only to confirm the award; and the reverſion is ſtill within the protection of 34 H. 8. and therefore the fine no bar to his iſſue: per Pemberton Ch. J. who ſaid, he was ordered to deliver Lord Keeper's opinion, that it was a *new eſtate* by the act of parliament, yet within the protection of 34 *H.* 8. Hill. 35 Car. 2. B. R. Skin. 95. E. of Derby's caſe.

Decreed Paſch. 16 Car. 2. Ch. caſes, 49. Goodrich v. Brown — Arg. Paſch 1688. 2 Vern. 56. cites it as reſolved in the caſe of Goodrick v. Brown.

3. Where a fine is ordered to be levied *by decree in chancery*, if it be ſo done as to paſs a greater eſtate, or to operate farther in law than this court * intended it, this court will *reſtrain* it to what was the original intention of levying it. Arg. Mich. 1682. Vern. 93.

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Tenant in tail ſuffers a *recovery to let in a mortgage of* 500 *years*, and then limits the land to the old uſes, and makes his will, and *deviſes all his lands for payment of his debts.*

4. A. ſeiſed in tail, and having a *term in truſt to attend* the inheritance, by fine, and deed *ſubjects the land to a debt of* 1000 l. but declares, that after that debt is paid, the land ſhould be *to the ſame uſes as before*; afterwards A. deviſed the land for payment of his debts. Decreed that the land was liable to all the debts in general. Sed quære tamen; for it ſeems, he was but *tenant in tail* of the inheritance, and ſo could not charge it by his will; unleſs it be intended he had a full power of doing it lodged in him by reaſon of the fine, notwithſtanding he had declared that after payment of the 1000 *l.* it ſhould go to the former uſes. Mich. 1682, Vern. 99. Turner v. Gwyn.

The court thought the equity of redemption ſhould be aſſets to ſatisfy creditors, or a ſubſequent grantee of an annuity. Note, the *redemption was limited to him, his heirs or aſſigns.* Hill. 1691. Ch. Prec. 39. Foſſet v. Auſtin.

5. The *wife joins* with her baron in a mortgage, and levies a fine with intent *to bar dower*, and in conſideration thereof, the baron *agrees*, that *the wife ſhall have the redemption of the mortgage.* The baron afterwards *mortgaged the eſtate twice more.* This agreement is fraudulent as againſt the ſubſequent mortgagees, ſo far as to intitle the wife to the whole equity of redemption. But her dower was decreed, in caſe ſhe ſhould ſurvive her baron, notwithſtanding the fine, without putting her to her writ of dower. By North K. Hill. 1684. Vern. 294. Dolin v. Coltman.

(L. a) *Enure to make good prior Eſtates*, and how.

1. IN ſci. fa. upon a *fine of an annuity*, Thirn. held that a prior preſentable who has a patron, may charge the church in perpetuity with his covent, if he has a covent and common ſeal; but contrary of a parſon. Becauſe the one may have a writ of right, and the other only juris utrum: and therefore it ſeems that a prior preſentable by a patron, who has not covent nor common ſeal, cannot charge but for his life; for he is but *merely as a parſon*; note a diverſity; and then *becauſe the annuity had eſſence before the fine*, and *ſo the fine is but as a judgment or recovery of the annuity*; therefore, though the fine was acknowledged by the prior without the covent, yet the plaintiff ſhall recover the annuity, and the church is bound by the judgment, quod nota, and ſo ſee that a *prior by his fine without the covent may charge the church* in perpetuity of a thing which *had eſſe* before. *Contrary of a thing newly granted by him by fine*, nota a diverſity. Br. Charge, pl. 8. cites 12 H. 4. 11. 21.

2. If *diſſeiſee* levies a fine *to a ſtranger* the diſſeiſor ſhall have the benefit of it. Noy. 59. in caſe of Hart v. Amerideth. Mar. 105. contra.—per Popham & Gawdy J. Goldſb. 162. pl. 96 ——If diſſeiſee *declares the uſes to conuſee*; it ſhall be to the conuſee's uſe only, and not to the diſſeiſor's; but otherwiſe if no uſe's declared; for then it would be to the uſe of the diſſeiſor and extinguiſh the right of conuſee. Per Bridgman, Ch. J. Lev. 128. Hill. 15 & 16 Car. 2. at the aſſiſes at Southwark Co. of Peterborough v. Bludworth ——Per Bramſton, Ch. J. accordingly; but by Jones J. that whoever has the land ſhall have the advantage of a fine by eſtoppel. Jo. 462.——Poph. 63. in caſe of Harrey v. Farry.——But if the diſſeiſin be *only at the election* of diſſeiſee, it is otherwiſe. Cro. C. 305. in caſe of Blunden v. Baugh. —— Or if the diſſeiſin be *ſecret and unknown to diſſeiſee*, it ſhall be to the uſe of the conuſor. Cro. C. 484 per two juſtices. Fitzherbert v. Fitzherbert.

3. *Tenant for life and remainder-man in tail joined in a grant of a rent-charge in fee* out of the land, and then they *joined in a fine to a ſtranger and his heirs*; the eſtate of the rent which was before determinable, is now made abſolute. Winch. 102. Holbeach v. Sambeach. Hutt. 96. S. C.—Cro. C. 103. Hill. 3 Car. C. B. Holt. v. Sambach S. C.

4. A. by will *bequeathed* 1000 l. *to D. his niece, payable at* 25 years of age, and *charged his lands with payment thereof*; D. intermarried with J. T. *her huſband and ſhe, before her age of* 21, *aſſigned over the ſaid* 1000 l. *to W.* for 750 *l.* afterwards D. attained her age of 21, and her huſband and ſhe (an eſtate tail being deſcended to her in the ſame lands) *levied a fine* and ſuffered a recovery *of the lands charged, and declared other uſes*. It was held, that this was a good aſſignment, and that the ſubſequent fine did not hurt it. Trin. 1731. 2 Wms's Rep. 601. 607. D. of Chandos v. Talbot.

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(L. a. 2) *Enure.* How. *By Eſtoppel.*

But if ſhe, who takes by the fine, be *examined*, ſhe ſhall be eſtopped to claim a better eſtate; as it ſeems. Br. Fines, pl. 51. cites 8 H. 6. 4.

1. IF a fine be levied *to a feme covert*, of land in which ſhe had a *better eſtate before the fine*, the fine ſhall not conclude her to claim it. Weſt. ſ. 15. cites 3 H. 6. 42. 41 E. 3. 7. 50 E. 3. 9. 24 E. 3. 62.

Br. Eſtoppel, pl. 60. cites S. C. per Hank.

2. If a *fine ſur render* be *levied to two*, where the *one is ſeiſed before and at the time of the fine*, and the *other hath nothing*; there he who has nothing, has gained joint poſſeſſion with the other by concluſion; per Hank. Br. Fines, pl. 35. cites 8 H. 4. 8.

3. If *two are ſeiſed in fee*, and a *ſtranger levies a fine to them and to the heirs of one*; in this caſe, the other ſhall be eſtopped to claim other eſtate than for life. Br. Eſtoppel, pl. 92. cites 15 E. 4. 28. per Cateſby.

But if the *tenant accepts a fine of a ſtranger* for life, or in tail, *and after dies without heir*; now the Ld. ſhall be concluded (as I think) for now he claims eſtate in the land under the eſtate of the tenant who was concluded. Co. R. on Fines, 16.

4. If there be *lord and tenant* by knight's ſervice, and a ſtranger levies a fine to the tenant in tail, to hold to him and his heirs; in this caſe, Herle ſaid, that the lord ſhall be concluded; becauſe he is not a meer ſtranger, but is privy in law. But this is not law, (as I think) for no man ſhall be eſtopped, but *only parties and privies in blood*, as heirs; *or* privies *in eſtate*, as thoſe who have derived any eſtate out of the eſtate of him that is eſtopped; for privies in law, as the lord is, ſhall not be eſtopped, having regard to his ſeigniory; for in reſpect of this he is wholly a ſtranger; for he does not claim the land, but a thing out of the land. Co. R. on Fines, 16.

5. And note, that as well *he who claims* eſtate *en le poſt* ſhall be concluded, as he who claims the land *en le per*, *if he claims the eſtate in the ſame thing*, upon which the concluſion is made; *as* if a feme be ſeiſed of land in fee, and be eſtopped, and after ſhe takes baron and has iſſue, he ſhall be eſtopped alſo. Co. R. on Fines, 17. cites 8 Aſſ. p. 33. Br. Fines, 73. 21 E. 3. 3. 5.

6. Eſtoppel *is reciprocal* of both ſides; for he, that ſhall not be concluded by a record, or other matter of eſtoppel, ſhall not conclude another by it; and yet in our books *the king* eſtopped the ſucceſſor to ſay, that M. had nothing in the land, by reaſon that M. held of the king, and levied a fine to his predeceſſor ſur conuſance de droit come ceo, &c. and though the king was a ſtranger to it and had nothing but the ſeigniory out of the land, yet the king, took advantage of this eſtoppel. Quære the reaſon of this caſe; for this ſeems * to be the prerogative of the king, of which I ſhall not ſpeak; but otherwiſe it is in the caſe of a common perſon, as 22 E. 3. 17. and 40 E. 3. 30. are agreed. See 41 E. 3. per Finch. that *a ſtranger* ſhall be concluded by a fine levied ſur conuſance de droit come ceo, &c. Co. R. on Fines, 17.

* *Orig.* (d'eſtate.)

7. The

7. The ſtatute of 4 H. 7. and 32 H. 8. *extends* to fines levied by concluſion, and ſhall bind the eſtate tail, though partes finis nihil habuerunt; *as* if *tenant in tail make feoffment in fee, or be diſſeiſed*, and after *levies a fine* with proclamations *to a ſtranger*, this ſhall bind the eſtate tail, and the iſſues in tail are barred for ever. 3 Rep. 90. cites it as reſolved by all the juſtices in C. B. in Ld. Zouche's caſe. Cro. E. 610. Paſch. 40 Eliz. B. R. Hunt v. King.

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8. A *fine* may be by way of concluſion, though neither conuſor nor conuſee have any thing in the land at the time; but if they *purchaſe it after*, the conuſee ſhall have the land againſt the conuſor who purchaſed it afterwards; per Jones J. and granted by Barkley J. Jo. 495. Trin. 14 Car. B. R. in caſe of Edwards v. Rogers. If *none of the parties have any thing at the time* of the fine, then it is a fine by concluſion between the parties; but all *ſtrangers may avoid it* by the averment of partes finis nihil, &c. Br. Fines, pl. 109.

9. *A. made a feoffment* to the uſe of *himſelf for life, and after the death of him and M. his wife*, to the uſe *of B.* (eldeſt ſon of A.) *for his life, and after the death of A. M. and B.* to the uſe *of B. and the heirs male of his body*, and for default of ſuch iſſue, to the uſe *of the heirs of B.*——*B. had iſſue a daughter*, and then by fine and indenture *granted to G. for* 500 *years*. B. dies; M. dies; A. ſtill living; upon a reference out of chancery to the lord Ch. J. Hale, and after hearing the arguments of counſel, his lordſhip was of opinion, that the eſtate as above limited to B. was a contingent remainder; and that the eſtate which cometh to the heir upon the happening of the contingency feeds this eſtoppel; and then the eſtate by eſtoppel becometh an eſtate in intereſt, and ſhall be of the ſame effect, as if the contingency had happened before the fine levied. January 3, 1672. Pollex. 55. 65 and 66. Weale v. Lower.

(L. a. 3) Enure. How. By Eſtoppel, Pleadings.

1. A man has iſſue M. by his firſt feme; ſhe dies; and he takes another feme, Iſabel by name, and *enfeoffed A. who by fine gave back to the baron and Sibel his feme* where *his feme is Iſabel*) *in tail*, the *remainder to the right heirs of the baron*; he *dies without iſſue by Iſabel*; M. enters as heir, and Iſabel ouſts her. *M. brings aſſiſe*, and *Iſabel pleads that her name was Sibel, and* pleads *the fine to the aſſiſe*, and it was found that ſhe had to name Iſabel; and it was awarded, that M. ſhould recover; and ſo note, that the fine is not good by a contrary name. And after Iſabel, by name of Sibel, brought ſcire facias againſt M. and had execution by default, and M. brought aſſiſe, and per G. Scrope, the ſaid feme plaintiff may plead the fine by concluſion againſt M. to ſay that the name of the feme is Iſabel, becauſe the fine was levied by name of Sibel, and becauſe *the father of M. whoſe heir ſhe is, was party and took by the fine*, * *affirming the name of his feme to be Sibel*, and that upon this plea M. ſhall be barred of the aſſiſe; it ſeems that this is good law. Br. Fines, pl. 72. cites 1 Aſſ. 11.

* *Jointly with the feme.* Br. Eſtoppel, pl. 113. cites S. C. & 3 Aſſ. 4.

*

2. A man levied a fine *ſur grant and render* (which is executory *of land, of which he had nothing at the time of the fine*, and *after purchaſes the land*, he ſhall render execution thereof, and cannot confeſs it and avoid it; becauſe he had nothing at the time of the fine; but ſhall be eſtopped by the fine, per Tanke and Finch. But per Finch. *contra* of a fine *ſur conuſance de droit come ceo*, &c. for this is executed, and there it ſuffices to *ſay, that after the fine his anceſtor was ſeiſed and died ſeiſed*, and he entred as heir. But Kirten ſaid that it ſhall be a good voidance of the fine ſur render, but not of the fine ſur conuſance de droit come ceo, &c. Quære, for moſt think the opinion of Finch. to be marvellous, and *it ſeems that the one fine, and the other ſhall be eſtoppel.* Br. Eſtoppel, pl. 41. cites 46 E. 3. 5.

3. Note, that a *fine ſur releaſe, levied by J. N. to the baron and feme, and to the heirs of the baron*, is no *eſtoppel to the feme after the death of her baron, to ſay, that ſhe never had any thing of the leaſe of J. N.* For a fine ſur releaſe does not prove a leaſe to her, but rather that ſhe was tenant at the time of the fine; for otherwiſe a releaſe [304] cannot enure to them, unleſs they had ſeiſin before; quod nota, per Cur. Br. Eſtoppel, pl. 200. cites 50 E. 3. 6, 7.

4. In aſſiſe, a fine was levied *to the tenant in tail in poſſeſſion for his life, ſur grant and render*, the *remainder over in fee to a ſtranger*; the *tenant in tail had iſſue and died*; and the *iſſue entred*; he in *remainder ouſted him*, and *he brought aſſiſe*, and the tenant pleaded the fine, and the *plaintiff pleaded the tail before, and averred the continuance of poſſeſſion in his anceſtor all his life*; *abſque hoc, that thoſe who levied the fine had any thing at the time of the fine, before or after*; and per † Cokine and Firwit, the fine does not bind the iſſue in tail, but per Hank. and Gaſcoign contra, & adjornatur. Brook makes a quære, and ſays, that it is inconvenient that where I am ſeiſed in fee, or in tail, a ſtranger (I not knowing of the levying of the fine to me for life ſur grant and render the remainder over) ſhall make me loſe the fee ſimple, where all is the act of the conuſor and * I ſay nothing; and an infant ſhall be in the ſame caſe by ſome, and the beſt opinion is, that, if it be not a fine executed, the iſſue in tail is not bound by the ſtatute de finibus of averment; for this is intended of the eſtate of the fee ſimple, where the heir claims only by the ſame anceſtor; but upon tail he claims by the gift. Br. Fines, pl. 35. cites 8 H. 4. 8.

Br. Eſtoppel, pl. 60. cites S. C. and that it was held by Hank. & Gaſcoigne and others that it is a diſcontinuance; becauſe it was *levied to him who had the poſſeſſion*, and therefore *he cannot otherwiſe execute the fine*, and that by the ſtatute W. 2. which ſays, that fines ipſo jure ſit nullus, it is yet a diſcontinuance, and that the ſtatute of averment of continuance of poſſeſſion againſt fines made 22 E. 1. was 11 years after the ſtatute of W. 2. and therefore the iſſue in tail, not excepted, ſhall be bound by them.——Br. Diſcontinuance of poſſeſſion, pl. 2. cites S. C. and ſays, that the beſt opinion is, that it is a concluſion to the tenant in tail for his life, but yet he makes a quære thereof where all are the words of the conuſor and he ſays nothing, &c. But the iſſue in tail ſhall not be bound, and that the *ſtatute of averment againſt fines, is of fee ſimple*, and where he *claims as heir, but in this caſe he claims per formam doni*, &c. & adjornatur.——† And by Hill. Br. Diſcontinuance of Poſſeſſion, pl. 2. cites S. C.——* *Orig.* (Jeo die rien.)

5. If there be *father and ſon*, and the *father levies a fine of the manor of D.* and *after purchaſes the manor*, and the conuſee enters, and after the father dies; now (as I think) the ſon ſhall be barred. But it is good to ſee the manner and form of pleading ſuch caſe. Co. R. on Fines, 16.

6. If

6. If *in the ſame caſe* the ſon brings an *action anceſtrel*, and as heir, and the fine be pleaded in bar, the ſon cannot ſay *quod partes fines nihil habuerunt*; but if the ſon enter and be ouſted, and brings aſſiſe, and the tenant pleads, that the father of the plaintiff was ſeiſed in fee, and ſo ſeiſed levied a fine, &c. the ſon may ſay, quod partes finis nihil habuerunt, *but ſuch a one whoſe eſtate he hath.* By this way the plaintiff ſhall be * tricked; and therefore the ſure way for the tenant in ſuch caſe to plead, is to *ſhew all the ſpecial matter*, how his father levied the fine, and after purchaſed the land; for be the fine executory, or executed, the fine ſhall bar his heir, as I think. Co. R. on Fines, 16.

(* *Orig.* Trie.)

(M. a) *Declaration of Uſes, Good.* In reſpect of the Perſon, *by whom.*

1. BARGAIN *and ſale inrolled* by *infant*, and a *fine afterwards* levied to the bargainee come ceo, &c. during his nonage. It was held that though the indenture was void againſt the infant, in reſpect of the thing which ought to paſs by the deed, yet the deed indented was but voidable; and then when the fine was levied upon it, this makes the bargain and ſale irrevocable, unleſs by writ of error; for the indenture ſerves to declare the uſe, and direct the fine. Dal. 47. pl. 6. 5 Eliz. Anon.

Infant may declare the uſes of a Fine. 2 Le. 159. pl. 193. 21 Eliz. in the Star-Chamber. Anon. —And Mr. Plowden affirmed, that it was ſo adjudged in his own caſe, by which he loſt lands of 40*l.* a year.—Arg. 4. Le 89. ſays, it was adjudged contra, in the court of wards.

2. Declaration of the uſe of a fine, by a man in *dureſs* is good, but per Anderſon Ch. J. contra. 2 Le. 159. pl. 193. 21 Eliz. in the Star-Chamber. Anon. [305]

3. If *ideot* levy a fine and declare uſes upon it, the declaration is void, and the fine ſhall be to his own uſe, 4 Le. 89. ſays, it was ſo adjudged in the Court of Wards.

Arg. Goldſb. 13. S. P.—The law of uſes and truſts, pag. 42. ſays, that a man non ſanæ memoriæ may declare the uſe of a fine, and in the Marg. there cites 2 Rep. 58. a. but I do not find ſuch point there.

(N. a) *Declaration Good.* In reſpect of the Perſon *to whom.*

1. USE of the fine of a *thing in grant* cannot be declared to a *ſtranger* without deed; yet it may be averred, that the uſe was to a ſtranger, without ſhewing the deed, or making mention of it. The ſame law of reverſion. Roll. R. 73. Mich. 12 Jac. B. R. Parvis v. Yeaton.

(O. a) Decla-

(O. a) Declaration, &c. *good*, in reſpect of the *Manner* of doing it.

And. 230. 2 Rep. 69 b. Brendl. 201.—2 And. 69. S. C.—Mo. 106. S. C. Mich. 17 & 18 Eliz. Andrew's caſes.—Jenk. 252. pl. 43.

1. A. Seiſed of a manor and advowſon appendant conveyed it to B. and covenanted for further aſſurance by levying a fine, *proviſo, that B. ſhall regrant the advowſon to A. that he may preſent during his life*, and if A. die before any avoidance, then B. to grant the next preſentation to the executors of A. and a *covenant that all aſſurances ſhould be to the uſes of this indenture*; a fine was levied ſur conuſance de droit come ceo, &c. to J. S. who rendered the rent to A. in tail, remainder over; and B. died without making any regrant to A. The church avoided, and in qua. impedit by A. judgment was given for him; becauſe B. in his life did not perform the condition, which remains notwithſtanding the fine, which was with render of rent, according to the agreement between A. and B. ſo that the fine upon render ſhall be to the uſes declared by indenture as before, and not extinct or determined by it. And. 17. Andrews v. Blunt.

2. A declaration of the uſe, either *expreſs or in law*, is ſufficient; as if A. covenants with B. for money to do all acts which B. ſhall require for aſſurance to B. and his heirs, and then levies a fine to B. This covenant and fine will give B. the whole land. Hob. 275. Mich. 13 Jac. Clanrickard's caſe.

3. If a man makes a *bargain and ſale*, and the deed is not *enrolled*, *or* make a charter of *feoffment*, and there is no *livery*; yet they will be ſufficient to declare the uſe of a fine afterwards levied between the ſame parties. Hill. 9 W. 3. 12 Mod. 163. Jones v. Morley.

And even *ſince* that ſtatute it may be good by *writing only, without a ſeal*, per Holt Ch. J. Farr. 76. Mich. 1 Annæ, B. R. in caſe of Shortridge v. Lamplugh.

4. Before the *ſtatute of frauds*, even a *parol* declaration of the uſes of a fine was good. 4 Mod. 262. Jones v. Morley.

5. *By* 4 & 5 *Annæ*, 16. § 15. *Declaration of uſes or truſts by deed, made* after the fines, or recoveries *ſhall be good in law, as if the* 29 *Car.* 2, 3. *of frauds had not been made.*——See infra. (R. a).

[306] (P a.) Declaration of Uſes, *good*; notwithſtanding *Variance* as to the *Uſes*.

1. USE implied in a fine ſhall not be *averred* againſt the uſe expreſſed in the indenture of uſes, D. 311. b. pl. 84. Paſch. 14 Eliz. Andrews v. Blunt.——2 And. 70. Ld. Cromwell alias Blunt v. Andrews.

2 Rep. 69. b. Hill. 43 Eliz.

2. Covenant was to levy a fine of the manor with a *render of rent in fee* to the covenantor and his heirs, the *conuſee by covenantor's conſent*

ſent renders in tail only to the covenantor, and *remainder to J. S. in fee*; this being by conſent of the covenantor, and the conuſee being only an inſtrument, acceptance of the leſs eſtate by the covenantor is good, and as if the fee of the rent had been rendered to him. Jenk. 252. pl. 43. C. B. Lord Cromwell's caſe.

3. In the caſe of declaring the uſes of a fine, it is *not always neceſſary that the wife's name be ſet to the indenture*, which declares the uſes. per Coke Ch. J. Godb. 180. Trin. 8 Jac. C. B. in caſe of Bury v. Taylor.

4. Where there is *a deed, and a laſt writing* by huſband and wife, the laſt writing, though not a deed, amounts to a ſufficient declaration of uſes upon the fine, being levied * at a *time different* from the deed. Cumb. 429. Hill. 9 W. 3. B. R. Jones v. Morley. This writing was only a deed betweenthe huſband of the one part, and the wife of the other part. But the deed was between them and others. Carth. 410. S. C.—— 2 Salk. 677. S. C.——4 Mod. 261. S. C.——Parliament Caſes, 143. S. C. and judgment affirmed. ——* Cart. 5. in caſe of Davis v. Kemp.]

(P. a. 2) Declaration of Uſes, notwithſtanding Variance, *as to the Time* of levying, &c.

1. Where the deed is, that the fine ſhall be levied of certain lands, *by the name of* 100 *acres to A. and B.* and that they ſhall grant, and render the ſame in fee ſimple, which ſhall be to certain uſes. The fine is levied of the land, but ſome * *variance is in the number of acres*, or in the fine, as where the fine is *levied to A. only*, who grants and renders the land, yet it may be *averred* to be to the uſe of the indentures, and that there was *no new conſideration*, or agreement between the parties. 2 Rep. 76. Hill. 43 Eliz. C. B. Ld. Cromwell's caſe. *Cro. J. 512. cites 5 Rep. 26. b. Earl of Rutland's caſe.

2. If A. covenants to levy a fine before ſuch a day, though the fine levied *differs from the indenture* in * time, place, quantity of acres, or in the perſon that occupied it; yet, when the fine is levied, it ſhall be intended to be to the ſame uſes in the indenture. Arg. 3 Bulſ. 251. cites 2 Rep. 69. Ld. Cromwell's caſe. —— But it may in ſuch caſe be *averred by parol to be to other uſes*. But if the fine be levied in all things purſuant to the indenture, no averment can be but by writing; for in this caſe, the indenture *is directory to the fine*, and in the other caſe, it is *but evidence*. Cro. J. 29. Paſch. 2 Jac. B. R. Counteſs of Rutland v. the Earl of Rutland.

Covenant to levy a fine within the year of 100 acres, the year expires, and a fine is levied of 80 acres. The fine ſhall be to the firſt uſe, cited per Coke J. and Montague Ch. J. Cro. J. 512. as the EARL OF RUTLAND'S CASE. 5 Rep. 26. b.——9 Rep. 1. Downam's caſe.——* Carth. 412. Jones v. Morley.

3. If a declaration of uſes be ſubſequent to a fine or recovery, it is good; but there may be an *averment*, that they were to *other uſes*, but with this difference, that where the declaration is ſubſequent, there the heir of the conuſor is *eſtopped to aver* other uſes, but a *ſtranger* is not. But where the *deed is precedent*, there, neither the heir nor a ſtranger is eſtopped to aver other uſes, in caſe the *fine varies in any circumſtance*; but if the fine was levied purſuant to the deed, Carth. 411. S. C. Parl. Caſes, 144. S. C. and P. —Per Holt Ch. J. He ſhould not plead that the *uſes were de-*

clared by a deed subsequent. But that recuperatio habita fuit,

deed, no proof whatſoever, either by writing or parol, ſhall be admitted, that the fine was to other * uſes, than what are contained in the deed, that being an eſtoppel to the parties, per Holt Ch. J. Cumb. 429. Trin. 9 W. 3. B. R. Jones v. Morley.

&c. quæ quidem recuperatio in forma predict. habita fuit, to ſuch and ſuch uſes; and, in caſe of a deed precedent, if the party ſet up other uſes, he muſt *confeſs and avoid*; and if a deed ſubſequent be ſet up, the other may traverſe thoſe uſes. Adjournatur. 2 Salk. 676. Hill. 8 W. 3. B. R. Tregame v. Fletcher.——9 Rep. 10. b. Downam's caſe.——2 And. 78. cites Vavaſor's caſe.

Carth. 412. S. C.—12 Mod. 159. S. C.—Cro. J. 29. * Counteſs of Rutland v. Earl of Rutland—1 Rep. 99. b. Arg. in Shelly's caſe.—* 5 Rep. 26. b. Trin. 12 Jac. B. R. Earl of Rutland's caſe.

4. Where there is a deed for levying a fine, but *the fine is not levied according to the deed*, other uſes may be *averred*, though thoſe other are declared by writing, and not by deed; for, by the variance, there is room and occaſion to enquire, and receive information, that the old agreement was relinquiſhed, and by the ſame reaſon, that the uſe of a fine may be declared by parol, upon an *original agreement*, it may now, as in this caſe, where the original agreement was *relinquiſhed*; yet without ſuch averment, the fine ſhall be intended to the uſe of the firſt agreement, notwithſtanding the variance. 2 Salk. 677. Hill. 9 W. 3. B. R. Jones v. Morley.

Abr. Equ. Caſes 258. (D) pl. 2. S. C.

5. A covenants *before the end of Eaſter term*, in conſideration of the marriage of B. his ſon with M. and a portion, *to levy a fine to the uſe of B. and M. for life, and to the heirs of the body of B. remainder to C.* the ſecond ſon of A. and the heirs of his body. A fine was *levied as of Eaſter term*, but the marriage being put off till after Eaſter term, the *deed was not executed, nor dated till after Eaſter term*, ſo that the fine was levied before the date of the deed, and ſo the deed was no declaration of the uſes of that fine. B. dies, leaving a ſon, who mortgages the land, and dies without iſſue. Decreed that the conſideration of B.'s marriage did not extend to C. ſo that C. was no purchaſor; and as he cannot, by means of the above defect, maintain an ejectment at law, he being only an equitable remainder-man at beſt, ſo neither will chancery relieve him, but he muſt diſcharge the mortgage made by B. who was tenant in tail in equity; and any ſuch may, by any conveyance, bar the ſettlement. Mich. 1703. Ch. Prec. 224. Staplehill v. Bully.

(Q. a) Where there are *ſeveral Declarations* of the Uſes.

And. 261. S. C. cited but adds a quære if the feme ſhould be bound, &c. and it ſeems not.

1. FEME, before the 27 H. 8. of uſes, being ſeiſed of land, ſuffered a common recovery, and intending to marry A. B. ſhe, before the marriage, declared by indenture that the feoffees ſhould be ſeiſed *to the uſe of herſelf and A. B.* whom ſhe intended to marry, *and their heirs.* The feoffees executed an eſtate after the marriage to the huſband and wife and their heirs, in fee, without

out any uſe expreſſed. Afterwards the baron and feme *by other indenture, declare that the firſt indenture was miſtaken*; for that it *ſhould have been to the heirs of their two bodies*, and for default *to the heirs of the wife*. And they covenant, bargain and *agree to ſtand ſeiſed to the uſe of* themſelves in tail, and after, to the right heirs of the wife; and the huſband covenanted, if the wife died without iſſue, during his life, that he would execute an eſtate accordingly. The wife died without iſſue, and after the ſtatute of uſes the baron died ſeiſed; and it was held, that the *firſt indenture was corrected by the ſecond*, and the firſt uſe is ſufficiently altered without eſtate executed, and the conſiderations are reaſonable and ſufficient, and adjudged for the heir of the wife. D. 307. b. pl. 71. Paſch. 14 Eliz. Vavaſor's caſe.

2. Fine by *grant and render*; no new declaration ſhall be to croſs the grant and render; but the regrant in the fine ſhall amount to a declaration * of the uſe, and it ſhall be intended done by the procurement of the conuſor himſelf. Clayt. 94. Jennings v. Chantery.

Fine with render may be to a uſe expreſſed in writing. Agreed. Mo. 472. in caſe of Ld. Cromwell v. Andrews.

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3. A deed is made declaring the uſes of a fine to be levied; afterwards (but before the fine levied) a *ſecond deed of declaration of the uſes* is made; by reaſon of this ſecond deed, other uſes, than according to the firſt deed, may be *averred*. 2 Salk. 677. Jones v. Morley.

Carth. 410. S. C. 4 Mod. 261. S. C. Cumb. 429. S. C. Parl. Caſes 143. ——Two ſeveral indentures were made precedent to the fine of different uſes, *between different perſons*; and in a ſubſequent term, to what the fine was covenanted to be levied in, the conuſor *acknowledged two ſeveral fines the ſame day, to the different covenantees*; firſt, to the firſt covenantee, and after to the ſecond. It was reſolved, that the uſes cannot be directed by theſe different indentures, and to make a commixtion of different eſtates, though, perhaps it was the intention of the parties; but that the ſecond declaration controlled the firſt. 5 Rep. 26. b. Earl of Rutland's caſe.——In the caſe of two indentures, it may be *averred to which* of the uſes in the ſecond indenture the fine was levied; for the firſt indenture does not bind the land, nor create any uſe, till the fine was levied; and upon thoſe indentures it ſtands indifferent upon which uſes the fine was levied. 2 And. 46. Mich. 38 and 39 Eliz.——S. C. cited. 2 And. 78. per Anderſon Ch. J. in caſe of Cromwell v. Andrewes.——Mo. 107. in Andrews's caſe.——Clayt. 51. Allen's caſe.

4. If a fine is levied by huſband or wife of lands, which he hath in right of his wife, and there is a deed made at the ſame time to declare the uſes thereof, and afterwards this *deed is loſt*, and then *another* is *made to the ſame effect and dated as the firſt*; that deed is ſufficient to declare the uſes of the fine, per Holt Ch. J. Holt's Rep. 735. Mich. 7 Annæ, in caſe of Buſhell v. Burland.

(R. a) Declarations of Uſes, Good; where made after the Fine or Recovery.

1. IF a *fine* be levied, and an indenture to lead the uſe of it to be ſealed and delivered *afterwards*, this is not ſufficient to lead the uſe of the fine, except it can be *averred*, and proved, that the conuſor

In Dowman's caſe. Mo. 191, 192 and 9

conuſor intended, before the fine levied, to levy it to this uſe. Quære. Cro. E. 218. Hill. 33 Eliz. B. R. Foſter v. Fountain.

Rep. 7. b. the jury found the deed of uſes was ſubſequent; but *that the intent of the parties, at the time of* ſuffering the recovery, *was to the uſes in the indenture* declared.——Two, or three, or four years, or more, after a fine levied, or recovery ſuffered, the uſes may be declared of ſuch fine and recovery; but *leaſes and other charges made in the mean time* ſhall ſtand, and the fine and recovery ſhall be to the ſaid uſes, ſubject to the ſaid leaſes and charges. Jenk. 212. pl. 50.

2. 4 *and* 5 *Annæ*, 16. *ſ.* 15. enacts that *all declarations or creations of uſes or truſts of any fines or common recoveries manifeſted by deed after the levying or ſuffering thereof, ſhall be as good in law, as if the act of* 29 *Car.* 2. *cap.* 3. *for prevention of frauds or perjuries had not been made.*

In ejectment on a ſpecial verdict, the caſe in ſubſtance was this, viz. A. and B. his wife levied a fine, and four years afterwards declare the uſes; in which deed, are the words following, viz. *all and every fine and fines levied or to be levied, ſhall be to the uſes of this deed.* Holt. Ch. J. delivered the opinion of the court, that the uſes were ſufficiently declared; (the jury having *found, that the fine was levied to the uſes therein declared.*) And that, notwithſtanding the *ſtatute of frauds and perjuries*, a ſubſequent deed is now as good as it was before the ſtatute. And that it was *doubtful whether the ſtatute extends to uſes*, becauſe they are not mentioned there, but only *truſts*; yet that they took truſts and uſes to be the ſame, in reſpect of truſts in their larger extent, &c. ſo within the ſtatute of uſes. Holt's Rep. 733. Mich. 7 Annæ, Buſhel v. Burland.——*And* this caſe is muſt ſtronger than DOWMAN'S caſe; for the jury there found, that the deed of uſes was ſubſequent, and the queſtion was, whether the deed was ſufficient to declare the uſes? and in that caſe it was objected, that there was a limitation of the uſe *without any impeachment of waſte*, which cannot be without deed. At the time of granting the reverſion, there was no deed; but when the deed came, and declared the intent of the party, then it was a ſufficient manifeſtation of the uſe, and the intent of the party. And it is true, waſt could not be diſpuniſhable without deed, but when the deed came and made good the uſe, it was well enough. per Holt Ch. J. Holt's Rep. 736. Mich. 7 Annæ, in the caſe of Buſhell v. Burland.

[309] (S. a) Enure how. Where levied by ſeveral, and the *Uſes* are *declared by one only, or differently by each.*

So where tenant for life, remainder in tail join in a common recovery, in which the remainder-man in tail is vouchee, but the tenant for life only declares the uſes, the remainder-man being neither party to the indenture, nor aſſenting to the uſes. Noy. 77. Argol v. Cheyney.——* D. 143. a. pl. 52.

1. IF *two* * *jointenants* ſuffer a common recovery, and *one only declares* the uſes, that does not bind the moiety of the other, unleſs the conſent of the other to that declaration be proved. Noy. 77. in caſe of ARGOLL v. CHEYNEY, cites 2 Rep. 57.

2. If *two jointenants, or two having different eſtates, join* in a fine, and one declares the uſe in one manner, and the other in another manner, this is good for every one of their parts; for the declaration of the uſe ſhall be directed, and governed according to their eſtates and intereſts. Trin. 27 Eliz. 2 Rep. 58. Beckwith's caſe.

4 Le. 88. S. C. by the name of Blithe v. Colgate.—But if baron alone declares uſes, and the wife * not, it ſhall be to the uſes declared by the baron. S. C. cited 2 And. 78.——Becauſe ſhe did not diſaſſent in her huſband's life time. Jenk. 238. pl. 17.——Mo. 196. S. C. adjudged.——* If ſhe does not diſagree, the law intends that

3. If *baron and feme*, ſeiſed in right of the feme, agree in limitation of the uſe of part of the land, and vary in the limitation of the reſidue of the land, it is *good for part*, and void for the reſidue. 2 Rep. 48. Trin. 27 Eliz. Beckwith's caſe.

that ſhe conſented thereunto; becauſe ſhe joined in the fine, per Windham J. Goldſb. 69. in caſe of Colgate v. Blythe.

If *ſhe does diſagree*, yet the *baron* by his declaration, *ſhall be bound as to his intereſt*, during the coverture. See Mo. 197. Beckwith's caſe.——But after, it ſhall be to the uſe of the feme and her heirs. Jenk. 238. pl. 17.

4. *But* if the *feme alone declares* the uſes, the *aſſent of the baron ſhall not be intended*, if nothing appears to the contrary, but the declaration is void, unleſs an expreſs aſſent be proved, per Cur. Paſch. 2 W. & M. B. R. Skin. 275. Johnſon v. Cotton.

5. If *tenant for life and reverſioner levy a fine, and both of them declare ſeveral uſes.* It ſhall enure according to their ſeveral intereſts. Noy. 20. ſeems to be Hill. 35 Eliz. in the caſe of Yelverton v. Yelverton. S. P. Noy. 77. Argol v. Cheyney.

(T. a) Enure, how. Where the Uſes declared are *repugnant*, or ſeemingly ſo.

1. *BARON and feme* ſeiſed of lands to them, and the heirs of the baron bargain and ſell the land to J. S. upon *condition*, that if they or any of them, or the heirs, executors, adminiſtrators or aſſigns of the baron, *pay* 500 *l.* at ſuch a day to J. S. that then it ſhould be lawful for the baron and feme to *enter and hold in their firſt eſtate*, and that *after the payment*, this indenture and all fines and other *aſſurances ſhall be to the uſe of the baron and his heirs.* A fine was levied to J. S. before the inrolment of the deed; the baron dies, his wife living; the heir pays the 500 *l.* the feme ſhall have the land for her life, becauſe J. S. was in by the fine, and not by the bargain and ſale; and alſo upon the payment, the uſe was *reveſted* in the feme, as was the ancient uſe before the fine, and this, by the expreſs words in the firſt part of the proviſo aforeſaid; and the laſt part, which appoints the uſe to the baron and his heirs, ſhall be repugnant, and ſo void, or otherwiſe ſhall ſtand in ſuch conſtruction, that it ſhall be to the ſole uſe of the baron for the reverſion only. Hill. 43 Eliz. Mo. 680. Wilmot v. Knowles.

And when both clauſes may by any conſtruction ſtand together, it is to be conſtrued accordingly. And in this caſe was a clauſe at laſt, that *all aſſurances ſhould be to the uſes contained in the indenture*, whereof this is one. And if all the clauſes cannot ſtand together, the firſt ſhall ſtand rather than the laſt. Hill. 42 Eliz. B. R. Cro. E. 744. S. C. by the name of Southcoat v. Manory.——Cro. E. 917. S. C.

2. *Two deeds of ſettlement*, the latter was contrary to the former, and left out the limitation to the heirs male, the firſt was decreed to ſtand againſt fine levied to the uſe of the laſt. 12 Car. 2. fol. 170. Chan. Rep. 192. Bingham v. Huſſey. [310]

(T. a. 2) Uſes well limited, or Enure how; where the *Limitations* in the Fine *vary* from the Limitations in the Deed.

1. A fine was levied *by baron and feme*, and the cogniſee *rendered* the ſame lands *to the baron and feme, and to the heirs of the feme*; and

and an *indenture* was made, by which it was *recited, that* the render *ſhould be to the uſe of the baron and feme, and of the heirs of the baron*; the queſtion was, if the limitation of the uſe by indenture ſhall hold? Dyer Ch. J. thought that it is well enough; for the indenture ought to rule the uſe, although in the render be a uſe implied to their own uſe.———Per Brown J. the poſſeſſion is transferred to the uſe by the ſtatute, and therefore a uſe cannot be expreſſed upon a uſe. As feoffment to J. S. to his own uſe, and that he ſhall be ſeiſed to the uſe of R. H. this is void to R. H. becauſe the uſe and poſſeſſion was to J. S. before. And ſo if a man bargains and ſells the land for money, and limits an uſe upon it, it is void. But here the render, of neceſſity, muſt be to the heirs of one of them, and for ſo much no uſe is implied. Weſton held to the ſame intent, for there is not any uſe implied upon a fine, no more than upon a feoffment, by which they thought the limitation over good enough; Dyer ſaid, if the render be made in tail, the cogniſee is ſeiſed of the reverſion to his own uſe. Quod Bendlows and other ſerjeants conceſſerunt. Mo. 45. pl. 138. Mich 5 Eliz. Anon.

2. By the rule of law, a *general covenant* directs the ſpecial uſes of a fine, and the ſpecial operation of theſe is by the general covenant, and according to the intent of the parties; and this is proved by 6 R. 2. Fitz. tit. Eſtoppel. Placito. 2. A *feoffment* was *to two and their heirs* by deed, and a fine to be levied; which is [was levied] to them, and *the heirs of one of them*; this ſhall be to the heirs of both of them; which caſe is put 2 Rep. 74. b. in the Ld. CROMWELL'S CASE; where it is ſaid that the precedent feoffment ſhall rule and direct the ſubſequent fine, and preſerve the joint eſtate in them of fee ſimple, againſt the expreſs limitation of the fine; and the fine ſhall be ruled, and *directed according to the precedent agreement*, and eſtate made by the parties. 3 Bulſ. 256. Mich. 14 Jac. in caſe of Havergill v. Hare.

[See (O. a) Andrews v. Blunt.]

(U. a) *What Eſtate* ſhall *paſs* by the Declaration.

Without mentioning any eſtate in particular, this is an eſtate for life; for it is *as a grant*. Jenk. 332. pl. 65.

1. A Fine was levied, and the indenture declared the uſe to be *to the wife of J. S.* it was adjudged in C. B. to be an eſtate for life, and judgment affirmed in B. R. though it was not expreſſed to be for life. For per Doderidge J. though the fine be but as a grant, yet an *eſtate for life* may paſs. Hill 16 Jac. B. R. Cro. J. 525. Egerton's caſe.

(W. a) *Enure*

(W. a) *Enure* how. Where the *Lands* lie *in ſeveral Vills.*

1. A Pariſh may contain 10 vills, and if a fine be levied of *lands in the pariſh*, this carries whatſoever is in any of thoſe vills. If the *conſtablewick* of the one goes over all the reſt, that is the ſuperiour or mother vill, and the lands which is in the other ſhall paſs *per nomen* of all the lands in that; and though it be found that A. was a tythingman, (decenarius,) which, prima facie, is the ſame with a conſtable, and differed little in the execution of that office concerning keeping the peace; yet Hale ſaid, he was not the ſame officer and it is found that the conſtables of A. have a ſuperintendency over B. and therefore it is but a hamlet of A. But if found that they had diſtinct conſtables, and could not interfere in their authority, it would be otherwiſe. Mich. 23 Car. 2. B. R. Vent. 170. Walden v. Ruſcarrit. Mod. 78. S. C. — 178. in caſe of Green v. Proud.

(X. a) *Second Fines.* How they ſhall enure.

1. IN aſſiſe; *fine* was levied *to two femes and to the heirs of their bodies*, and *after the donor by fine ſur conuſance de droit come ceo*, &c. in writ of warranty of charters, *acknowledged the land to both and the heirs of the body of the one* the *remainder to the other in tail*; and both have iſſue and die, and the iſſue of the eldeſt claims by the fine, and brought aſſiſe of all againſt the baron of the youngeſt, who was tenant by the curteſy, and could not recover but only the moiety. And ſo ſee that this fine is only as a confirmation, and ſhall not alter their eſtates. Br. Diſcontinuance de poſſeſſion, pl. 28. cites 8 Aſſ. 33.

2. A. levied a fine to the uſe of himſelf for life, remainder to his wife for life *remainder to his executors for 20 years*, remainder in tail to B. his ſon, remainder over; afterwards A. levied another fine *to the ſelf ſame uſes leaving out the eſtate for years to the executors.* A. died; reſolved that the remainder to the executors for 20 years, being in abeyance, was *extinct* by the ſecond fine. Mo. 745. Trin. 42 Eliz. Remington v. Savage.

3. A fine is acknowledged to A. and afterwards a *ſecond* is acknowledged *to B.* If the *firſt is not recorded*, the ſecond fine is good. But if the firſt had been recorded in court, in time convenient, viz. the *next term*, it had been good, and the firſt merely void. Cro. C. 284. Mich. 8 Car. B. R. in caſe of Burgaine v. Spurling.

4. A. tenant in tail levied a fine to the *uſe of B. for the life of B. with warranty*; and afterwards he levied *another to the uſe of himſelf and his heirs*, with warranty; and afterwards bargained and ſold the lands to C. and his heirs. Adjudged that the firſt fine thus levied by tenant in tail made a *diſcontinuance*, but it was only during Lutw. 781 S. C. and judgment.

the life of B. For it remains no longer a diſcontinuance, when the wrongful eſtate is gone by which it is cauſed; that the ſecond fine did not enlarge the diſcontinuance; becauſe the eſtate raiſed by the fine returned back to the cogniſor, and by conſequence, the warranty annexed to it was extinguiſhed. 1 Salk. 244. Hill. 1 Annæ, B. R. Hunt v. Bourne.

[312] (Y. a) By Grant and Render. Enure How. *Conſtruction* of ſuch Fines.

1. FINE is levied *reciting, that the conuſor held certain land of the conuſee by 5 marks*, the *conuſor acknowledged and rendered 5 marks rent to the conuſee out of his land*; this is taken to be a *new rent*, and not the ancient rent, nor ſhall it have relation to the recital. Br. Relation, pl. 33. cites 21 E. 4. 60.

2. Feoffment by deed rendering 3 *l.* rent, with clauſe of diſtreſs, and covenant by feoffor to make further aſſurance of the land; feoffor *levies fine* to the feoffee, who *renders* 3 *l. rent*, adjudged that he may avow for the firſt rent, notwithſtanding the fine, and that the render is not a grant of new rent, but confirmation of the old rent, and the old rent was preſerved by the intent of the fine. Mo. 298. Trin. 32 Eliz. Sherrot v. Holloway.

3. Where there was a *repugnancy between a third and a fourth render*, the one limiting the remainder in fee to the conuſor, and the other limiting it to a ſtranger, it was reſolved, that what was contained in the third render, ſhall be of the ſame condition and quality in *conſtruction, as a charter or other conveyance between party and party*, and need not have ſuch preciſe form as a writ or a judgment. But a conuſance of a fine, and a grant and render ſhall have ſuch conſtruction as another conveyance between party and party; for it has words of grant and render, becauſe it is a conveyance of record. Trin. 34 Eliz. B. R. 5 Rep. 38. a. b. Tey's caſe.

S. C. cited 1 Rep. 174. b.

4. If *A. tenant in tail, and J. S.* a ſtranger, levy a fine to W. R. a ſtranger, who *grants and renders to J. S. for years rendering rent to W. R.* and by the ſame fine grants the *reverſion to A. and his heirs*; it is good; and though all be by one and the ſame fine at an inſtant, yet in judgment of law, the leaſe precedes the grant of the reverſion, as is held in 36 H. 8. Br. Fines 118. and ſo was it adjudged upon a demurrer. 1 Rep. 76. b. cites M. 41 and 42 Eliz. C. B. Rot. 336. White v. White.

5. If baron and feme levies a fine to B. who *renders again for life*, the *reverſion remains in the conuſor* to his own uſe. Arg. Gouldſb. 68.

2 Salk. 590. contra, Trin. 7 Annæ, B. R. Abbot v. Burton.

6. *Fine with grant and render* is tantamount to a feoffment and refeoffment, and creates a new eſtate. Paſch. 2 W. & M. B. R. 1 Salk. 337. Price v. Langford.

(Y. a. 2) Fine. Enure. *By Way of Surrender.* In what Caſes.

1. A. and B. *jointenants*, *A. for life*, and *B. in fee*, *make leaſe to J. S. for* term of his *life*, and after *J. S.* ſurrenders by fine *to A.* It ſeems to me that this is a ſurrender, and ſhall enure to both A. and B. as I think. Tamen quære. Co. R. on Fines 5.

2. *But if J. S.* had granted his eſtate by fine *to A.* it ſhall be a *ſurrender* in law *for one moiety*, *and a grant* of his eſtate *for the other* moiety, and B. cannot enter into any part with A. as I think. Co. R. on Fines 5.

(Z. a) Enure. Where Conuſors, or one of them *takes* back *no greater Eſtate than before.* [313]

1. A. Sold land to the huſband and wife, and the heirs of the huſband; afterwards the huſband and wife levied a fine to J. S. and J. N. to the uſe of huſband and wife during their lives, remainder to the huſband in tail ſpecial, remainder over. It was held in the court of wards, that after the death of the huſband, the wife need not ſue out livery, becauſe the lands *being originally purchaſed in the names of the huſband and wife*, and then they joining in a fine whereby the wife had no greater or leſs eſtate, than ſhe had before, the eſtate to her by the fine was no conveyance for the advancement of the wife within the meaning of the ſtatute of 32 H. 8. Trin. 15 Jac. Ley 51. Menfield's caſe.

[See (B. b.) pl. 7.]

(A. b) Enure; By Way of *Extinguiſhment.*

1. *FEOFFMENT* was made by indenture *rendering 3 l. rent*, with a clauſe of diſtreſs; and the feoffor *covenants for further aſſurance* of the land. The feoffor levies a fine to the feoffee, and *renders 3 l. rent by the fine*; adjudged, that the feoffor may avow for the firſt rent, notwithſtanding the fine, and that the render *is not a grant of a new rent*, but confirmation of the old rent, and the old rent was preſerved by the intent of the fine. Trin. 32 Eliz. Mo. 298. Sherrot v. Holloway.

The like of a *condition.* Mo. 106. Mich. 17 & 18 Eliz. Andrews's caſe.——And. 18. Puttenham's caſe.——D. 157. b. 29. Hill. 4 and 5. P. & M. S. C.

2. *A. tenant for life*, *B. and C. coparceners being reverſioners in fee*; A. and B. join in a leaſe to J. S. of the whole eſtate for 21 years at 10 *l.* rent per ann. to A. during her life, and after to B. Afterwards A. B. and C. all join in a fine to W. R. and W. S. to the

the uſe of the huſband of B. The court inclined that A.'s eſtate for life was not ſurrendered by joining in the fine, nor the rent extinct. For every one granted what he lawfully might, though it was urged that the reverſion, to which the rent was incident, was gone. Cro. E. 285. Trin. 34 Eliz. B. R. Farrar v. Johnſon.

3. If tenant in tail makes *leaſe by indenture for* 30 *years*, rendering rent with *reentry*, and after, *for further aſſurance*, *he demiſes the land by fine for* 30 *years to leſſee*, rendering the rent: this is no ſurrender of the firſt leaſe, but a confirmation, and the leſſee ſhall hold ſubject to the rent and re-entry, though no uſe can renew by the fine being but demiſe for years. Arg. Mo. 384. Mich. 36 and 37 Eliz. in Perrot's caſe.

Reſolved that the reverſion and rent paſſed, being by fine, and that it ſhould *enure as ſeveral fines.*

4. Fine levied by A. and B. to C. with render of the land to B. *rendering* 5 *l. rent*, with clauſe of diſtreſs to C. the conuſee, *remainder of the land to* A. and his heirs; the limiting the remainder over by C. (to whom the rent was firſt reſerved upon the render of the land in tail) was extinguiſhment of the rent, and cannot go to the remainder. Mo. 575. Paſch. 41 Eliz. White v. Geriſhe.

But if one *by deed* makes a gift in tail rendering rent, remainder over in fee; this being by deed, is a good reſervation of the rent to the donor, and the remainder only ſhall go to the ſtranger; but in a fine it is otherwiſe, and ſo is the courſe of fines, and adjudged acc. Cro. E. 727. S. C ——— It ſhall be taken as a grant in tail, rendering rent, and after a grant of the reverſion. Ow. 126. S. C. ——— 1 Rep. 76. S. C. and P. cited, and 174. b. S. C. and P. cited.

The words were *quod tenementa prædicta remanebunt to A.* It was adjudged a grant of the reverſion, and that the rent paſſed. Ow. 129. White v. Geriſh. ——— The rent paſſes to him, to whom the word remainder limits the eſtate, and it paſſes the reverſion with the rent. 2 And. 131. pl. 76.

[314] 5. If one makes a *feoffment on condition*, and afterwards levies a fine to a ſtranger, his condition is gone. Cro. E. 665. per Coke Attorney General.

6. Fine to the uſe of himſelf for life,—remainder to his wife for life—*remainder to his executors for* 20 *years*, remainder over in tail, &c. after he levies *another fine* to the very ſame uſes, only *omitting the* 20 *years to his executors*; he dies and makes his wife executrix. It was reſolved per two Ch. J. that the remainder to the executors for 20 years, being *in abeyance*, was extinct by the fine. Mo. 745. Trin. 42 Eliz. Remington v. Savage.

7. A. ſeiſed of lands acknowledged *a ſtatute to B.* and afterwards levied a fine of the lands to the uſe of himſelf for life, and after, as to part of them, to the uſe of J. S. in tail, and of the *reſidue to B. in fee*, and died. This purchaſe, in this manner, is a ſufficient diſcharge of the ſtatute. Cro. E. 756. Paſch. 42 Eliz. C. B. Humphrey v. Harneage.

8. If the party to whom the eſtate is limited, *is in poſſeſſion*, ſuch fine enures by way of extinguiſhment of right. Weſt's Symb. 6. ſ. 20.

9. A. by indenture of uſes raiſes an eſtate in fee to B. who regrants turbary to A. by another deed, and after levies a fine *to confirm the eſtate* and uſes above declared; and it was ruled, that this fine touches nothing upon the grant to A. of the *turbary* to extinguiſh it, or otherwiſe hurt it. Clayt. 42. Barton v. Colethirſt.

10. A.

10. A. upon marriage, ſettles an *annuity on his wife as a jointure*, to be iſſuing out of D. and afterwards they both join in a fine *to mortgage part* of the lands; but before the mortgage, the mortgagee had notice of the annuity, and it was *excepted in the mortgage*; and it appeared that it was never intended to extinguiſh the annuity by the wife's joining, and decreed accordingly, and that ſhe be paid the arrears. Hill. 29 Car. 2. Fin. R. 277. Solly v. Whitfield.

11. A. on marriage with B. gave a *bond for* 600 *l. to a truſtee*, and a warrant of attorney to *confeſs judgment* thereon defeaſanced for *payment of* 300 *l. to the wife if ſhe ſurvive* the huſband; ſhe afterwards joined with him in a conveyance by leaſe and releaſe and fine of all his real eſtate. It was agreed that the leaſe and releaſe did not extinguiſh her intereſt in the judgment, but the fine extinguiſhed all her right in the land, per Ld. Harcourt. Paſch. 1712. Ch. Prec. 333. Goodrick v. Shotbolt.

G. Equ. R. 18. Trin. 9 Annæ. S. C. by name of Shotbolt v. Biſcow.

(A. b. 2) Enure; to make a *Diſcontinuance*. In what Caſes.

1. 27 *E.* 1. *ſtat.* 1. *cap.* 1. enacts that *neither parties to fines nor their heirs may plead in avoidance thereof, that before the levying, and at the levying of the ſame, and ſince, the demandant or plaintiff, or their anceſtors were always ſeiſed of the lands contained in the fine, or of ſome parcel thereof.*

If *tenant in tail, the remainder in fee*, levy a fine, ſur conuſance de droit come ceo, &c. he in remainder may aver the continuance of poſſeſſion, notwithſtanding the fine and ſtatute, becauſe *he is neither the party nor his heir*; and ſo may a feme covert, where her huſband alone levies the fine, per Fairfax. Weſt's Symb. ſ. 191. cites 12 E. 4. 12.

2. The iſſue in tail may aver continuance of poſſeſſion againſt a fine *ſur conuſance de droit tantum*, or *ſur render*, *but not* againſt a fine ſur cognizance de droit come *ceo que* il ad de ſon done; becauſe that fine is executed, and the other executory. Weſt's Symb. ſ. 191. cites 12 E. 4. 15 and 19. 11 H. 4. 85.

3. *A. B. and C. coparceners* of a manor; *A. infeoffed J. S.* of his part, to the *uſe of himſelf for life*, and after his deceaſe, to the uſe of *his eldeſt ſon and heir apparent in fee.* And after *A. levied a fine de tertia parte* 200 acrarum terræ, 400 acrarum paſturæ, &c. (amounting to more acres than the whole manor contained) *ſur conuſance de droit come ceo*, &c. *with warranty of him and his heirs*, and *retook by the ſame fine for his life only*, and then died, and his ſon entered. The queſtion was, if the third part of the ſaid acres be ſevered from the manor by this fine againſt the heir, or that againſt this fine, it ſhall be taken that he had a continual poſſeſſion and continuance of ſeiſin ante finem, tempore finis, & poſt finem, &c. in the tenement for term of life? It was held ſtrongly by Plowden, Bromley ſollicitor, and Lovelace, that this averment by him in remainder, who was a *ſtranger to the fine* ſhould be received, *quia neque pars finis nec partium hæres, &c.* But Dyer, Saunders, Manwood, Southcote, Harper,

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Harper, and Catlin, held the law clear contrary, and that ſuch fine amounted to a feoffment of record, which makes diſcontinuance of the remainder or reverſion. D. 333. b. 334. a. pl. 30. Paſch. 16. Eliz. Anon.

4. If a fine be *levied to a tenant in tail*, and he grants and *renders* the land *to him and his heirs*, and *dies before execution*, this is no diſcontinuance; otherwiſe it is if it had been executed *in the life of* tenant in tail. Co. Litt. 333. b.

5. *A. tenant for life remainder in tail to B.*—*B.* levies a *fine to A. and to A.'s huſband* upon a conceſſit tenementa to the baron and feme *for the life of A.* and dies after proclamations. Reſolved, that it was not any diſcontinuance or bar of the intail, but during the life of tenant for life; nor is it any bar or alteration of the entail after that eſtate determined. Cro. J. 40. Mich. 2 Jac. in court of wards. The Earl of Rutland's caſe.

6. If tenant in tail *accepts a fine with render to another for years*; this ſhall bar him, becauſe it works a diſcontinuance, but otherwiſe where it is for life, per Hutton J. Winch. 123.

7. The ſtatute de donis ſays, that a fine ſhall be *ipſo jure nullus*. The meaning is not, that it ſhall be abſolutely void; but only that it ſhall not be a fine to bar the iſſue; for it is a fine to make a diſcontinuance, &c. Arg. 10. Mod. 179.

(B. b.) By *Baron or Feme* ſingly.

Huſband and wife tenants in ſpecial tail. Huſband levies a fine with proclamations, and dies—wife enters.—The iſſue in tail is barred.—But if the *wife enters* after the death of her huſband, and *before the proclamations paſs*, the iſſue is not bound by the fine. Le. 260. 18 Eliz. B. R. in caſe of Manning v. Andrews.———Kelw. 205. b. pl. 7. contra.—213. b. contra. though the eſtate was in truſtees.———He cannot claim as heir to both; for by the father he is barred. Arg. Godb. 312. cites 8. Rep. 72.

1. *HUSBAND and wife tenants in ſpecial tail. Huſband aliens by fine and deed inrolled.* If this bars the heir, is left a quære? Mo. 28. pl. 90. where, ſome hold that 32 *H.* 8. 28. provides only for the eſtate of the wife, and not of the heir, others the contrary. T. 3 El. Anon.

She continues tenant in tail, and may make leaſe for 3 lives or years, and the conuſee has nothing in her life, per Hobart Ch. J. Jo. 40. cites 9 Rep. 140. b. Greenly's caſe.—* After the fine levied by the baron, the feme is not tenant in tail, but is like to a tenant in tail after poſſibility of iſſue extinct.

2. Huſband and wife *donees in ſpecial tail.* The *huſband alone levies a fine* of the lands. It was held that if the proclamations be made in his life time, or before the wife, by her entry, had avoided the fine, the iſſue ſhould be barred; otherwiſe, if the huſband had died before the *proclamations paſſed.* 4 Le. 2. Trin. 8 Eliz. Manning v. Andrews.———The heir is bound by the ſtatute 32 H. 8. of fines, which does not bind the wife. But quære what eſtate the wife ſhall have, when the ſon of their 2 bodies ſhall not inherit? And. 39. pl. 101. Anon.—Bend. 225. S. C. Mich. 16 Eliz. ———* She is tenant in tail, but if ſhe make feoffment, her feoffee ſhall not have it; for the feoffment of the baron had diſpoſed of the fee ſimple, and took away the poſſibility of the wife. Litt. R. 29. in Beck's caſe, cites 9 Rep. 139. Beaumont's caſe.

extinct. Arg. 2 Roll. R. 427. in the ſerjeant's caſe.——The iſſue is totally and finally barred, and ſo are the caſes, 18 Eliz. D. 351 & 269. and BEAUMONT's caſe; yet the entail remains to the wife in right, as to herſelf, and to all eſtates and remainders depending upon it; and to all the conſequences of benefit to herſelf, and to others by her, as long as ſhe lives, as amply as if the fine had not been levied. Hob. 257. in caſe of Duncomb v. Wingfield.——Per Omnes J. The heir ſhall be barred; for he cannot claim by the gift in tail; becauſe, when he makes conveyance to himſelf, he muſt make himſelf heir as well to the father as to the mother; and this he is eſtopped to do by the fine; and though the feme might have entered, this was by reaſon of the ſtatute, and not by force of the tail; and the *right given by the ſtatute does not deſcend to the heir by the mother, but only the right of the entail, which deſcends from both.* Dal. 50. pl. 16. Trin. 18 Eliz.—— Kelw. 205. b. pl. 7. S. P.——Mo. 28. pl. 90. S. P.——D. 351. b. pl. 24. Trin. 18 Eliz. Anon

3. *Feme was deviſee for* 30 *years* of the occupation and profits of a term if ſhe ſo long ſhould live a widow; and after her widowhood the remainder to B. his ſon. She enters, and the *reverſioner*, by indenture, *granted*, *&c.* the ſaid tenement *to the feme and her heirs.* The *reverſioner and his feme levied a fine to the uſes aforeſaid*, and afterwards the feme married. Reſolved that the wife of the reverſioner is concluded of her right of dower, by the declaration of the uſes of the fine by her huſband only, which was after levied by them jointly, becauſe *no contradiction of the feme* appears, that ſhe did not agree to the uſes declared by the huſband by his indenture ſolely. Trin. 28 Eliz. C. B. Ow. 6. Haverington's caſe.

4. *Baron and feme exchanged* the lands of the feme, which exchange was executed, and they levy a fine of the lands taken in exchange. Per Rhodes & Windham J. the feme, after the death of her baron, may *enter into her own lands*, notwithſtanding the fine; and judgment for the feme. Le. 285. pl. 386. Hill. 28 Eliz. C. B. Anon.

5. *Feme, without her huſband*, levies a fine of her land as a feme ſole; the ſame ſhall bind her after the coverture, if the huſband do not enter on the conuſee during the coverture, and interrupt the poſſeſſion gained by the fine. per Periam J. Le. 82. Paſch. 29 Eliz. C. B. Zouch v. Bampfield.

6. *Baron tenant for life*, remainder *to the heirs of the body of the wife, by the baron to be begotten*; they have iſſue a daughter; the wife dies; a fine by the baron only is no bar to the daughter. Yelv. 131. Trin. 6 Jac. B. R. Repps v. Bonham.

7. A. and his wife were *ſeiſed in ſpecial tail, remainder to A. in fee*; A. alone levied a fine to king E. 6. in fee, which eſtate came to B. in fee; A. having iſſue, died; his wife entered; B. confirmed the eſtate in the wife, habendum to her, and the heirs of the body of her and her huſband. And it was ruled that the confirmation wrought nothing, becauſe ſhe had as great an eſtate before; and alſo the iſſues could not be made inheritable, which were before barred by their father's fine, and the eſtate tail, as againſt them, lawfully given to another. And it was further reſolved by way of admittance, that *if the remainder in fee had not been to A. himſelf, but to a ſtranger*; the entry of the wife had reſtored that remainder to the ſtranger, and had left nothing in the cogniſee, but a mere poſſibility; ſo ſhe hath the tail not only for herſelf, but to the benefit, and advantage of other eſtates, growing out of one root with his. And yet during the life of A. the entail had been barred, and all had been in the cognizee, and the wife had had nothing but a poſſibility.

Hob. 257. cites 9 Rep. 140. Paſch. 10 Jac. in the Court of Wards. Beaumond's caſe.

8. If land be *ſpecially entailed to A. and his wife, the remainder to B.* in tail; the *remainder to C. in fee*; and A. the huſband levies a fine alone to D. in fee, and dies, leaving iſſue, and the wife enters; ſhe is in of her eſtate in tail, and *her entry* alſo *remits B. and C.* to their ſeveral remainders, and hath put D. out of his whole eſtate. And therefore I am clear of opinion, that the wife in that caſe *may ſuffer a common recovery* againſt herſelf, as tenant in tail, and vouch the common vouchee; and that ſhall bar the old remainders of B.
[317] C. For ſhe cannot be ſaid to be in of other eſtate at all, much leſs to them. If the wife after ſuch common recovery paſſed againſt her die, leaving iſſue by her huſband; now D. is to have the land (as hath been ſaid) neither can the recovery had againſt her, hurt him; for *as to him, ſhe was eins de autre eſtate*, and therefore the value cannot come to him. And if ſhe had come in as a vouchee, yet it could not have hurt D. For his eſtate and hers never ſtood together, nor had dependance the one upon the other. And he had his eſtate divided from hers, and by contrary means; though both out of the root of the entail, per Hobart Ch. J. Mich. 16 Jac. Hob. 259. in caſe of Duncombe v. Wingfield.

(B. b. 2) *Amendment* of Fines and Common Recoveries, and of Writs relating thereto.

1. *Scire facias upon a fine levied by king Ed. 2. reddendo eidem regi & hæredibus ſuis 10 s. per annum tenendum de nobis & hæredibus noſtris*, where it *ſhould be of E. 2. quondam rege & hæredibus ſuis*; and becauſe it was a writ judicial, therefore it was not abated. Br. Amendment, pl. 104. cites 39 E. 3.

2. *Scire facias upon a fine*, which *was to him and his heirs male*, and the *mittimus was, ad proſecutionem J. T. conſanguinei & hæred'* without (maſcul',) and it was doubted, if it may be amended. Br. Amendment, pl. 48. cites 9 E. 4. 15.

But where land was *given by fine to baron and feme, and to the heirs of their bodies*, and *certiorari* iſſued to remove the record out of the treaſury into the chancery, and now it came into C. B. by mittimus; and the plaintiff brought *ſcire facias* upon it, *as heir to the baron and feme of their bodies*; and *in the mittimus, he made himſelf heir to the baron only*; and *in the ſcire facias he had made himſelf heir to the baron and feme*; the opinion was that the ſcire facias ſhould abate; for the *fine warrants the mittimus*, and the *mittimus warrants the ſcire facias*, and therefore they *ought to agree*. And per Vaviſor, Reade and Fineux it ſhall be amended, becauſe it is *founded upon record*. *Contra* of ſcire facias, which is *founded upon ſurmiſe*; note the diverſity. Br. Amendment, pl. 63. cites 9 H. 7. 1. 8.

3. 23 *Eliz. cap.* 3. § 10. enacts that *none of the fines or recoveries heretofore levied, paſſed, or ſuffered, which ſhall be exemplified under the great ſeal according to the form of this act, ſhall, after ſuch exemplification had, be in anywiſe amended.*

4. 27 *Eliz. cap.* 9. § 10. enacts that *no fines or recoveries heretofore levied, paſſed or ſuffered; which ſhall be exemplified under any judicial ſeal of any the ſhires of* Wales, *or town or county of* Haverford-

Haverford-Weſt, *or under the ſeal of any of the* counties palatine, *ſhall after ſuch exemplifications had, be in any wiſe amended.*

5. The *return of the writ of covenant* was *oct. purif.* 31 *H.* 8. and in truth was *ingroſſed trinit. ſequent.* but was entered thus, viz. *& poſt conceſſ. & recordat. in craſtin. ſanctæ trin. anno* 30 *H.* 8. where it ſhould be 32 *H.* 8. And upon this, writ of error was brought and pending the writ of error, by the reſolutions of Wray, Gawdy, Clench and Shute juſtices of B. R. ſedente curia, the record was amended in his verbis; *(et poſtea conceſſ. craſtino trinit.* 32.) 5 Rep. 44. cited as Mich. 27 & 28 Eliz. Kettle's caſe. At the foot of the fine a *proclamation* was *indorſed* to have been made 30 *July* which was *after the end of Trinity term.* A writ of error was brought, and this aſſigned for error. But it was amended by the court according to the note of the fine, which was 30 *Junii.* 5 Rep. 44. b. cited as Mich. 38 & 39 Eliz. C. B. Down's caſe.

6. In a formedon, the tenant pleaded a fine with proclamations; the demandant replied, nul tiel record; and the truth of the caſe was, that the *record* of the fine, *which remained with the chirographer*, did warrant the plea; but that, which remained *with the cuſtos brevium*, did not warrant it; and both theſe records were ſhewed to the court. And Rhodes J. cited a precedent 26 Eliz. where, by the advice of all the juſtices of England, where ſuch records *differ*, the record, remaining with the cuſtos brevium, was amended and made according to the record remaining with the chirographer. Which Windham conceſſit. And afterwards, the ſaid precedent was ſhewed, in which were ſet down all the proceedings in the amending of it, and the names of all the juſtices, by whoſe direction the record was amended, particularly; and that the ſaid precedent was written, and the amendment of the ſaid record, entered, by the commandment and appointment of the ſaid juſtices in perpetuam rei memoriam. And the reaſon which induced the ſaid juſtices to make ſuch order, is there written; becauſe they took it, that the *note, remaining with the chirographer*, eſt *principale recordum.* 3 Le. 183. pl. 234. Mich. 29 Eliz. C. B. Anon. 5 Rep. 44. a. cites Trin. 26 El. Dowling's caſe.— 3 Le. 106. pl. 107. Trin. 26 Eliz. B. R. Ragg v. Bowley.

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7. The records, before amendment, were *in com. Suſſex*; but were amended and made *Kanc.* as the truth was. 5 Rep. 44. b. cited as the caſe of Payn v. Covert. *So* two fines were amended, and inſtead of *civitate Ebor.* were made *Ebor.* 5 Rep. 44. b. cites Mich. 33 & 34 Eliz.

8. A. levied a fine to B. of *the manor of D. and* 1000 *acres of land, &c.* according to the uſual form of fines, which were valued at 20 marks a year; ſo that the fine in the hamper was 1 *l.* 6 *s.* 8 *d.* and conſequently the fine *pro licentia concordandi* or poſt fine was 40 *s.* in the whole, and yet the clerk entred the king's ſilver or poſt-fine thus, *B. dat dominæ reginæ* 40 *s. pro licentia concordandi, &c. in placito conventionis of* 1000 *acres of land, &c.* and purſued all the other words, only that he *omitted the manor.* It was aſſigned for error, that the king's ſilver was not paid as well for the manor as for the tenements; but becauſe it appeared, upon examination and view of all the parts of the fine, on a motion to the court of C. B. for amendment of this fine, that it was only the *miſpriſion of the clerk* that entered the king's ſilver, and that the ſaid ſum of 40 *s.* in

verity

verity was the fine, as well for the manor as for the reſidue; and always the value entered upon the back of the writ of covenant is the warrant for the entry of the king's ſilver; and though the tranſcript of the fine was removed by writ of error; yet ſince the body of the record remained with them, they unanimouſly reſolved that the ſaid entry ſhall be amended, and ſhall be *made* in the writ *de conventione of the manor aforeſaid, &c. and of all the acres, &c.* as it ought to be. And after, upon diminution alledged in the omiſſion of the ſaid manor in the entry of the king's ſilver, the writ was directed to this purpoſe to the Ld. Anderſon, who, one day this term, moved all the juſtices of Serjeant's Inn in Fleet-ſtreet to know their opinions concerning the ſaid amendment in this caſe, pending the ſaid writ of error. And it was reſolved by Popham Ch. J. of Eng. Periam Ch. Bar. Clerk, Walmſley, Fenner, Owen and Ewyns, that the ſaid entry of the king's ſilver ſhould be amended; and this pending the writ of error. 5 Rep. 43. b. 44. a. Mich. 38 & 39 Eliz. Bohun's caſe.

9. *Alſo* where the writ of *covenant* ſhould be *teſte meipſo*, the writ was *dede meipſo*, which was inſenſible and vitious; and this was alſo amended by all their opinions. Mich. 38 & 39 Eliz. 5 Rep. 44. Bohun's caſe.

10. The certificate of the note of the judge, &c. was thus—In *præcipe de duabus partibus rectoriæ*, & duabus partibus tenement. by miſtake of the clerk who wrote the concord, the *cognizance* was *partem ultimam quam, &c.* But *the foot* of the fine, *and the note* in the hands of the chirographer, *were* right, viz. *partes quas*, ut illas quas, &c. and by theſe the certificate of the judge was amended, pending a writ of error which had been brought in B. R. upon which the plaintiff in error moved the court of C. B. that the fine ſhould be made in ſtatu quo, as it was before the amendment; but all the court denied the motion, and directed that the amendment ſhould ſtand, though made after the writ of error brought. 5 Rep. 44. cited as Hill. 38 Eliz. C. B. Morgan's caſe.

[319] 11. In the writ of covenant, and the note and foot of the fine, the village was *Calehurſt*, but was amended by the court, and made *Salehurſt* according to the acknowledgment to the judge, which was right. 5 Rep. 44. b. cited as Wealch's caſe.

D. 220. contra. Pl. 13. Hill. 5 Eliz. Bolderow v. Futter. —Per Holt Ch. J. contrary to Coke's report of GAGE's caſe, it was not amended, but judgment reverſed. 6 Mod. 196. ——Jenk. 258. pl. 53.

12. In a writ of error to reverſe a fine the 4 Eliz. and aſſigned for error, that the *writ of covenant bore teſte* 24 *Apr. returnable* 15 *Paſchæ, which in truth was* 15 *Apr.* and ſo the *return before the teſte*. Reſolved that it ſhall be amended. Trin. 41 Eliz. B. R. 5 Rep. 45. b. Gage's caſe.——This was afterwards reverſed and adjudged not amendable. Mo. 571. Gage v. Toper.

13. A writ of entry ſur diſſeiſin en le poſt was of 15 *acres of land, and one acre of meadow in Alphamſton and Lamarſh* in the county of Eſſex; whereas by the feoffment produced, the ſaid acre of

of meadow lay in Great Henney. It was ordered to *expunge Lamarſh, and, in the place thereof, to inſert* the name of the village of *Great Henney*, and that the prothonotary's clerk amend the entry, &c. Pig. of Recov. 228, 229. cites Mich. 6 Car. 1. Skinner v. Land.

14. The writ of covenant in the certificate, is *ſi fecerit eos ſecur. &c.* where it ought to be (*vos.*) But upon view of the return of that writ certified from Cheſter, where the fine was levied, it was (vos;) whereupon it was awarded, that the roll ſhould be amended, and the fine was affirmed. Mich. 11 Car. B. R. Cro. C. 415, 416. Done v. Smetheir & Leigh.

15. A *fine, to make a tenant to the præcipe*, was of *two meſſuages and one garden*, but the *recovery was* of *one meſſuage and one garden*. Ordered, upon affidavit, examination in court, and conſent of parties, to be amended. Pig. of Recov. 222, 223, 224. cites 13 Car. 1. Drake v. Biddulph.

16. *Præcipe and concord* were of *tenements lying in the pariſh of Lanceſton in com' Cornwall*; when in fact there is no ſuch pariſh within all the county of Cornwall, but ought to have been *in the pariſh of Saint Stephens near Lanceſton*; it was ordered by the court, that as well the præcipe and writ of covenant, as all entries and records of the ſaid fine in all offices, which it has paſſed through, be amended and rectified, by *inſerting the words (St. Stephens near)* as by law it ought to be done. Pig. of Recov. 218, 219. cites P. 34 Car. 2. Tregeare v. Gennys.

17. It was ordered, that the *writ of covenant* be amended, *by inſerting* theſe words, *(and Knowſton)* in the ſaid writ; and that all entries and proceſs made thereon, be amended by the ſaid writ according to the ſame rule. Pig. of Recov. 220. cites Hill. 3 Annæ. Courtenay v. Blake.——Then he adds two preceding orders made to ſhew cauſe why the ſaid writ, and all the entries and proceſſes ſhould not be amended, and the ſaid words inſerted. Ibid. 221, 222.

S. P. as to inſerting the name of the village of *Waterfall*, upon oath of one of the conuſees, and conuſor made in court, and conſent of conuſor. Pig. of Recov. 232. Mich. 1650. 2 Car. 2. Parker and Jolly v. Cotton & Ux'.

18. Ordered that the words *(Clarendon and Clarendon park)* which were mentioned in a deed produced in court, declaring the uſe of a *fine and recovery* levied and ſuffered of tenements in Laverſtock, Pitton, Purton, &c. in the county of Wilts, be, by the curſitor of the ſaid county, inſerted in the writs of covenant and entry, next after the word Purton; and alſo that all parts of the ſaid fine, between the parties thereto, and the recovery aforeſaid, and the exemplification thereof, and the writs of ſeiſin between the ſaid parties, be amended on record in the ſame aforeſaid words, (Clarendon & Clarendon park) *in all places neceſſary*. Pig. of Recov. 225, 226, 227. Hill. 5 Annæ, Abney v. Ld. Clarendon.——& Heck v. Abney & al.

S. P. as to the word *(newchurch)* in a recovery. Pig. of Recov. 230, 231. cites 13 Car. 1. Wightwick & al. v. Maſters.

19. Fines were levied of lands in the iſland of Antegoa, and error was brought to reverſe the ſame, the lands being mentioned in the writs, &c. thus, *in inſula de Antegoa in America, in partibus tranſmarinis*,

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marinis, viz. in parochia ſanctiæ Mariæ Iſlington in com. Midd. and the ſame was ordered to be amended by ſtriking out the words *(in America in partibus tranſmarinis.)* And articles of agreement between the parties to the fines being read, which were to convey and aſſure lands in the iſland of Antegoa; the court ſaid, that the repugnancy inſerted merely through want of ſkill, and which would vitiate the fines, muſt be rejected, and the fines made effectual, viz. in common form; but that, if then they ſhould be inſufficient, advantage may be taken thereof. Barnes's Notes of Caſes in C. B. 143. Paſch. 8 Geo. 2. Forſter v. Pollington, & Forſter v. Brooke.

(B. b. 3) *Warranties in Fines. How* they may be.

1. A fine was levied by the *baron and feme*, who acknowledged the tenements to be the right, &c. and releaſed, and quit-claimed from them and the heirs of the feme, and *bound the heirs of the feme to warranty, without a word of the baron.* Br. Fines, pl. 19. cites 44 E. 3. 21.

* Weſt's Symb. ſ. 147.

2. If *divers join* in a fine, it is ſaid the warranty muſt be by them, and the heirs of one of them, who is the owner of the land. Yet if there are divers conuſors, they may warrant ſeverally, and either *generally or ſpecially*; for * warranties are ſometimes general, that is, againſt all men, ſometimes *againſt all except a ſingle certain perſon*, ſometimes *againſt certain perſons only*; ſometimes *againſt every conuſor and his heirs ſeverally*, ſometimes *againſt one of the conuſors* and his heirs only, ſometimes *of all except a certain part*; and ſometimes *of a part only* certainly expreſſed. Manb. of Fines, 9. cites 44 E. 3. (but there is no page, plea or term mentioned.)

(C. b) By *Baron and Feme.*

1. BARON *makes gift in tail of his wife's land*, and after they *join in a fine of the reverſion*; this bars the wife of all. But if they had *granted the rent only by fine*, then the wife might have entred after the death of her baron, per Caril. as Brown and Walmſley J. vouch it. Mo. 91. pl. 224. Trin. 10 Eliz. Anon.

2. Baron and feme are ſeiſed of land *in jure uxoris*; *baron alone ſells the land* by indenture in his name alone, or without deed indented, and afterwards *baron and feme levy a fine to the vendee.* This ſhall be to the uſe of the vendee. For her agreement by the fine ſhall be intended, unleſs ſomething be to the contrary. Agreed per omnes. And. 164. Mich. 29 & 30 Eliz. in caſe of Colgate v. Blith. al. Kenn's caſe.

Cro. E. 216. Hill. 33 Eliz. B. R. Harvy v. Thomas.

3. Baron ſeiſed of land in right of the wife, makes a *leaſe to A. for 21 years*, and after he and his wife levy a fine ſur con. de droit come ceo, &c. to C. and his heirs; the baron dies; the leaſe is determined by his death, and the *conuſee ſhall avoid it*; for the baron joined

joined but for conformity and neceſſity, 2 Rep. 77. b. cited in Cromwell's caſe, as the caſe of Harvy v. Thomas.

4. A baron and feme *in facto, & non de jure*, levy a fine of the wife's land, it ſhall bind the feme and her heirs. Mo. 477. Mich. 39 & 40 Eliz. in the caſe of Prat v. Phanner.

5. Baron and feme ſeiſed of land to them and the heirs of the baron. They bargain and ſell by deed in fee, in which is a proviſo, that if either of them pay 100 *l.* then they to rehave *as in their former eſtate*; and that this indenture, and all other fines, &c. *ſhould be to the uſe of the baron and his heirs*, omitting the feme. And laſtly it is agreed, that all * fines and aſſurances to be made between the parties within, &c. ſhould be to *the uſes, intents, &c. and agreements before herein expreſſed, and to no other uſe, &c.* The deed was not inrolled; a fine was levied within the time; the baron dies; the feme pays the 100 *l.* Reſolved ſhe ſhall have her eſtate for life. Hill. 42 Eliz. B. R. Cro. E. 744. Southcot v. Manory.

Cro. E. 917. S. C. by the name of WILMOTT v. KNOWLS, ſaith that the bargain and ſale was inrolled after the fine levied, and that the baron paid the money at the day and re-entered.——Mo. 680. S. C. Wilmott v. Knowles.

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6. If baron and feme join in a fine ſur conceſſit with warranty, and the baron dies; *covenant on the warranty lies againſt the feme.* Lev. 301. Mich. 22 Car. 2. Wootton v. Hale.

Mod. 66. S. C. & S. P. admitted per the counſel of the defendant, who then excepted to the pleadings.——2 Saund. 180. S. C.

7. *Feme tenant for life*, remainder to her firſt ſon in tail; ſhe and her baron (before any ſon born) *accept a fine of the fee.* The contingent *remainder* is *deſtroyed*, and not preſerved by the poſſibility of ſurviving the baron and ſo waving the eſtate taken by the fine. 2 Lev. 39. Hill. 23 and 24 Car. 2. B. R. Purefoy v. Rogers.

8. *Feme tenant in tail, remainder to her ſiſters in fee.* The tenant in tail and her huſband levy a fine to the uſe of huſband and wife, and the heirs of the body of the wife, remainder to the huſband in fee, with *warranty againſt them and the heirs of the wife.* Feme dies without iſſue. The ſiſters are barred by the warranty. And the huſband by taking back as great an eſtate as he warrants, deſtroys the warranty. Cart. 243. Mich. 25 Car. 2. C. B. Fowle v. Double. Mod. 281. S. C.

9. An annuity was made payable out of lands for the *jointure* of the wife, afterwards baron and feme join in a fine to B. to whom A. after the marriage, had *mortgaged* part of thoſe lands; B. had *notice* of the *annuity* before his mortgage, and it was *excepted* in the mortgage. Decreed that her joining in the fine was no extinguiſhment of her annuity. Hill. 29 Car. 2. Fin. R. 277. Solly v. Whitfield.

10. Huſband and wife covenant to levy a fine of the wife's land *to the uſe of the heirs of the body of the huſband on the wife begotten.* Here can be no eſtate to the huſband for life *by implication*; becauſe the eſtate was the wife's to which he was a ſtranger, ſo it is merely void; for taking it as a remainder there is no precedent eſtate of *freehold to ſupport it*; and taking it as a ſpringing uſe, then it is a Affirmed in Dom. Proc. Parl. Cases, 104.

ſpringing executory uſe to ariſe after a dying without iſſue, which the law will not expect; ſo that it is either way void, and it muſt be one of theſe; per Cur. Hill. 3 W. & M. B. R. 2 Salk. 675. Davis v. Speed.

[322] (D. b) By *Other Perſon* of the Lands of a Feme Covert, either in Poſſeſſion, Remainder, &c.

1. A Tenant for term of life, *remainder in fee to feme covert.* The *tenant for life levies a fine.* The *baron dies*, and feme takes other baron; and *tenant dies.* 5 years paſs. The ſecond baron dies. The feme ſhall be barred. D. 72. b. pl. 3. Marg. 43 Eliz. Whetſtone v. Wentworth.

(D. b. 2) Proclamations. Made *at what Time.* After the Death of the Parties.

1. The writ of covenant, and ded. pot. with the concord, was certified, and the *king's ſilver entred*, the ſame term that the fine was acknowledged; *but the fine was not engroſſed, but remained in the Chirograph office*; and now the conuſee being dead, his heir moved to have the fine ingroſſed with proclamations; and becauſe a *formedon is pending now for part* of the land, curia aviſare vult; & poſtea, viz. Michaelmas term, it was held per Cur. that the fine ſhould be ingroſſed, but that the proclamations ſhould not be entered nor *engroſſed*; becauſe the parties to the fine are dead, to whom by the ſtatute of 4 H. 7. election is given to have the fine with proclamations, or without. And no party is here to make election. D. 254. pl. 104. Trin. 8 Eliz. Compton's caſe.

2. In formedon. The tenant *pleads a fine with proclamations* in bar, *by* one *Richard*, the *demandant's anceſtor.* The plaintiff *replies, that Richard entered upon his father, being tenant in tail, and levied the fine*; *and before the* proclamation paſſed, the *father re-entred, and died*, &c. And by the whole court it was held to be a good replication, and the bar well avoided. For when the father re-entered before all the proclamations paſſed; the fine thereby is avoided to all purpoſes, as well to himſelf, as to the ſon who levied it: but if the proclamations had incurred before his entry, although he had re-entered within the five years, and died, yet it ſhould have bound the ſon and his heirs for ever. Cro. E. 361, 362. Mich. 36 & 37 Eliz. C. B. Archer v. Green.

3. A. tenant for life of certain land, the *remainder to B. in tail*, the *reverſion to B. and his heirs* expectant. *B. levied a fine to* C. and D. and to the heirs of C. to the uſe of them and their heirs, and *had iſſue and died before all the proclamations* were paſſed, the *iſſue* in tail *then being beyond ſea*; the *proclamations are made*, and after the iſſue in tail returned, and immediately made claim upon the land to the remainder in tail; if in this caſe the eſtate tail was barred or not,

not, was the queſtion. It was reſolved by all the juſtices and barons of the exchequer, nullo contradicente, that though by the death of tenant in tail a right of eſtate tail deſcended to the iſſue, inaſmuch as he died before all the proclamations were paſſed; yet when the proclamations paſſed without any claim made by the iſſue in tail upon the land, this right that deſcended to him is barred by the ſtatutes of 4 H. 7. and 32 Hen. 8. For though the *fine without proclamations, nor the proclamations without the fine, cannot bar an eſtate tail*; and though after the fine levied, and before all the proclamations paſſed, a *right is deſcended to the iſſue* in tail *per formam doni*, which is *paramount the fine*; and though there is no fine with proclamations levied after the death of the tenant in tail to bar this right, ſo deſcended to the iſſue in tail; yet inaſmuch as it is provided by the ſtat. of 32 *H.* 8. *That all fines levied with proclamations of any lands, &c. entailed to the perſon, ſo levying the ſame, or to any of his anceſtors in poſſeſſion, reverſion, remainder, or in uſe, ſhall be immediately after the fine levied, ingroſſed, and proclamations made, adjudged a ſufficient bar againſt the ſaid perſon and their heirs, claiming the ſame only by force of any ſuch entail*; and the iſſue in tail, in this caſe, claimed as heir by force of the ſaid eſtate tail; therefore by the expreſs letter of the ſaid act, he is barred; and with this agrees the judgment in SMITH and STAPLETON'S caſe. Pl. C. fo. 430. 3 Rep. 84. a. 86. b. 87. a. Paſch. 44 Eliz. caſe of Fines. [323]

(E. b) With *Proclamations*. And how to be read and proclaimed. And the Effect thereof.

1. 1 *R.* 3. *c.* 7. § 1. enacts that *a fine ſhall be openly read and proclaimed the ſame term, and three terms after, at four ſeveral days.* But ſee pl. 6.

A tranſcript of the fine ſhall be ſent to the juſtices of aſſiſe of the county where the land lies, to be there proclaimed.

§ 2. *A tranſcript ſhall be ſent to the juſtices of peace.*

2. If *proclamations* be *before the ingroſſment*, it is void, and not granted by the * 4 H. 7. 24. as I think. Denſh. R. upon the ſaid ſtatute. * Vid. ſect. 2. of that ſtatute, and the notes thereon at (W. 4).

3. 1 *Ma. ſt.* 2. *cap.* 7. § 1. *Strengthens fines when proclamations are not made, &c. by reaſon of* adjornment of the term. It has been reſolved, that this act extends, where but *part of the term is adjorned.* For it is a favourable law, and to be taken by equity. 2 Inſt. 519.——D. 186. pl. 68. Mich. 2 & 3 Eliz.

4. Nothing can diſturb the operation of the proclamations, but the re-continuance of the tail by judgment in a formedon, entry, claim or remitter, as the caſe requires. Vid. Pl. C. Smith v. Stapleton. If the *proclamations paſs after the conuſor's death*, the entry or claim of the iſſue in tail, prior to the proclamations, will not render the fine ineffectual. Vid. 3 Rep. 60. b. 61. in caſe of fines, cites Purflow's caſe.——And vid. Poph. 65, 66. cites 23 Eliz. Id. Sturton's caſe.

5. Fine to bar an entail muſt be *alledged* to be with proclamations, otherwiſe it will be intended to be without proclamations; and ſo the bargainee will only have an eſtate for the life of the tenant in tail, becauſe it is no diſcontinuance. Mo. 220. Mich. 27 & 28 Eliz. Owen's caſe.

6. 31 *Eliz.* 2. enacts that *all fines with proclamations to be levied in the Common Pleas, ſhall be proclaimed* 4 times only, *viz. once in the term in which it is ingroſſed, and once in every of the* 3 *terms holden next after the ſame ingroſſing; and every fine ſo proclaimed ſhall be of force as if the ſame had been* 16 *times proclaimed according to the ſtatutes heretofore made.*

7. If the *conuſee dies*, the heir has election to have the fine with proclamations, as well as the anceſtor. For it is for his benefit, and the ſtatute does not reſtrain it. And the reaſon of 8 Eliz. 254. why the proclamations there made were *ſtayed* after the conuſee's death was, becauſe a *formedon was depending*, and that was only in the diſcretion of the court. Cro. E. 693. Mich. 41 & 42 Eliz. B. R. Wakefield v. Hodgeſon.

The proclamations *ſerve only to diſtinguiſh, that it is a fine according to the ſtat.* 4 *H.* 7. accordingly,

8. The proclamations *do not make the eſtate, but enure to* the eſtate made by the fine, and make the bar according to the eſtate; which paſſed before by the fine. Poph. 63. in caſe of Harry v. Farcy.

For though the iſſue having notice by the proclamations brings his *formedon* yet it ſhall not avail him. 3 Rep. 91. Patch. 44 Eliz. in the caſe of fines.

9. Where a fine and 5 years paſt are urged to bar a right, &c. by non-claim within the ſtatutes, he muſt *ſhew the proclamations under ſeal*; and the chirographers mentioning that it is a fine with proclamations, as is uſual, will not ſerve. Clayt. 51. 13 Car. Allen's caſe.

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10. A fine *with proclamations* when *given in evidence*, ought to have the proclamations *indorſed* on it; and it is not enough to ſay that it is ſecundum formam ſtatuti. Held on a trial per Scroggs Ch. J. 2 Show. 126. pl. 105. Trin. 32 Car. 2. B. R. Anon.

(E. b. 2) *Reverſal.* What muſt be done in Order to reverſe Fines. *Scire facias* againſt Tertenants, &c.

1. In ſcire facias, *W. acknowledged the manor of Dale to be the right of R.* by force of which acknowledgment *R. granted and rendered again to the ſaid W. and his heirs*; and after *W. died*, and F. his ſon and *heir brought ſcire facias to execute the fine*; per Fencot, fine ſur conuſance de droit, is to be executed by ſcire facias; for ſuch fine is executory. Contra elſewhere of a fine ſur conuſance de droit come ceo, &c. nevertheleſs it ſeems in the caſe above, that the conuſee or his heir *may enter*, as upon a recovery. Br. Sci. fa. pl. 199. cites 38 E. 3. 17.

2. Scire facias to execute a fine, it ſeemed by the argument of the caſe, that where a *fine* is levied *to the baron and feme in tail*, the *remainder*

remainder to W. And the *baron died without iſſue*, and the feme *leaſed her eſtate to W.* and he died; his heir ſhall not have a ſcire facias, for it was *ſurrendered* to his father, and ſo he is ſeiſed by force of the fine. Br. Sci. fa. pl. 38. cites 45 E. 3. 18.

3. Scire facias upon a fine, the *defendant ſaid that he had nothing but for term of years of the leaſe of J. N. and that he is not pernour*; and ſo ſee if he be tenant of the franktenement or pernour, the writ lies againſt him. Br. Brief, pl. 434. cites 8 H. 6. 32. Br. Non-tenure, pl. 21. cites S. C.—— Br. Scire facias, pl. 110. cites S. C.

4. Coke demanded the opinion of the court in this caſe, M. being *tenant in tail, had iſſue two ſons R. and J.* and dies. *R. levies two fines* of the land *and dies without iſſue.* J. brings two writs of error upon theſe fines; the *defendant, to the firſt fine pleads the ſecond* fine not reverſed; *and to the ſecond he pleads the firſt* not reverſed; the queſtion was, what is to be done? Curia, You may reply, that the ſaid fine pleaded in bar is alſo erroneous, and ſo aid yourſelf. 7 H. 4. 39. Cro. E. 151. Mich. 31 & 32 Eliz. B. R. Molton's caſe. 2 Le. 211. S. C.

5. Fine by tenant in tail was reverſed by writ of *deceit.* The *iſſue in tail is remitted*, and ſhall avoid all eſtates made by him; for the fine is void between the parties. But the *tenant in tail, after that fine levied*, and before it was reverſed, had *made a leaſe for years*, the *remainder* over *for life.* And whether the iſſue might *enter* to avoid thoſe eſtates, was the queſtion? and it was held, that he could not, without a *ſcire facias ſued againſt him, who had the freehold*; for he, who is to defeat a record, is always to commence his ſuit againſt him, who is privy to the record; but when he hath reverſed it againſt him he ought always to have a ſci. fa. againſt him who is tertenant; for it may be, he hath ſome matter to bar him of execution; and otherwiſe he ſhall not be bound, unleſs he be made privy by a ſci. fa. or that 2 nihils be returned. Cro. E. 471, 472. Paſch. 38 Eliz. B. R. Cary v. Dancy.

6. A. & B. his wife, the wife being then *within age, levied a fine* of the lands of the wife, *and a præcipe quod reddat* was brought againſt the *conuſee, who vouched the huſband and* the *wife*, and *they appeared in perſon*, and *vouched* over the common vouchee, who appeared, and after made default, whereby a recovery was had; and now the ſaid *wife and* her 2*d huſband brought* a writ of *error to reverſe the fine, and another writ of error to reverſe the recovery*, by reaſon of the nonage of the woman; and the court was of opinion to reverſe the fine, but they would adviſe upon the recovery, for that the ſaid A. and his wife appeared in perſon and vouched over; and ſo the *recovery was had* againſt them *by their appearance, and not by default*, and ſo it ſeemeth no error; and to prove that, Gawdy cited 1 & 2 Mar. D. 104. and 6 H. 8. 61. Saver Default 50. Alſo, as this caſe is, it ſeems, that by general entry into warranty, the error upon the fine is gone; but upon examination, it was found that the *recovery was before the fine*; for the recovery was *quindena trin.* and the fine was *tres trin.* and ſo the *recovery doth not give away the error in the fine.* Goldſb. 181. pl. 116. Sir Henry Jones's caſe. [325]

7. It was agreed by the counſel at bar, and Coke Ch. J. that *writ of error muſt be brought againſt a party or privy* to reverſe a fine, *and not againſt the tertenant.* Roll. R. 37.

A. tenant in tail leaſed for 60 years, and afterwards *levied a fine to W. R. and W. S.* ſur conuſans de droit *come ceo,* &c. with a *render to him and his heirs* in fee; and upon a *ſcire facias againſt the conuſees, ſuppoſing the lands to be ancient demeſne,* the *defendant made default,* for which the fine was avoided, and now the iſſue in tail entred upon the *leſſee for years,* and he *brought an ejectione firmæ,* and it was *found* that the land was *frank-fee*; and all the queſtion was, if the reverſal of the fine by writ of diſceit, without ſuing forth a ſcire facias againſt tertenant, ſhould bind him, or ſhould be void only againſt the conuſee, and not againſt the leſſee? Kingſmill conceived the ſcire facias brought againſt the parties only is good enough, for they were *parties to the diſceit,* and not tertenants; it was adjourned. 3 Le. 120. Trin. 27. Eliz. Lee and Loveday's caſe.——— 1 Le. 290. S. C.

8. *But* in a writ of *attaint or diſceit,* the writ ſhall be againſt the tertenant; and the court was of the ſame opinion as to the firſt part of the diverſity; but Coke only ſpoke to the ſecond part. Roll Rep. 37. Trin. 12 Jac. B. R. Benfield v. Bartholemew.

9. The court will not reverſe a fine without a ſcire facias returned againſt the tertenants; for the *conuſees are but nominal perſons*; and though it was otherwiſe in the precedent in Co. Ent. and Hern's Plead. 375. and the law perhaps does not ſtrictly require it, yet the courſe of the court does; per Cur. 1 Salk. 339. Hill. 6 W. 3. B. R. Anon.

(E. b. 3) Avoided or Reverſed, &c. for *Fraud*; and Pleadings.

1. Colluſion may be *averred* contrary to a fine. Br. Fines, pl. 115. cites 27 Aſſ. 53. and Trin. 33 H. 8.

S. P. Br. Fines, pl. 11. per Danby, but he ſaid it was otherwiſe, if there was *only one of that name, and a ſtranger acknowledged* the fine *in the name of R. D.* But Brook ſays, that it ſeems to him all one; for in pleading he ſhall ſay that there are two, viz. R. D. of S. and R. D. of P. and that R. D. of S. is and was owner of the land, and R. D. of P. acknowledged the fine, abſque hoc, that R. D. of S. acknowledged it; ſo nothing is in iſſue, but if R. D. of S. acknowledged it. Br. Fines, pl. 11. cites 34 H. 6. 19. ———Co. R. on Fines 9. S. C.———Br. Fines, pl. 54. cites 19 H. 6. 44.——Br. Diſceit, pl. 17. cites S. C.

2. If there be two *R. D.*'s of one name, and the *one levy a fine of the land of the other,* the other may avoid the fine by pleading, *that there are two of one name, and the other R. D. levied the fine, and not he.* Weſt's Symb. ſ. 191.

If a man *levies a fine of my lands in my name,* and I am ouſted by the conuſee, I ſhall have an action againſt him; and if he pleads the fine, I ſhall ſay, that it was another *of the ſame name who levied the fine, abſque hoc, that I levied* the fine *or was party or ever appeared,* per Littleton, which Danby Ch. J. agreed; becauſe the party cannot reverſe it by action of diſceit. Br. Confeſſe and Avoid, pl. 40. cites 5 E. 4. 40.

3. *And* in like manner, if any *ſtranger* levy a fine *in the name of another,* that is owner of the land, 34 H. 6. 19. Contra held 19 H. 6. 44. becauſe it is a matter of record; therefore, he hath no other remedy in ſuch caſe, but an *action of diſceit.* Weſt's Symb. ſ. 191.

4. A. levies a fine *in the name of B. B.* being beyond ſea; and ſentence was given that the fine ſhould be void. Noy. 99. in the Star Chamber, Gillibrand v. Hubbard.

The perſon was fined and impriſoned, and

vacat entered on the roll. Cro. E. 531. S. C. by name of Hubert's caſe.——Mo. 630. 39 Eliz. in the Star Chamber, S. C.——12 Rep. 123. cites S. C. but ſays, that part of the ſentence was, that if defendant did not *reaſſure the land to the plaintiff*, he ſhould forfeit a greater fine to the Queen. But that there was no ſentence to draw the fine off the file, nor damages awarded to the plaintiff.——A reconveyance was decreed. Roll. R. 115. cites S. C. Mich. 38 &

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5. *A. leaſed to B. for years*, land in D. rendring rent; *B. has other lands of inheritance in D.—B. leaſes to C. for life the ſaid lands leaſed to him for years*; and afterwards *B. levies a fine* with proclamations *of all* the ſaid lands which were his inheritance, and of thoſe which were leaſed to him for years; (the number of acres in the fine amounted to the whole) *B. paid his rent yearly to A.* during the years; the ſaid fine was levied of all the ſaid lands with proclamations; and 5 years paſſed; A. ſhall not be barred in this caſe, for there is apparent covin in levying this fine; by all the judges of England. Jenk. 253. pl. 45.

44 Eliz. 3 Rep. 77. Fermor's caſe.—— Though there were many notorious circumſtances of fraud in Fermor's caſe which

Co. in his report of it lays much weight upon; yet it does not thence follow, that the law is not the ſame where there are not ſuch evidences of fraud. In other books where that caſe is reported, the reſolution does not ſeem to go ſo much upon the particulars of the fraud; it is fraud apparent in the leſſee. Vent. 241, 242. Hill. 24 & 25 Car. 2. B. R. in caſe of Whaley v. Tancred.

6. If a fine be levied to *ſecret uſes to deceive a purchaſor*, an *averment* of fraud may be taken againſt it by the ſtat. 27 *Eliz.* 4. 3 Rep. 80. Hill. 44 Eliz. in Chancery, in Fermor's caſe.

7. So if a fine be levied *upon uſurious contract*, it may be avoided by *averment* by the ſtat. of 13 *Eliz.* 8. 3 Rep. 80. in Fermor's caſe.

8. *By 71 Jac. 1. 26. § 2. it is felony without benefit of clergy, to acknowledge, or procure to be acknowledged any fine, recovery, &c. in the name of any perſon, not privy, or conſenting thereunto.*

(E. b. 4) Avoided or Reverſed for *Error*; for what Errors in General; and at what Time.

1. A fine was levied *to the baron and B. his wife*, where her *name was M.* it was ſaid by Bereford, that nothing paſſed to her; but per Scroope, ſhe may conclude the heir of the baron, who took by the fine with her to ſay, that ſhe had other name than B. Br. Feoffment, pl. 20. cites 1 Aſſ. 11.

A fine is not good by a *contrary name as Sibell* for *Iſabell*. Br. Fines, pl. 72. cites

S. C.—Br. Eſtoppel, pl. 113. cites S. C.——Br. Grants, pl. 63. cites S. C.——Weſt's Symb. f. 15. cites S. C.

2. A fine was levied *by A. and B. his wife*, where the *name of the wife was M.* yet this ſhall bind her by eſtoppel, and the tenant may plead, that ſhe, by the name of B. levied the fine. Br. Fines, pl. 117. cites tempore H. 8.

3. It was reſolved that the conuſor ſhall not aſſign error, *in the grant and render, by which himſelf takes eſtate*, no more than the

conuſee ſhall *in the conuſance*; for this is to defeat the eſtate, which by the fine is given to himſelf; neither ſhall the recoveror bring a writ of error to defeat the record, in which himſelf was recoveror; for the judgment in the writ of error *is to be reſtored to all that he loſt* by the fine or judgment; *and not to avoid* and *loſe that which he had gained by the fine or judgment*, 7 E. 3. 25. b. a man ſhall not reverſe judgment for error, if he cannot ſhew that the error is in his diſadvantage, 8 H. 5. 2. b. and F. N. B. 21. accordingly; and after the fine was affirmed. 5 Rep. 39. b. Trin. 34 Eliz. B. R. Tey's caſe.

4. In the conuſance of a fine *falſe Latin, or incongruity*, will not hurt the fine; as where a fine is levied de maneriis (in the plural number) of B. and H. where (in truth) B. and H. are only one manor. 9 Rep. 48. a. Coke's notes there, Trin. 8. Jac. in the E. of Shrewſbury's caſe.

5. Fines and recoveries being conveyances by conſent, are as feoffments or deeds; and an error to reverſe them, *ought to be palpable, groſs, and abſurd*; *and* ought to be *in the eſſence of the fine* or recovery. Jenk. 258. pl. 53.

6. 10 & 11 *W.* 3. 14. § 1. *For quieting men's titles and poſſeſſions, under ancient fines and recoveries, and ancient judgments; it is*
[327] *enacted, that no fine, or common recovery, nor any judgment in any real or perſonal action, ſhall after* 1 *May* 1699, *be reverſed for any error therein; unleſs the writ of error or ſuit, for reverſing ſuch fine, recovery, or judgment be commenced and proſecuted with effect, within* 20 *years after ſuch fine levied, recovery ſuffered, or judgment ſigned, or entered on record.*

Saving the rights of infants, &c. ſo as they bring their writ of error within 5 *years after ſuch impediments removed.*

(E. b. 5) Error in Fines. *Barred. By what Act.*

Cro. E. 469. (bis) S. P. per Fenner J.

1. By *releaſe of all right in the land* by him, who has title to reverſe a fine or recovery by writ of error, the error is extinct; per Fenner J. Ow. 22. 37 Eliz. B. R. in Wright's caſe v. Wickham (Mayor).

2. By *general entry into warranty*, the error upon the fine is gone. See Goldſb. 181. pl. 116. Sir H. Jones's caſe.

(E. b. 6) Pleadings to Reverſe Fines; and where there is *Variance between Writ* of Error *and the Record.*

1. Writ of error on a fine mentioned 105 *acres*, and the fine certified was 150 *acres*; it was inſiſted that this was good, becauſe it agrees with the record which is with the *cuſtos brevium.* But Wray ſaid, that the principal part of the fine is with the *chirographer*, and it ought to agree with that, or otherwiſe it is not good; and

and afterwards the fine was reverſed, quoad one of the conuſors only, he being an infant. Cro. E. 124. Hill. 31 Eliz. B. R. Pigot v. Ruſſell.

2. Mr. Carthew moved for leave to quaſh his own writ of error to reverſe a fine, becauſe *one of the parties to the fine is omitted in the writ of error*; per Holt Ch. J. we cannot do it; how can we take notice of any thing but what is on record? we cannot quaſh it on a foreign ſuggeſtion; but let them ſhew cauſe why you ſhould not diſcontinue. Writs of error are rarely diſcontinued, but ſome times they may be. 5 Mod. 67. Mich. 7 W. 3. Winchurſt v. Maſely.

3. A *fine* was levied *by three*, and *two* of them *brought error* to reverſe it; *perhaps the other had nothing* in the land, and it was reverſed, per Holt Ch. J. who ſaid it was ſo done in time of Pemberton Ch. J. 5 Mod. 67. Mich. 7 W. 3. in caſe of Winchurſt v. Maſely.

(E. b. 7) Error in the *Return of the Caption*; what.

1. Error to reverſe a fine, becauſe, upon the back of the dedimus poteſtatem, it was *executio* iſtius brevis *patet in quodam panello huic brevi adnexo*; whereas it ought to have been *in quadam ſcedula* huic brevi annexa. For it is not any panel, but a ſchedule. Sed non allocatur, for it is but *matter of form*, and not material; for although it be not properly ſaid to be a panel, yet a panel and a ſchedule are all one in ſubſtance, and no cauſe to reverſe it. Cro. J. 77, 78. Trin. 3 Jac. B. R. E. of Bedford v. Forſter.

(E. b. 8) Pleadings. *Setting forth the Title.*

1. Note, per Thirning, that it is no avoidance of a fine to ſay, that thoſe who were parties to the fine had nothing, without ſaying, but *on J. N. whoſe eſtate he hath*; for he muſt ſhew who had any thing in the land at the time, &c. but where a recovery againſt my anceſtor is pleaded againſt me, it is ſufficient to ſay, that the anceſtor had nothing in the land at the time, &c. without ſhewing who was tenant thereof. Br. Fines, pl. 43. cites 14 H. 4. 33.

2. A man may confeſs and avoid a fine levied by his anceſtor whoſe heir &c. of the manor of D. by ſaying that there are *two manors, viz. Over D. and Nether D. and* that *the fine was levied of Over D.* &c. [*whereas the*] *action is of Nether D.* and a good plea, per Vaviſor, Davers, and Brian juſtices; contrary Conſtable and Woode; for by them the anceſtor was eſtopped, and therefore his heir ſhall be eſtopped likewiſe, quære; for the beſt opinion is, that he may confeſs and avoid, if it be well pleaded. Br. Confeſſe and Avoid, pl. 39. cites 12 H. 7. 6. [328]

3. *Error* to reverſe a fine levied by A. and brought the writ as *couſin and heir of A.* and aſſigns the errors, and brings a *ſcire facias ad audiend. errores*, and doth *not ſhew in either of the ſaid writs, how* he was couſin to the ſaid A. and for this cauſe, the defendant pleaded in abatement

abatement of the writ, and it was thereupon demurred in law; and after argument, the court reſolved, that it was good enough, without ſhewing how in the writ of error, or in the ſcire facias; for the one is but a commiſſion to hear the errors, and needs not ſuch certainty; and the other is but a writ founded thereupon. And therefore, how couſin, need not be ſhewed in the writ; nor is it requiſite that the title be ſhewed therein, unleſs it be *in a ſpecial caſe*, varying from the common courſe; *as where an eſpecial heir* in tail brings a writ of error, *or he in remainder*; becauſe he is to intitle himſelf, he ought to ſhew ſpecially, *how couſin*, or how he hath the remainder; but otherwiſe not; and although in ſome ſuch writs, it is ſhewn, how couſin, as in VENNER's caſe, and is good enough, yet it is not of neceſſity, and the omitting thereof, is no cauſe of abating the writ. See 33 H. 6. 54. 34 H. 6. 44. * 38 H. 6. 17. & 39. 45 E. 3. 25. the Book of Ent. 272. wherefore it was adjudged accordingly. Cro. J. 160, 161. Paſch. 5 Jac. B. R. Sir Richard Champernoon v. Sir William Godolphin.

* Br. Fines pl. 45. S. C.

(F. b) Reverſed by Reaſon of ſome *Default* as to the *Proclamations*, and the Effect thereof; and Pleadings.

1. IF the fine with *proclamations be not read openly*; or be read for one day in every term, *or only one term*, or if the *pleas do not ceaſe at the time of reading*; *or if it be read there*, and *none of the juſtices preſent*; and this form, which does not accord with the ſtatute, appears there of record; the fine, ſo levied, has not the force of this ſtatute; but if the *record be, that the fine was proclaimed according to the ſtatute*, the fine is good, and has the force of the ſtatute. Denſh. R. 5. upon 4 H. 7. 24.

2. 1 *Mar.* 7. § 2. Enacts that, *proclamations not duly made, by reaſon of adjournment of the term, ſhall not prejudice the fine.*

Yet it ſtands as a good fine at common law. Bulſ. 206. Paſch. Jac. Anon.

3. *Where* 15 *proclamations* were made, and *one of them out of term*, it was adjudged that the fine ſhould ſtand, and *makes a diſcontinuance*, and the proclamations be reverſed. 4 El. D. 216. pl. 54. ——See D. 181. b. pl. 53. 182. a. pl. 55. Paſch. 2 Eliz. Fiſh v. Broket.

For the fine by itſelf, is a matter of *record perfect and full before the proclamations made*, and binds the parties, and the right of the land between them before the proclamations; and the *proclamations*, that are made after, *are other matter of record*, which have other entry in the record after the fine; and ſo the proclamations, though they are grounded upon the fine, and are purſuant upon it, are *ſeveral from the fine*, and they and the fine are *ſeveral matters of the record*, and therefore error in them is not error in the fine. Pl. C. 266. Mich. 4 & 5 Eliz. Fiſh v. Brokett.

4. If any proclamation be *made on a Sunday*, it is error; becauſe it is not dies juridicus. D. 181. b. pl. 52. 182. pl. 55. Fiſh v. Broket.

5. Tenant in tail levies a fine, and *dies before the proclamations* paſs; a *writ of error is brought* before the proclamations; yet the *proclamations may paſs* in the Common Pleas; for only the tranſcript of the fine is removed by the writ of error. Jenk. 193. pl. 97. cites 21 Ed. 3. 40 Aſſ. Dy. 95.

6. *Proclamation*

6. *Proclamation made in a ſubſequent term, by reaſon of adjournment* of the former term, was held good. 4 Le. 202. Hill. 25 Eliz. C. B. Wingate v. Sands.

7. Error was brought upon a fine, and the error was aſſigned in the proclamations; whereupon iſſued a *certiorari* to the *cuſtos brevium*, who *certified* the proclamations, by which certificate it appeared, that two of the ſaid proclamations, *were made in one day*, upon which the defendant prayed another ſcire facias to the *chirographer*, in whoſe office it appeared, *that all* the proclamations *were well and duly made.* It was the opinion of Wray Ch. J. in this caſe, that the defendant ought to have his prayer; for the *chirographer makes the proclamations, and he is the principal officer as to them*, and the *cuſtos brevium hath but the abſtract of the proclamations*, and we may in diſcretion amend them upon the matter appearing; but the other juſtices ſeemed to be of a contrary opinion; for that the proclamations being *once certified* by the cuſtos brevium, who is the principal officer, we ought not afterwards to reſort to the chirographer who is the inferior officer; and afterwards the clerks of the Common Pleas were examined of the matter aforeſaid by the juſtices of the King's Bench, and they anſwered according to that which was ſaid by Wray Ch. J. wherefore it was awarded by the court, that a new certiorari be directed to the chirographer, who certified the proclamations to be well and duly made. And thereupon the court awarded, that the proclamations in the office of the cuſtos brevium, ſhould be amended according to the proclamations in the cuſtody and the office of the chirographer. 3 Le. 106, 107. Paſch. 26 Eliz. B. R. Ragg v. Bowley.

3 Le. 183. pl. 234. S. P. Anon. ——Godb. 103. pl. 121. Anon.

8. A. tenant for life, remainder to B. in tail. B. dies leaving two daughters L. and M.—L. takes huſband, and ſhe and her huſband levie a fine ſur cognizance de droit come ceo, &c. and *before proclamations L. dies*; M. claims the land, and afterwards proclamations are made. See the arguments, 2 And. 109. Mich. 36 & 37 Eliz. but no judgment, Harvy v. Facy.

3 Rep. 91. S. C. cited in the caſe of fines, and ſaid that the doubt conceived in B. R. in the caſe of HARVY v. FACY, was well reſolved in the caſe adjudged in C. B. reported by Serjeant Bendlows. Bendl. 122. pl. 156. (which ſee ſup. D. 3.) that the heir in tail was barred by the fine of his anceſtor, though the anceſtor died before all the proclamations paſſed; though in that caſe the eſtate which paſſed by the fine was utterly avoided before the proclamations paſſed. But when they paſſed afterwards the eſtate tail was barred.

9. A. by fine was tenant for life, remainder to M. his wife for life, remainder to the heirs males of the body of A. remainder to the heirs males of B.—A. and M. levy another fine to the uſe of A. for life, and after to the uſe of M. for life with diverſe remainders in uſe; *after one of the proclamations made, A. died*; the eldeſt iſſue of A. was beyond ſea; after A.'s death, the reſt of the proclamations were made; it was agreed by all the judges that this fine ſhall be bar to all who might claim by the eſtate tail, created by the firſt fine. 2 And. 177. Hill. 44 Eliz. Sir John Danvers's caſe.

Mo. 628. S. C.——3 Rep. 84. the caſe of fines ſeems to be S. C. and there in the third reſolution, page 87. it is held that the iſſue in tail, being heir and privy, cannot by any *claim*, which he can make, ſave the right of the eſtate tail, which deſcends to him, but that after the proclamations paſſed the eſtate tail ſhall be barred by the *ſtatute* 4 *H.* 7. & 32 H. 8. notwithſtanding any claim, which may be made by him.

10. Upon

10. Upon a fine the *firſt proclamation* was made in *Trin.* 5 *Jac.* and the *ſecond* in *Mich.* 5 *Jac.* and the *third* in *Hill.* 6 *Jac.* (where it *ſhould be Hill.* 5 *Jac.*) and the *fourth and fifth* in *Eaſter* 6 *Jac.* and this was agreed to be a palpable error; for the fourth proclamation was not entered at all, and the fifth was entered in Hillary term 6 Jac. (where it ſhould have been in Hillary term 5 Jac. and it ſhall *not be amended*; *becauſe it was of another term*, and the court conceived that this was a *forfeiture of the office of chirograper*; for it was abuſing of it, and the ſtatutes of 4 H. 4. 23. and Weſtm. 2. are that judgments given in the king's court ſhall ſtand until reverſed by error. 2 Brownl. 300. Paſch. 7 Jac. C. B. Anon.

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D. 216. pl. 54.

11. *No proclamation made the firſt day* is error apparent to reverſe the proclamations, but the fine ſtill remains a good fine *at common law*. 1 Bulſ. 206. Paſch. 10 Jac. B. R. Anon.

(F. b. 2) Avoided for what Cauſe, Dureſs, &c.

Co. R. on Fines, 9.

1. If men, compelled by *threatnings* or impriſonment, ſhould be *admitted to levy fines*, they ſhould thereby be barred; becauſe the law intendeth ſuch perſons are at liberty when they acknowledge Fines. Weſt. Symb. 3. ſ. 11. cites 17 Ed. 3. 52. 78. 17 Aſſ. 17.

(F. b. 3) Reverſed for *Default in the Dedimus*, or Writ of Covenant.

Co. R. on Fines, 10. Br. Fines, pl. 116. cites 35 H. 8.

1. If the *dedimus poteſtatem* bears date before the *writ of covenant*, the conuſance taken upon it is void; becauſe the *dedimus poteſtatem* recites *cum breve noſtrum de conventione inter A. petentem & B. deforceantem, &c.* ſo that the conuſance was taken without writ of covenant; or otherwiſe *præcipe quod reddat*, is void, albeit it is taken by the juſtices of C. B. but they uſe to have *writ of covenant* pending before the *certificate*, and this makes the conuſance, and note good; becauſe the writ is intended before conuſance. Denſh. R. of Fines 8.

2. The *caption* of the conuſance of the fine was before Sir Roger Manwood Ch. Bar. 27 *Martii*, 27 Eliz. and the *writ* of *covenant*, and dedimus poteſtatem bore *teſte* 9 *Aprilis*; ſo the conuſance taken without warrant, and by the ſtat. of 23 Eliz. the day of the caption is always to be certified; but the court over ruled it, and would not hear it argued; for they ſaid it is good enough, and otherwiſe they ſhould reverſe diverſe fines. Cro. E. 275. Hill. 34 Eliz. C. B. Argenton v. Weſtover & Lucas.

Where the writ of covenant bore teſte *after the teſte of the ded. pot.*

3. Error to reverſe a fine levied 21 Eliz. becauſe the writ of *covenant*, whereupon it was levied, *bore teſte the 2d of January 21 Eliz.* and the *dedimus* poteſtatem to take the conuſance *bore date the ſame 2d day of January, reciting quod cum breve conventionis pendet,* &c.

&c. whereas it was not depending until the return, which was Octab. Hillarii. Gawdy and Fenner only in court held, that it was not error; for the writ is pending presently upon the purchase thereof. Cro. E. 677. Trin. 41 Eliz. B. R. Arundel v. Arundel.

it was held manifest error. And a fine levied in Chester was reversed for this cause. Cro. E. 740. Hill. 42 Eliz. C. B. Goburn v. Wright.

4. If dedimus potestatem be *awarded to two*, and the *one of them takes conusance* of a fine, and this fine is after *drawn up in C. B.* yet the party may well have error upon this fine, viz. *that the conusance was without warrant*, for it is not contrary to the record; for the dedimus potestatem is parcel of the record, and the assignment of error agrees with it, per Popham. Pasch. 1 Jac. B. R. Yelv. 34. in case of Arundel v. Arundel.

But if such erroneous conusance upon ded. pot. be taken, and the fine is after *drawn up as a fine acknowledged in court*, now no misprision in the ded. pot. shall avoid it; for it shall be adjudged as a fine acknowledged in court only, per Popham. Yelv. 34. in case of Arundel v. Arundel.

5. Where a *sheriff was one of the cognizees*, the *writ was directed to the coroners*, with this clause at the end of the writ, *quia prædict. Johannes Done* (one of the cognizees) *est vicecomes comitatus Cestriæ, fiat executio brevis prædict. per coronatores, ita quod vicecomes non se intromittat*; and resolved by all the court, that it was not error, though he is not the sole party, but others are joined with him; for if the writ be directed to the sheriff, and he is party, it is doubted in the books, if he, as plaintiff, may execute a writ for himself, and, as defendant, may do it upon himself. And therefore it is good, and the general course is to award the writ to the coroners, *to avoid the doubt of delay*; and when the party *appears, and levies a fine thereupon*, he never shall assign it for error afterwards, that it ought not to have been directed to the coroners, especially upon this amicable writ to make assurance, &c. Cro. C. 415. Mich. 11 Car. B. R. Done v. Smeither & Leigh.

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(F. b. 4) Error. *Variance* between the Caption and Fine ingrossed.

1. By the caption of the fine upon the dedimus potestatem the *land was given to W. and his wife*, and to the *heirs of the body of the baron of the body of the feme begotten*; and the fine ingrossed was, to the heirs of the body of the baron *upon the wife begotten*, so is variant. But all the justices conceived, that it was not material; for in both cases the feme had but an estate for life, and the baron an estate tail, and the words are of the same sense. Cro. E. 275. Hill. 34 Eliz. C. B. Argenton v. Westover & Lucas.

2. The caption was, *si contingat the baron to die without issue*, that it should remain over, and the fine engrossed was, si contingat, that the *baron and feme die without issue*, that it shall remain over, so it is variant; but it was held all one; for the *estate in remainder is always limited upon the more long estate*, which is the estate tail, yet it was all of one sense; and afterwards, the fine was affirmed.

firmed. Cro. E. 275. Hill. 34 Eliz. C. B. Argenton v. Weſtover & Lucas.

3. Error, the writ of *covenant was de manerio de Corthuther*, and the dedimus poteſtatem was de manerio *de Cortheder*, and for this variance, it was inſiſted there is no conuſance upon the writ; but it being with an *alias Corthuther*, it was held good. Cro. E. 275. Hill. 34 Eliz. C. B. Argenton v. Weſtover & Lucas.

4. Error aſſigned was, that the writ was, *inter Nicholaum Forſter* querentem *& Johannem Forſter* deforceantem; and *ſo was the dedimus* poteſtatem. And in the *caption* of the fine annexed to the writ of dedimus poteſtatem (which was certified) it was in this manner; præcipe *Johanni Foſter militi*, quod teneat Nicholao Foſter, &c. ſo it varies from the firſt writ & dedimus poteſtatem, ſed non allocatur; for they held, that the names are all one, *Forſter* and *Foſter*, and are of the ſame ſound, & *quaſi one and the ſame name.* Cro. J. 77, 78. Trin. 3 Jac. B. R. E. of Bedford v. Forſter.

5. The writ of *covenant was*, præcipe, &c. quod teneat, &c. *de octo meſuagiis, decem gardinis*, &c. ſo it varies from the firſt writ or commiſſion, and there is not any warrant for the commiſſion; ſed non allocatur, it is not any cauſe to reverſe the fine; for although *duobus meſuagiis* is *pro duobus toftis*, yet they held it not material; for the *concord hath relation to the* writ of *covenant, and the dedimus* poteſtatem; and the *entry of the præcipe upon the teſte of the concord*, is a rehearſal of the ſubſtance of the writ of covenant, and *is more than needs to be*, and being variant from the writ of covenant, is idle, immaterial, and meerly void; wherefore the fine is good enough, and it was affirmed. Cro. J. 77, 78. Trin. 3 Jac. B. R. E. of Bedford v. Forſter.

[332] (F. b. 5) Reverſed for Errors, in the *Caption*.

1. Error to reverſe a fine in Cheſter, the *conuſance* was *taken* of it *by one*, and the *dedimus* poteſtatem was *to him, and another* jointly; and this was erroneous. Cro. E. 240. Trin. 33 Eliz. B. R. Downes v. Savage.

(F. b. 6) Reverſed in Reſpect of Payment of the *King's Silver*. And what the King's Silver is, &c.

1. The king's ſilver *is* the fine paid to the king, pro licentia concordandi.

2. *A. and his wife acknowledged a note* of a fine the 26*th of March* 1621, before commiſſioners by dedimus poteſtatem, and the *wife died the* 27*th* day of the ſame month. The 28*th* day *compoſition was made* in the alienation office upon a *writ of covenant made*

made returnable in Hill. term before, and the *king's ſilver was entered* in the office of the king's ſilver *as of* the ſame *Hill. term*, and ſo the fine was paſſed and engroſſed, and now in Eaſter term the heir of the wife moved againſt this fine; but upon debate the court reſolved that the fine muſt ſtand. Hob. 330. Farmer's caſe. Co. R. on Fines, 10.

3. It was aſſigned for error, that *one of the conuſors died before the return of the caption*, and alleged a diminution in the record before the judge in Cheſter (where the fine was levied) and after before the prothonotary there, who *returned* no ſuch diminution, but *that in a paper book, in which the things of the office were written, it was entred, that* ſuch a day *was paid for the king's ſilver* (without ſhewing what). The queſtion was, whether this fine was erroneous for this reaſon (amongſt others) 2 Sid. 54, 55, &c. Row v. Evelyn.——And afterwards it was held by Newdigate J. and as it ſeems by Warburton J. that it was; and Glyn Ch. J. held the fine erroneous for other reaſon, and ſo thought that the king's ſilver came not in queſtion in the caſe; for to proceed upon the fine, the conuſor being dead before the return of the writ, is as to him, a building without a foundation. 2 Sid. 93, 94, 95. Trin. 1658. B. R. Row v. Evelyn.

4. *And* Glyn Ch. J. ſaid, that if, in the caſe above, one of the conuſors had not been dead, he thought, that the king's ſilver might well be paid; for if it was not paid, yet *there was a compoſition for it* before the original; and in favour of common aſſurances, we ought to preſume that it is paid, if nothing appears to the contrary. 2 Sid. 95, 96. Trin. 1658. B. R. in caſe of Row v. Evelyn. ——cites * Carrell's caſe. * D. 220. b. pl. 15. Paſch. 5 Eliz.

5. Four conuſors, *two die before the fine ingroſſed, or king's ſilver* paid; whether the fine ſhall be reverſed for part, or for all? it was argued that it is a fine without an original, and therefore ſhould be reverſed in toto, and cited Hill. 1662. B. R. to have been ſo adjudged in caſe of Roe v. Yeatly. 2 Lev. 127. Hill. 26 & 27 Car. 2. B. R. Biddulph v. Harriſon. See (Q.) pl. 1.—2 Sid. 96. per 2 Juſtices againſt Glyn Ch. J. Row v. Evelyn.

6. *Huſband and wife levied a fine* of the lands of the wife, and this was *by dedimus in the Lent vacation, ſhe being then but* 19 *years of age*; the *king's ſilver was entered in Hillary term before, and ſhe died in the Eaſter week*; and upon a motion made the firſt day of Eaſter term, to ſtay the engroſſing of the fine, it was denied by the court; for they held it to be a good fine. 3 Mod. 141. cites it as the caſe of * Warnecomb v. Carrill. * Dy. 220. b. pl. 15. S. C. 12 Rep. 124. S. C. Paſch. 5 Eliz.

7. A fine was acknowledged before Herbert Ch. J. by a man and his wife 7 *December* 1689. And by reaſon that the late *king James had deſerted* the kingdom, *and taken away the great ſeal*, there followed a *ſtop of proceedings at law*; and the *woman died the 20th of February* following, and *upon the 22d of February, the king's ſilver was paid, as upon a writ of covenant in king James's time*, though *no writ was then ſued out.* But afterwards a *writ of covenant was taken out returnable* in Michaelmas term, which was ſealed with the ſeal of king William and queen Mary; and the fine was engroſſed, and made as a fine in Michaelmas term. The court, (after the cauſe had been twice moved, and full conſideration of it) gave 3 Mod. 140. S. C. Cumb. 66. S. C.

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their opinions ſeriatim, that the fine ſhould ſtand. For the entring of the king's ſilver after the parties death could not be now examined, in regard the fine was *engroſſed*, and compleated *as a fine in Michaelmas-term.* 2 Vent. 47. Trin. 1 W. and M. C. B. Ball v. Cock.

Jenk. 169. pl. 28.—The death of the conuſor before the *entry of the king's ſilver*, is an apparent error. Cumb. 59. Trin. 3 Jac. 2. B. R. Paul v. Claxton.

8. Fine acknowledged before commiſſioners in long vacation, and *no writ of covenant* taken out, the party dies immediately.—They ſhall after, enter the king's ſilver, and take out a writ of covenant as of the term before. per Holt. Farr. 95. Mich. 1 Annæ, B. R. in caſe of Oades v. Woodward.

(G. b) Reverſed or avoided for what *Error*.

This ſtatute extends only to fines, *taken by ded. pot.* and is only to regulate, and not to annul fines. Arg. 10. Mod. 43. in Ld. Say and Seal's caſe.——But was intended to protect and ſupport them, per Cur. Ibid. 45. Mich. 10 Annæ, B. R.

1. 23 *Eliz.* 3. enacts that, *no fines, proclamations upon fines, or common recovery, ſhall be reverſible by writ of error for falſe Latin, raſure, interlining, miſentring of any warrant of attorney, or of any proclamation, miſreturning or not returning of the ſheriff, or other want of forms in words and not in matter of ſubſtance.*

2. A fine is before ſuch juſtices and *aliis fidelibus*, and if there be *no ſuch judge* as one of them which is named, yet the fine, being levied before other judges, is good. Cro. E. 320. Paſch. 36 Eliz. B. R. Walſh v. Collinger.——Obiter.

3. Writ of *covenant bore teſte after* the teſte of the *ded. pot.* and the fine was reverſed for that cauſe. Cro. E. 740. Hill. 42 Eliz. C. B. Goburn v. Wright.———This is a common error, and becauſe it is a common aſſurance it is not now to be diſallowed. per Coke and Doderidge. Roll. R. 223. Trin. 13 Jac. B. R. Herbert v. Binion.

4. A writ of *covenant bore teſte* 15 *April*, returnable quindena Paſch. and that year quind. Paſch. was the 14 *April*, and ſo the return was before the teſte, and the fine was reverſed. Noy. 171. Gage v. Taylor.

5. A fine *levied in the vacation* was agreed, by the court of Common Pleas, to be, *at the election of the parties*, a fine either of the *precedent or ſubſequent term.* Now whether *the intervening of a term* can make ſuch a difference, as that in the one caſe the fine ſhall be good, and in the other utterly void, cannot be diſcovered from the reaſon of the thing; but muſt depend entirely upon *the practice of the court of C. B.* every court being judge of its own rules. Such kind of evidence was refuſed in the caſe of CLERK AND WARD, even by a court of equity, viz. the chancery and this judgment was confirmed in error in the houſe of Lords. per Cur. Mich. 10 Annæ, B. R. 10 Mod. 44. In Ld. Say and Seal's caſe.

(G. b. 2) *Error* to reverſe Fines. *By whom* the Writ muſt, or may be brought.

1. A. made a *feoffment to* the uſe of *himſelf and B. his wife, and to the heirs of their two bodies*, the remainder *to the right heirs of the huſband.* They had *iſſue M.*——then A. died; B. *the wife ſold* the land in fee; M. married J. S. And afterwards B. M. and J. S. her huſband joined in fine, come ceo, &c. in confirmation of the eſtate. But before the certificate and ingroſſment *M. died without iſſue*; now J. S. and B. and one *C. as couſin and heir of M.* brought a writ of error to reverſe the fine, and then to avoid the ſale of B. the widow, upon the ſtatute 11 H. 7. Note, that the writ of error is brought by C. as couſin and heir collateral to M. and it appears, that *no right* is *deſcended to him by M.* ſo that *ſhe had but an eſtate tail*, which is determined by her death without iſſue. *And non conſtat, that the fee ſimple was in her as right heir of A. her father*; for it might be, that A. had iſſue a ſon and another daughter beſides M. for any thing that is ſhewn to the contrary; for ſhe is not named heir to her father, in any ſhewing before; and then he is not damnified by this erroneous judgment, as the writ ſuppoſes, as right heir to M. from whom no right is deſcended; and the writ of error ſhall be brought *by him, who ſhall have the thing*; *whereof the judgment was erroneouſly given*, and that is the right heir of A. ſo this judgment is reverſible by him in the remainder by the common law, or by the equity of the ſtatute of 9 R. 2, 3. (Quære hoc.) and not by the heir general of M. and admit that it ſhould be intended, that M. was right heir to A. yet becauſe this *fee ſimple was not then executed in her*, but was *expectant upon the tail*, he, who ſhall demand this fee ſimple, when the tail is ſpent, muſt make himſelf right heir to A. according to the limitation of the remainder; for though C. was of the half blood to M. yet he ſhall have this remainder of the fee-ſimple as right heir to A. if he be of the whole blood to him, by whom, &c. D. 89. b. and 90. Mich. 1 Mar. Reynolds v. Dignam, als. Verney's caſe.——— Ibid. cites 3 H. 4. where the *iſſue female in tail ſpecial brought a writ of error*, becauſe that ſhe is to rehave the land, and not her brother, who was general heir to the anceſtor. And cites alſo Hill. 10 E. 3. to the like purpoſe.

2. He in *remainder, or reverſion expectant on eſtate tail*, may have error. Trin. 25 Eliz. 3 Rep. 3. b. 4. a. the third reſolution in the Marqueſs of Wincheſter's caſe.

It ought to be a remainder, or reverſion

in deed, and *not in right*, which is a ſufficient ground to maintain writ of error. Arg. Palm. 237. cites 50. Aſſ. 3. Br. Error, 132.———And 32 E. 3. Error, 73. where it was required to *ſhew how he came to the reverſion, and that he had a reverſion, and not a right only.*———Le. 273. the Queen v. Brayhrooke S. C.———S. S. cited per Haughton J. Palm. 245.———S. C. cited and agreed per counſel. Arg. Roll. R. 301.——See 3 Lev. 36. Hutchinſon's caſe.

3. Mich. 21 & 22 Eliz. It was argued, and 25 adjudged between BRAYBROOKE and the LD. NORRIS, that *he in remainder* may

Le. 270. S. C. by the name of

the Queen v. Braybrook.—See Braybrook's caſe.—See Marq. of Winchester's caſe.

may have writ of error; but if he in remainder be *attainted, during the life of the tenant for life*, the *queen* ſhall not have it. D. 188. Marg. pl. 9. Mich. 21 and 22 Eliz.

4. *And* 17 Eliz. ſo adjudged, as there was ſaid, between HENNINGHAM and juſtice WYNDHAM. D. 118. Marg. pl. 917. Eliz.

S. C. cited D. 89. b. Marg. pl. 2.

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5. A. ſued two writs of error, one to reverſe a fine, the other to reverſe a common recovery, by reaſon of his nonage. Tanfield moved that the writ to reverſe the fine, was not well brought. The caſe was, *B. was tenant for life, in right of his wife*, the *remainder to the plaintiff in fee*, and they *joined in a fine* to D. It was inſiſted, that they all ought to join in the writ, and there ought to be ſummons and ſeverances, and he cannot bring it alone; but it was anſwered, that this writ is well brought by the plaintiff alone; for it is *brought for an error in fait*, viz. his *nonage*, and of his nonage, the other can take no advantage; ſo the *cauſe of the action being ſeveral*, and not joint, they cannot join in the action, 34 H. 6. in caſe of attaint; 7 H. 4. 44. and they relied upon the caſe, 29 Aſſ. 14. The court held the writ was well brought, becauſe it is *no error in the record*, but an error in fait; and if *two infants bring* a writ of *error*, they muſt aſſign the errors ſeverally; and therefore if one be within age he muſt bring the writ alone. Cro. E. 115. 30 and 31 Eliz. B. R. Pigott v. Ruſſell.

6. If *huſband and wife* levy a fine of the wife's land unto a ſtranger, the *wife being within age*, they ſhall have a writ of error during her nonage. F. N. B. 21 (D).

7. *A. levies a fine* of lands *to B.*——*C. cannot have* a writ of *error* to reverſe this fine, *although* C. be *in poſſeſſion, and tenant in fee ſimple* of the land. Jenk. 161. pl. 6.

(G. b. 3) Reverſal. How. *By Plea*, without Writ of Error, and by what Plea.

1. Where a fine is pleaded, it is no plea, that there is *no ſuch record of writ of covenant, upon which it was levied*; for a fine levied without original is not void, but error; for they are judges of the thing. Br. Aſſiſe, pl. 397. cites 26 H. 6. and Fitzh. Aſſiſe, 13.

3. If error be *in the proclamations* of a fine, they ſhall be reverſed by plea without writ of error; but that fine nevertheleſs remains of good force ſtill; for they are ſeveral matters of record; yet if error be in the fine, the proclamations are void; becauſe the fine is the firſt record, whereupon the proclamations depend, and *ſublato ſubjecto tollitur ejus accidens*. Weſt's Symb. ſ. 192. cites pl. 266. a. D. fol. 216. pl. 54. 4 Eliz.

(G. b. 4) Pleadings. Where a Fine is pleaded, How it may be *avoided by Pleading* Partes Finis non, &c. Or by confeſſing and avoiding.

1. The fine is good, if any of the *parties* be *ſeiſed at the time*, &c. Br. Eſtoppel, pl. 26. cites 40 E. 3. 30.

2. If a fine be levied *to a monk, by a ſtrange name*, it ſhall be eſtoppel to plead *profeſſion*. Br. Eſtoppel, pl. 2. cites 3 H. 6. 23.

3. Where a recovery, or fine of my anceſtor is pleaded againſt me, I ought to *ſhew how my anceſtor came to it after*, and otherwiſe, he cannot confeſs and avoid it; for it is not ſufficient to ſay, that the anceſtor was ſeiſed after, without ſhewing how he came to it. Br. Confeſs and Avoid, pl. 57. cites 6 E. 4. 11. per Neale.

4. It hath been reſolved, that againſt a *jointenancy pleaded* by fine, the demandant may confeſs and avoid the fine; as to *ſay that the jointenant not named, releaſed before the writ brought, or that they both infeoffed one who re-infeoffed the tenant*, or the like; for theſe, or the like pleas, confeſſing and avoiding the fine do in no ſort weaken the ſtrength or force of the ſame. 2 Inſt. 524.

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5. It is ſaid in one book, that a fine may be *avoided in two manners*, viz. either to ſay quod *partes finis nec eorum aliquis tempore levationis finis nihil habuerunt; nec eorum aliquis aliquid habuit, &c. ſed quidam J. S. cujus ſtatum ipſe habet*; *or* to *confeſs and* to *avoid* the fine, *as* to ſay, *that J. S. was ſeiſed, till by the conuſor diſſeiſed, who levied the fine*, viz. *that J. S. entered, who enfeoffed him.* Co. R. on Fines, 17. cites 3 H. 7. 9. Br. Fines, pl. 87. cites S. C. and that he may confeſs the fine, and avoid it by elder title and regreſs; and where he that ſo pleads, *concludes, & de hoc ponit ſe ſuper patriam*, he, who pleads the fine, ſhall ſay *& idem querens ſimiliter*: and there it appears, (he ſays) that there are diverſe forms of pleading in avoidance of a fine.——————Br. Iſſues joined, &c. pl. 3. cites 33 H. 6. 21.

6. Upon a *formedon of gift* in tail by fine, *ne dona pas* is a good plea, and averment againſt the fine, and in avoidance of the fine, per Cur. Co. R. on Fines, 17. cites 38 E. 3. 3. a. S. P. Br. Eſtoppel, pl. 26. cites 40 E. 3. 30. if he is a ſtranger to the fine.

7. Et notandum eſt, if one plead in avoidance of a fine, quod partes finis, nec eorum aliquis, &c. the *other*, *in maintenance of the fine, need not to ſhew, that the parties had the eſtate*; *but* he, that pleads in avoidance of the fine, ought to *conclude, & de hoc ponit ſe ſuper patriam*; then he that maintained the fine, ſhall not ſay more than, *& predictus quer. ſimiliter*, &c. and if he, that pleads the fine, *can prove, that any of the parties* to the fine *had any thing*; this is good enough for him. Co. R. on fines, 17. S. P. and there is no other *rejoinder* made. The reaſon ſeems to be becauſe the defendant pleads in the negative, and then this makes iſſue immediately, as ne dona pas, nul tort, not guilty, &c. Br. Iſſue joined, &c. pl. 3. cites 33 H. 7. 21. per Littleton, who ſaid that it was adjudged by Sir John Juue in C. B.

Nor need he *ſhew how he had the eſtate of J.* S. and it is as well as if the que eſtate had been limited in him who was party to the writ.

8. And upon this, that hath been ſaid, it appears clearly, that if one plead quod partes finis, &c. ſed quidam J. S. cujus ſtatum ipſe habet, &c. the *ſeiſin of J. S. is not traverſable*; but he, that pleads the fine, ought to maintain the fine, as is aforeſaid. Co. R. on Fines, 17.

Br. Fines, pl. 70. cites 37 H. 6. 34.

9. If a *feme covert* only, *without her baron*, levies a *fine executory*; though the *baron continues in poſſeſſion during his life*, and after dies, yet this ſhould conclude the feme and her heirs; but if *execution* had been ſued, and after the baron had died, this had avoided the fine for ever. Co. R. on Fines, 17.

10. Scire facias to execute a fine *levied by D. where he had but two parts in common with J. S.* at the time of the fine, who was ſeiſed of the third part in common with the ſaid D. who levied the fine of the third part, &c. it is dangerous to ſay that D. had nothing at the time of the fine, but *ſhall ſay that he had nothing but in common with J. S. which eſtate he has*; nota. Br. Sci. fa. pl. 1. cites 26 H. 8. 9.

11. It is a good plea to ſay, *that J. S. was ſeiſed tempore levat', and before* the fine levied, *without that*, that the parties in the fine had any thing therein at the time of the fine levied. Weſt's Symb. ſ. 291. cites 9 H. 4. 27. 3 H. 6. 27.

12. *Or* to ſay, that the parties to a fine had nothing, &c. *but A. B. whoſe eſtate he hath*, et de hoc ponit ſe ſuper patriam, Weſt's Symb. ſ. 191. cites 33 H. 6. 18. 26 H. 6. fo. 9 42 E. 3. 20. 4 H. 4. 8. 14 H. 4. 33. 4 H. 7. c. 24.

13. A. *deviſed to B. for life, and if B. have iſſue male, then to ſuch iſſue male and his heirs for ever*; and after B.'s death, *if he leave no iſſue male*, then *to C. and his heirs*. B. ſuffered a recovery, in which he was vouchee, and the uſe was declared to B. and his heirs. The coheirs of A. were E. and F. two femes, then of age and unmarried. *B. by will gave* the land *to J. N. in tail, remainder over.* B. died, and C. entered; afterwards, *J. N. and W. R. joined in levying a fine, and ſuffered a recovery to the uſe of W. R. and his heirs.*
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It was objected that partes finis nihil habuerunt, in regard, that *before the levying it, W. R.* (who was ſaid to be the diſſeiſor of the premiſſes), *by leaſe and releaſe did convey the inheritance of the premiſſes to W. S. in mortgage*, and that though W. R. had the poſſeſſion, yet this was under the proviſo of the mortgage, as tenant at will to the mortgagee, until default of payment. But Ld. C. Parker held, that in this caſe, it could not be ſaid, that partes finis nihil habuerunt; becauſe J. N. as *deviſee of B. had a right againſt all perſons but the heirs of A. and that W. R. entering upon him was a diſſeiſor*, and though W. R. afterwards mortgaged in fee, yet he continuing in poſſeſſion, and joining with J. N. in the fine, it could not be ſaid, that partes finis, &c. when one of them, viz. *W. R. had the poſſeſſion, and J. N. the right* againſt W. R. and alſo againſt his mortgagee; and alſo that E. and F. the coheirs of A. being of age, and unmarried at the time of recovery, ſuffered by B. were barred by the ſtatute of limitations. Wms's Rep. 505, 506, 507, 519, 520. Mich. 1718. Carter v. Barnardiſton.

(G. b. 5) Reverſed *by one*, where it ſhall *benefit others*.

1. The law, after the ſtatute of 4 H. 7. is, that if the *eſtate* contained in the fine *was defeated within the 5 years*, the fine thereby had *loſt its force*, not only againſt him, who had defeated it, but againſt *all others that had right* or title *paramount*, and *who do not put in their claim within the 5 years after the proclamations, though* he who defeated it had brought his action within 5 years, but had *no judgment and execution till 7 years were paſſed after the proclamations*. per Saunders. Pl. C. 358. b. in caſe of Stowel v. Ld. Zouch. See Mo. 251. contra per Periam J.

2. Tenant for life, remainder for life, remainder in fee; if the firſt *tenant for life alien*, and the *alienee levy a fine*, he in *remainder for life* may enter, and defeat the fine, and not he in remainder in fee; and if he *enters*, this ſhall give benefit to him in remainder in fee; for the fine againſt him ſhall be ouſted. And by the ſame reaſon, if he makes continual claim, he in remainder in fee, at all times after ſhall take advantage of it, and ſhall avoid the fine, as Saunders ſaid. Pl. C. 359.

3. Fine being levied *by A. in the name of B.* a reconveyance was decreed, and that a vacat ſhould be made, if by law it might be. Roll. R. 115. in caſe of DAY v. HUNGATE, cites 38 & 39 El. the caſe of Gellerband v. Hubard.

(H. b) Reverſed or Avoided by *Death* of Conuſor, or Conuſee.

1. If fine be *acknowledged before a judge*, and the conuſor dies, it may be inrolled after. Co. R. on Fines, 10.

2. If *one of the conuſees dies before return of the writ*, this makes not the fine void, but voidable only by writ of error. Per two juſtices againſt Glynn Ch. J. who held it void, for this reaſon. 2. Sid. 94, 95. Trin. 1658. B. R. Row v. Yeveley.

3. The father and ſon join in a fine in order to make a ſettlement upon the ſecond wife of the father, who was only tenant by the curteſy, the remainder in tail to his ſaid ſon. *One of the cogniſors died* after the caption, and *before the return of the writ of covenant*; and now the writ of error was brought to reverſe it, and this was aſſigned for error. Per Cur. If it had been in the caſe of a *purchaſor for a valuable conſideration*, the court would have ſhewed him ſome favour; but it being to do a *wrong to a young man*, they would leave it open to the law. 3 Mod. 99. Paſch. 2 Jac. 2. B. R. Okell v. Hodgkinſon.

4. Conuſor died *between the teſte and return* of the writ of covenant, for which reaſon the fine was reverſed, Hill. 3 and 4 Jac. 2. B. R. Cumb. 57, 71. Price v. Davis. [338]

5. If the *caption* of a fine be taken *in the vacation*, and the *writ* be *returnable the next term*, the death of the party determines it; but if it be returnable *the term before*, it ſhall be well, notwithſtanding the party's death. Farr. 2. per Cur. Paſch. 1 Annæ, B. R. in Dr. Woodward's caſe.

(H. b. 2) Reverſed by *Error* brought *in B. R.* How.

1. If a writ of error be brought in B. R. to reverſe a fine levied in C. B. the very record of the fine itſelf is never removed hither, but on a tranſcript of it: *but if this court adjudge it erroneous*, then a *certiorari* goes to the chirographer, *to certify the very fine*; and when it comes up, it is *actually cancelled*; per Holt Ch. J. 1 Salk. 341. Fazacharly v. Baldo.

Per Berkley J. Mar. 10 pl. 27.—— Br. Error. 137. cites 1 H. 7. 19, 20. S. P. Br. Record, pl. 48. cites S. C.——Ibid. pl. 46. cites 40 Aſſ. 29.——Upon a tranſcript of a record, a man ſhall not aſſign errors, if it be not upon a writ of error ſued upon a tranſcript of a fine, and there he ſhall aſſign errors upon the *tranſcript of the note of the fine*; and if the juſtices do conceive it error, then they ſhall ſend for the note of the fine, and ſhall reverſe the ſame. F. N. B. 20 (F).—— But B. R. Record, pl. 79. cites 5 Ma. 1. nota, that in B. R. they have diverſe precedents, that in writ of error upon fine the record itſelf ſhall be certified, ſo that no more proclamations ſhall be made, and if they are reverſed, this makes an end of all, but if they are *affirmed*, then the *record ſhall be ſent into C. B. by mittimus to be proclaimed and ingroſſed.* Quod nota, for if nothing be removed but the tranſcript, they may proceed in B. C. notwithſtanding.——*Certiorari* was awarded out of B. R. directed *to the cuſtos brevium*, which was *to remove the foot and record of a fine*, levied tempore reg. and reginæ P. & Ma. (whereof, in law and truth, only the tranſcript was removed before by writ of error, and *error found and adjudged* in this) to the intent, that the record of the fine ſhould be removed *a placitis in C. B. and cancell'd in B. R.* and of this are books and precedents. And Egerton, clerk of the office of chirographer, ſhewed a precedent tempore E. 3. of certiorari out of the chancery directed to the juſtices of C. B. & *pro tenore pedis finis pro errore*, and by *mittimus* ſent over into B. R. anno 16 E. 3. D. 274. b. pl 44. Paſch. 10 Eliz Anon.

2. Where a writ of error brought in B. R. was directed to the cuſtos brevium of the C. B. *to remove recordum & proceſſum* (leaving out the word *prædict.*) *cum omnibus ea tangentibus*, which was done accordingly, it ſeems that the writ of error, in form, is not good becauſe the tranſcript ought to be removed, and not the very record itſelf, until judgment be given of reverſal. And this appears in diverſe books and precedents, as 21 E. 3. 40. Lib. Aſſ. 24. Becauſe there is no chirographer in B. R. if the fine be affirmed. D. 89. b. pl. 2. 4. Mich. 1 M. Reynolds v. Dignam al. Verney's caſe.

3. When a fine is to be reverſed for error, the courſe is for the plaintiff in the writ to have *ſeveral writs of error*; viz. one, directed *unto the Ch. J.* of the court of Common Pleas, *to certify the record and proceſs* of the fine, and another *to the cuſtos brevium* of the ſame court *to certify the tranſcript of the foot of the fine*, and the third, *to the chirographer to certify the tranſcript of the record and proceſs* of the fine. Weſt's Symb. ſ. 192.

*The *reaſon* why tranſcript of the fine only, and not the record of the fine, ſhall be removed by writ of error, is becauſe *in B. R. there*

4. Error being brought in B. R. of a fine in C. B. *the fine was affirmed*; and now a writ of error, *coram vobis reſiden.* was brought here; and exception was taken, that the writ ought to abate; for that no ſuch writ lies in this caſe, becauſe, * *only a tranſcript* of the fine *is removed* into this court; and it was likened to the caſes of error in the Exchequer Chamber, where only a tranſcript goes up, and if the writ abates, no writ of error coram vobis lies. Sed per Cur. the reaſon of that is not becauſe *they in the Exchequer Chamber* have only a tranſcript, but becauſe they *have only a particular authority to affirm or to reverſe.* It was admitted, that the tranſcript of the record

record of a fine is only removed, becauſe upon judgment of reverſal, a certiorari goes for the very foot of the fine, and it is cancelled. But notwithſtanding that, the court held, that error coram vobis reſiden. lay. Paſch. 4 W. & M. B. R. 1 Salk. 337. Winchurch v. Belwood.

is no chirographer. Co. R. on Fines 12.—Br. Record, pl. 56. S. P. cites 40 Aſſ. 29.

(H. b. 3) Reverſed. *Ancient Demeſne.* Fines levied there Reverſed by Writ of Diſceit. [339]

1. Scire facias was ſued upon a writ of diſceit, which was to reverſe a fine levied of land, which is ancient demeſne; the lord brought the writ of diſceit, and the record of the exchequer was ſhewn, proving the manor of E. to be in ancient demeſne; and the plaintiff ſaid, that *parcel* of the land in the fine, *was parcel of the manor, and parcel at the common law*, and the defendant cannot deny it; and becauſe the *tranſcript* was ſent, therefore the *court ſent to the chamberlain of the Exchequer for the fine itſelf*; and upon this they adjudged that the fine, as to this which was ancient demeſne, ſhould be reverſed, and * annulled; and the lord reſtored to his ſeigniory; and the fine was *marked of this parcel and not drawn off the file*; for it is good for the reſt, and therefore it ſeems here, that by theſe words, (void and annulled,) that it is void, as well to the parties as to the lord; and yet by 17 E. 3. the conuſee ſhall have the land. Br. Fines, pl. 47. cites 21 E. 3. 20. and 7 H. 4. 28.

* Orig. (Ancient).

2. Fine was levied of land in ancient demeſne at common law, the lord brought writ of *diſceit againſt thoſe only, who levied the fine and not againſt the terre-tenants*, and had *ſcire facias againſt the tertenants*, and well; and it was agreed that the fine ſhall be *annulled againſt the lord*; but quære, if by this it ſhould be void *between the parties* and ſo ſee in this action non-tenure is no plea, if it may be againſt thoſe who are not terretenants. Br. Diſceit, pl. 38. cites 7 H. 4. 44.

3. If a man levy a fine at the common law unto another of land, which is in ancient demeſne; the lord of ancient demeſne ſhall have a writ of diſceit againſt him, who levied the fine, and he, who is tenant, ſhall avoid the fine; and there he, who ought to give the land, *ſhall be reſtored unto his poſſeſſion or title, which he had given by the fine*; becauſe the fine and gift thereby is avoided; *but if he*, who levies the fine, had after by his deed *releaſed* unto him, who hath the poſſeſſion by the fine, *or by* the *deed confirmed his eſtate in the land*; then he unto whom the releaſe or confirmation is made, ſhall have and keep the land, notwithſtanding that the fine be avoided; becauſe that releaſe, or confirmation, made unto him being in poſſeſſion hath made his eſtate firm and rightful againſt him and his heirs, who releaſed or confirmed the ſame. F. N. B. 98 (A.)

(H. b. 4) *Reverſal* of Fines, of *Ancient Demeſne*. *At what Time.*

1. Where a *man recovers* land *in ancient demeſne court*, which was made *frank fee* before *by fine levied at common law*, this judgment in court of ancient demeſne is void, & coram non judice. Br. Judgment, 19. cites 7 H. 4. 27.

2. It was argued, and at length agreed, that a lord in ancient demeſne ſhall have a writ of deſceit, *after* a fine levied, and *the king's ſilver paid, though the fine be not engroſſed.* Mo. 6. pl. 21. Hill. 3 E. 6. Anon.

[340] (H. b. 5) Pleadings. In Maintenance of Fines.

1. He, who maintains the fine, may ſay, *that the conuſor was ſeiſed in fee.* Br. Fines, pl. 50.

2. *As* in ward, the *defendant intitled himſelf by joint eſtate to the anceſtor and himſelf by fine, and that he ſurvived*; the plaintiff ſaid that thoſe who were parties to the fine, had nothing at the time of the fine, &c. *and* the defendant ſaid, *that the conuſors were ſeiſed in fee, at the time of the fine*, &c. Br. Fines, pl. 50. cites 7 H. 6. 21. and 33 H. 6. tit. Replic. and Rejoinder.

(I. b) Avoided, &c. *Not being perfected.*

S. P. 254. D. 254. as to the fine, but the proclamations denied to be engroſſed, the parties being dead. Compton's caſe.—The reaſon of the caſe in D. 254. why the proclamations there made, were *ſtayed* after the conuſee's death, was, becauſe a *formedon was depending*, and that was only in the diſcretion of the court. Cro. E. 693. Mich. 41 and 42 Eliz. B. R. Wakefield v. Hodgeſon.

1. A. In 33 H. 8. acknowledged a fine of certain lands; the king's ſilver was entered, and a conuſance taken; but the *fine was never engroſſed.* * He who claimed under the fine came into court (29 El.) and prayed that the fine be ingroſſed. The court examined them on their oaths, to what uſe the fine was levied, and in the ſeiſin and poſſeſſion of what perſons the lands, whereof the fine was levied, had been after the fine?—On which examination it appeared fully to the court, that, the party, to whom the fine was levied, was ſeiſed after the fine, and ſuffered a common recovery of the land; and that the ſaid land had been ſo enjoyed, according to the ſaid fine, at all times ſince, &c. whereupon the court commanded that the fine be ingroſſed. 4 Le. 96. Trin. 29 Eliz. C. B. Sir J. Brome's caſe.

(I. b. 2) *Averment* againſt Fines. *Continuance of Poſſeſſion*, and dying ſeiſed, &c.

* See (W) (P. a 2).

1. A *fine* was levied *between baron and feme and H. R.* by which fine *H. R. rendered to the baron and feme in tail, remainder to the plaintiff in fee*; and he in *remainder ſued execution, ſuppoſing the baron and feme to be dead without iſſue* of their bodies; the *tenant ſaid that before the fine H. R. gave to the baron, who was party to the fine in tail*, the *remainder over*, who *had iſſue P. by another feme, and died, whoſe eſtate P. the tenant has*, and *did not ſhew where the fee ſimple was*, and yet well, and *averred the continuance of the poſſeſſion in the donee*, at the time of the fine, and was not eſtopped by the fine to the contrary thereof. But per Thirning, if it had been conuſance de droit *come ceo*, &c. it had been contra, by which the plaintiff ſaid that H. R. was ſeiſed in fee at the time of the fine, abſque hoc, that he gave in tail before the fine. Br. Eſtoppel, pl. 67. cites 11 H. 4. 85.

2. The *iſſue in tail cannot aver continuance of poſſeſſion againſt a fine ſur conuſance de droit* come ceo, &c. *but contrary of his wife, and him in remainder*; for they are not parties nor privies. Br. Averment, pl. 57. cites 12 E. 4. 15.——Nevertheleſs, where the baron is eſtopped, the feme, who claimed by him ſhall be eſtopped. Br. Averment, pl. 57. cites 4 E. 3.

S. P. Becauſe *this is by the ſtatute* of 27 E. 1. de finibus, and not at common law, which

was after the ſtatute of W. 2. de donis conditionalibus, made 13 E. 1. *contra of a fine ſur conuſance de droit tantum; for this was at common law.* Co. R. on Fines 4. cites 12 E. 4. 15. 19.——Br. Fines pl. 74. S. P. cites 13 Aſſ. 8.

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3. Againſt a fine *ſur conuſance de droit tantum, & ſur grant and render, and* againſt a fine *ſur releaſe*, levied to the tenant in tail, or by tenant in tail, the iſſues may aver continuance of their poſſeſſion in their anceſtor. For, although the ſtatute *de donis conditionalibus* was made 13 E. 1. and our ſtatute made 27 E. 1. yet it was not the intention of this ſtatute to take away the liberty and benefit of the iſſue in tail, which the ſtatute, *de donis conditionalibus* had given to them; for it appears that the intention of the makers of this ſtatute was to reform ſuch averments, which were *contra leges & conſuetudines Angliæ antiquit. uſitat.* and not to toll ſuch lawful averments, as by the ſtatute *de donis conditionalibus* were given to the tenant in tail; but againſt a fine *ſur conuſance de droit come ceo*, &c. to which the anceſtor in tail is a party, the iſſue in tail ſhall have averment of continuance of poſſeſſion in his anceſtor againſt the fine in ſome caſe, and in ſome not. And therefore I have taken this diverſity, that againſt a fine *levied by tenant in tail ſur conuſance de droit come ceo, &c.* the iſſue in tail ſhall have no averment of a continuance of poſſeſſion; but if a fine *ſur conuſance de droit come ceo, &c.* be *levied to the tenant in tail*, this ſhall not conclude the iſſue (as divers books ſay) to aver continuance of poſſeſſion. Co. Read. of Fines, 16.

Br. Averment 6. cites 8 H. 4. 7. Br. Aſſiſe pl. 51. cites 8 H. 4. 7.

See Br. Fines pl. 35. cites 8 H. 4. 8.

4. *And*

4. *And* in ſome caſes, *privies in blood and inheritable* alſo ſhall have an averment againſt the fine, notwithſtanding the ſtatute of 18 *Ed.* 1. And therefore, if *tenant in tail accepts a fine ſur conuſance de droit come ceo, &c.* yet the *iſſue in tail*, that is privie and heir in tail, ſhall aver continuance of poſſeſſion in the father; for it ſtandeth well with the fine, which is (come ceo que il ad de ſon done). 2 Inſt. 517.

5. *So* it is in the caſe above, if *tenant in tail* had *granted and rendered* the land to the conuſor, the *iſſue* in tail *might have averred continuance of poſſeſſion* in the father; for the fine was executory, and nothing veſted in the conuſor until execution. 2 Inſt. 517.

6. *But* if tenant in tail *levy a fine ſur conuſance de droit come ceo*; the iſſue in tail, though he be not barred by the fine, yet he ſhall not againſt this fine aver continuance of poſſeſſion in the father; and that diverſity was holden for law after the ſtatute 18 *Ed.* 1. neither after this ſtatute could the iſſue in tail have generally pleaded, that *partes finis nihil habuerunt*, but was ouſted thereof by this ſtatute, albeit ſome have relied much upon theſe words in this act *rite levatus*; now the ſtatutes of 4 H. 7. and 32 H. 8. and the expoſition thereof makes this out of queſtion. 2 Inſt. 517.

(I. b. 3) Averment againſt Fines. *Death* of Conuſor *before* the Teſte of the *Dedimus*, Return of the Writ of Covenant, *Execution*, &c.

1. In aſſiſe, the *tenant pleaded in bar by fine of the anceſtor of the plaintiff*, whoſe heir, &c. It is no title for the plaintiff, that the ſame *anceſtor was ſeiſed, and died ſeiſed*; for if he died ſeiſed *before execution* of the fine, the entry of the conuſee is lawful. *But* it is a good title, *that, after the execution* of the fine, *his father, or the ſame party to the fine was ſeiſed, and died ſeiſed, and he entered as heir*, and was ſeiſed until, &c. quod nota, diverſity of dying ſeiſed before execution, and dying ſeiſed after. Br. Aſſiſe, pl. 483. cites 33 E. 3. and 10 H. 4. 9. and Fitzh. Title. 4. and 14.

2. A man may be received againſt the conuſance of a fine *taken before the Ch. J. of the C. B.* (which may be without a dedimus) to ſay, *that the conuſor died before the return of the writ of covenant*, per Popham Ch. J. Cro. E. 469. (bis) Paſch. 38 Eliz. B. R. in caſe of Wright v. the Mayor, &c. of Wickham.

[342] D. 89. b. Reynolds, Verney, & al. v. Dignam & al.

3. A fine was levied by a feme covert, who *died before certificate and ingroſſment*, and the fine afterward certified; it was alledged for error in fait, that the woman died *before the teſte of the dedimus*, whereas the judge had *certified the concord taken after*; and this was not admitted to be queſtioned after the certificate. Hard. 127. Arg. Trin. 1658. in the Exchequer. cites D. 89. b. Verney's caſe.

[See Error (U.) pl. 4, 5, 6, 7.]

(I. b. 4.) Averment againſt Fines. *Colluſion* or *Uſury, &c.*

1. Error to reverſe his own fine, becauſe he was within age at the time, &c. and the court adjudged him within age by inſpection; the *tertenant cannot aver that he was of full age, but* ſhall have averment, *that another of the ſame name levied the fine, and not he who appeared.* Br. Averment, pl. 55. cites 27 Aſſ. 53.

Colluſion may be averred againſt a fine. Br. Fines. pl. 115. cites T. 33 H. 8.

S. C.——Ibid. ſays, that the principal caſe was agreed to be law.

2. The *lord may aver colluſion*, againſt a fine levied by his tenant, to the intent *to take his ward from him.* Br. Averment, pl. 64. cites 12 H. 4. 16.

S. P. Br. Garde, pl. 74. cites 7 H. 4. 15.

But cites 38. E. 3. contra. that the lord cannot aver colluſion againſt the fine of his tenant ſur conuſance de droit; come ceo. &c.

3. Upon the ſtatute of 13 *Eliz. againſt uſury*, and 27 *Eliz. againſt fraud*, although fines be levied; yet where there is *uſury*, or *fraud*, or covin, they may be averred ſo to be againſt any act whatſoever. Jenk. 254. pl. 45.

3 Rep. 80. in Fermor's caſe.

(I. b. 5) Averment againſt Fines. *Other Matters.*

1. In ſcire facias upon a fine levied of *land in D.* the tenant ſhall not *ſay*, that there is *no ſuch vill*; for this will avoid the fine, which will not be ſuffered. Br. Fines, pl. 98. cites 21 E. 4. 51.

2. If the *record be, that the fine was proclaimed according to the ſtatute*, the fine is good, and has the force of this ſtatute. Denſh. R. 5. upon 4 H. 7. 24.

3. If *J. S. has warranty of attorney for* J. D. and this is taken by a judge in C. B. and the record is accepted in court, it ſhall not be averred after, that *there is no ſuch J. S.* becauſe contrary to that which the court has recorded; yet, if the judge had been informed of it at firſt, he would, and ought to have ſtayed it. Per Popham. Yelv. 34. Paſch. 1 Jac. in caſe of Arundel v. Arundel.

4. A. levied a fine *to W. his ſon, and his heirs*; upon this fine the judge cannot make queſtion for any matter in law; but if the party comes and avers matter in fact, and ſays that *A. had two ſons named W.* elder and younger. This averment out of the fine is good of this matter of fact, which *ſtands well with the words of the fine*, and ſhall be tried per pais. Mich. 8 Jac. 8 Rep. 155. in Altham's caſe.

5. Againſt *jointenancy by fine* the demandant *cannot take a general averment, that the tenant is ſole ſeiſed*; for that ſhould ſeem to weaken the force of the fine; and the ſtatute of *conjunctim feoffatis*, anno 34 *E.* 1. extends not to jointenancy by fine, but to jointenancy by deed only, to take the general averment againſt the deed, that the tenant is ſole ſeiſed. 2 Inſt. 524.

6. If

Co. R. on Fines, S.— Ibid. 17. cites 32 E. 3. Br. Replication. 63.

6. If the *fine* be *received and recorded*, the *feme covert*, or her heirs, ſhall not be received to aver, *that ſhe was not examined* nor aſſented; for this ſhould be againſt the record of the court, and tending to the weakening of the general aſſurances of the realm. 2 Inſt. 515.

7. In ſome caſe the *party himſelf* ſhall not be concluded of his averment againſt the expreſs fine; *as* if 2 *jointenants* be in fee, and they *accept a fine ſur conuſans de droit come ceo*, to them and the heirs of one, the eſtate is not changed, and they may plead the former feoffment to them and their heirs, and that by law they could have no other fine. 2 Inſt. 517.

So if the conuſance was taken by J. S. one of the juſtices of C. B. *eſq. who is after made a knt.* and chief baron of the exchequer; though the dedimus, which neceſſarily muſt overreach the conuſance, be directed to J. S. knt. who returns it, yet it ſhall not be aſſigned for error. Yelv. 33. Paſch. 1 Jac. Arundel v. Arundel.

8. A *dedimus poteſtatem*, to take conuſance of a fine, is *directed to J. S. knt.* and he takes the conuſance, and certifies it by the name of J. S. knight, whereas in truth he is *not a knight*. This is not erroneous, nor aſſignable for error that he is not a knight, for it is againſt the record. Jenk. 280. pl. 3.

(I. b. 6) Averment againſt Fines. By *Stranger*.

1. *Baron and feme levied a fine to C. who* granted and *rendered* back *to the ſaid baron and feme, and to the heirs of the feme*. Afterwards *J. S. brought formedon in deſcender* againſt the baron and feme. After many delays the feme was received, and vouched to warrant C. which voucher J. S. counterpleaded, and thereupon it was demurred; but the judges of C. B. neglecting to proceed to give judgment, though by the king's writ commanded ſo to do, for which purpoſe J. S. had applied to the houſe of lords, and at length the record being brought thither by the juſtices of C. B. it was there agreed, that J. S. being a ſtranger to the fine, might aver, that the baron had nothing in the premiſſes; and agreed that J. S. recover. Pryne's Abr. Cott. Rec. 30. 14 E. 3. Sir John Stanton's caſe.

2. In formedon, the *tenant denied a gift by J. R.* &c. and becauſe it was *by fine, and executed by the words of the fine*, therefore Finch. awarded the other to anſwer; for he ſaid, that *party, privy, nor ſtranger* ſhall not have averment *againſt a fine executed*. But Brook makes a quære thereof as to the *ſtranger*. Br. Eſtoppel, pl. 31. cites 42 E. 3. 9.

3. Though the ſtatute of 27 *E.* 1. 1. extends to averments taken by parties and privies, and *extends not to averments made by ſtrangers* that are *no parties nor privies* to the fine, *yet by the common law*, the puiſſant force and nature of fines was ſuch, that a *mere ſtranger could* not have *a general averment* againſt a fine; and therefore it is reported by Shard, one of the juſtices of the court of C. B. that it was reſolved by the ſages of the law, that the parties, or their heirs, ſhould have no averment againſt fines levied, contrary to the fine levied, to avoid it; and that a ſtranger ſhould have no general averment

ment directly to avoid a fine, if it were *not upon ſome ſpecial matter*; for he, that is *tenant after the fine levied, is intended* tenant *under* the eſtate of *ſome of the parties to the fine*, to whom, by the common law a general averment is not given, more than to the party or privy; and the ſpecial matter, which gives him the averment, is, that after he pleads, that the parties to the fine had nothing in the land at the time of the fine levied, he doth formally *add*, that *either he himſelf, or ſome other whoſe eſtate he hath, was ſeiſed at the time of the fine levied, &c.* But yet the matter is *not traverſable*, but a mean to traverſe and avoid the fine, and therefore the tenant that pleads [344] ſuch plea doth conclude, et de hoc ponit ſe ſuper patriam, with a further replication. 2 Inſt. 522, 523.

(K. b.) Unduly gained. Equity.

1. A Fine was levied *by a feme covert, infant, of her inheritance*, and the father of the baron was one of the commiſſioners, that took the fine, and the uſes were declared to her and her huſband, and the heirs of their two bodies, *remainder to the heirs of the ſurvivor*. The feme dies without iſſue, and under age. The huſband, after her death, mortgages the land to J. S. of whom the heir at law of the wife gets an aſſignment, and then levies a fine and 5 years paſs. W. R. who was entitled under the firſt fine, brought a *bill to redeem*, and for a *diſcovery of the deed of uſes*. The heir of his wife *pleads the ill practices, and his own fine and non-claim*, and denied that there was any ſuch deed of uſes, and if there was, that it was obtained by practice. And per Cur. all titles at law, that are not directly againſt conſcience, ſhall be aſſiſted here to a redemption, and if there were *only a blemiſh in the title*, ſo ſhould the plaintiff; but could not get over the fine and non-claim. The plea is good, and ſo diſmiſs the bill. Paſch. 1703. Ch. Prec. 218. Packington and Barrow.

(K. b. 2.) Pleading a Fine in Bar of Actions; In what Caſes it is a good *Eſtoppel*, unleſs the Plaintiff ſhews how he came to the Land after.

1. In aſſiſe, a man ſeiſed in fee acknowledged a *fine* ſur conuſance de droit *come ceo*, &c. the *conuſee granted, and rendered to the conuſor for life*, remainder *to A. in tail. A. after the death of tenant for life, entered and was ſeiſed, and granted a rent-charge of 10 l. and died*; the *iſſue in tail entered*; the *grantee is ſeiſed and diſſeiſed of the rent, and brings aſſiſe*; the *heir alleges this matter of the tail* to avoid the grant; the *plaintiff ſaid, that the anceſtor of the tenant was ſeiſed in fee at the time of the grant, abſque hoc, that he was ſeiſed in tail at the time, &c.* and *the other pleaded the fine for eſtoppel*; and

and the opinion of the court was againſt the plaintiff, and that he ſhould be eſtopped, as well as he who took by the fine, and that he ſhould not have the averment without *ſhowing how his eſtate was changed*, as by recovery of a more high, &c. or, that another was ſeiſed at the time of the fine; quære; for he in remainder, who changed, was not party to the fine. Br. Eſtoppel, pl. 135. cites 30 Aſſ. 9.

2. If a *man levies a fine, or loſes by recovery*, and enters *after the fine executed, or* after the *execution of the recovery, and dies ſeiſed, this is no title for his heir* in aſſiſe, *if the fine or recovery be pleaded in bar, without ſhewing how he came to the land after.* And it is ſaid, that there is a great diverſity between a fine executory and executed pleaded in bar. Nota. Br. Aſſiſe, pl. 483. cites Fitzh. Title 5.

Br. Eſtoppel, pl. 4. cites 3 H. 6. 27, 28.

3. In treſpaſs, the *defendant ſaid, that the anceſtor of the plaintiff, whoſe heir*, &c. *levied a fine* ſur conuſance de droit *come ceo, &c. to J. N. and conveyed from him*, judgment, if he ſhall be received to ſay that it is his frank-tenement, without *ſhewing how he came by it after*, and it was held a good eſtoppel. Br. Fines, pl. 6. cites 3 H. 6. 27.

[345] (K. b. 3) Plea good; By or againſt Strangers to the Fine.

1. In formedon, the *tenant prayed aid of* 2, becauſe *W. was ſeiſed in fee, and leaſed to the tenant for life, and granted the reverſion to* 2 *in fee*, of whom the tenant prayed aid, and had it, and the *prayees came and vouched* W. and the *demandant counter-pleaded, that W. had nothing in demeſne, nor in ſervice after*, &c. and the opinion was, that the demandant ſhould not be eſtopped to counter-plead the voucher by the ſuffering of the aid prayer, and though the gift be by fine, yet the *tenant ſhall not be eſtopped to plead ne dona pas*, and this where the fine was *levied by a ſtranger*, as it ſeems. Br. Eſtoppel, pl. 70. cites 38 E. 3. 23.

2. The *tenant vouched to warranty J. ſon and heir of R.* and the *demandant counter-pleaded generally by the ſtatute*, and the *tenant ſaid, that* to this he ſhall not be received, for *at another time R. levied a fine* ſur conuſance de droit *come ceo*, &c. *to our anceſtor*, &c. and demanded judgment, &c. & non allocatur; for the *demandant is a ſtranger to the fine*, and alſo the fine is good if any of the parties be ſeiſed at the time, &c. Br. Eſtoppel, pl. 26. cites 40 E. 3. 30.

3. And *in formedon upon a gift by fine*, the tenant may ſay, that *ne dona pas*, if he is a ſtranger to the fine. Quod nota. Br. ibid.

(L. b.) Avoided

(L. b.) Avoided in Part.

1. A Writ of error is quaſi a commiſſion, and may *reverſe for part* and affirm for part, and is not abatable; becauſe the fine is good for part. Mo. 366. Mich. 36 and 37 Eliz. Barton v. Lever and Brownloe.

2. A. brought a writ of error againſt the mayor and commonalty of B. to reverſe a *fine levied by his anceſtor of* 20 *acres of land, the defendants*, in abatement of the writ of error, did *plead that the plaintiff after the death of his anceſtor, did diſſeiſe the defendants* of the land, *and made a feoffment* to a ſtranger; the plaintiff *replied that they did re-enter* upon him, *without that, that he did infeoff a ſtranger* modo & forma; the jury found, that there was a fine of 20 acres, and that *the plaintiff* being *diſſeiſor of all, made a feoffment of* 6 *of the acres* to a ſtranger. Et ſi ſupra totam materiam, &c. But it was reſolved by the court, that the feoffment does not deſtroy the title of the writ of error for more than ſo much as a feoffment was made of, and thereupon they firſt took a difference between ſuſpenſion and extinguiſhment of an action; for, peradventure, if he ſuſpend his action as to any part for any time, this is a ſuſpenſion unto all, but extinguiſhment of part is a bar to that part only. And the opinion of all the court was, that the fine ſhould be reverſed for that part of the land only, whereof no feoffment was made, but for ſome defects in the writ of error, judgment was ſtayed. Owen 21. Wright's caſe. Cro. E. 468. (bis) S. C. Paſch. 38 Eliz. B. R. Mo. 413. S. C.

3. Gawdy cited the caſe in 9 H. 6, where judgment was reverſed for part only, and it is not unuſual to have a fine reverſed for part, as if a fine be *levied of lands in ancient demeſne*, 47 E. 3. 9. a. there, by Parſley, if there *be error in law as to one parcel, and error in fact as to another parcel*, the judgment, as touching the matter in law may be reverſed. Owen 22. in Wright's caſe.

4. *Baron and feme* (the *feme within age*) levy a fine, and upon inſpection the wife was adjudged to be within age, and judgment was given, quod finis predict. reverſetur, and Wray ſaid, he had conferred with many of the other juſtices who were of the ſame opinion. Gawdy, the fine ſhall be reverſed in all, for this is an *error in law of the court*, F. N. B. 21 D. for by this fine the huſband giveth nothing divided from the eſtate * of the wife, but all paſſeth from the wife, therefore all ſhall be reverſed, and if the fine ſhould be reverſed as to the wife only, then the fine, levied now by the huſband alone, is a diſcontinuance, by which the wife at the common law ſhall be put to her cui in vita, and that is not reaſon. And we cannot, by this reverſal, make the conuſee to have a particular eſtate during the life of the wife, and therefore the fine is to be reverſed for the whole, and as void for the whole to the conuſee. 1 Le. 115, 116. Trin. 30 Eliz. B. R. Charnock v. Worſeley. Cro. E. 125. Becauſe it is an intire thing. Paſch. 31 Eliz. B. R. S. C.—Ow. 21. S. C. cited Arg. F. N. B. 21. (D) *[346]

5. If there be *tenant for life, remainder to an infant in fee*, and they join in a fine; upon a writ of error brought, it ſhall be reverſed only 3 Le. 120. Trin. 27. Eliz. C. B.

in caſe of * Lee v. Loveday.— * 1 Le. 230. S. R.

only as to the infant. Le. 317. Mich. 30 and 31 Eliz. B. R. Pigot v. Harrington.

6. Baron and feme, and a third perſon, levied a fine, and the writ of covenant was againſt the baron and the third perſon, and *in the ſummons the feme was left out.* Coke moved, that for this error the whole fine ſhould be reverſed, and it being ill in part, is ill in all, and ſo was the opinion of the court, but they would adviſe. Cro. E. 290. Hill. 34 and 35 Eliz. B. R. Baxter and Ux. v. Mounting.

7. *And* it is not a ſtrange thing for a fine to be reverſed in part, and to be in force for the reſidue. Arg. Cro. E. 469.

And a *mare ſhall be made* upon the fine, in nature of a cancelling of that,

8. *As* a fine levied *of guildable lands and* of lands *in ancient demeſne*, in which caſe, though the lord by a writ of diſceit avoids the fine for the ancient demeſne land, yet it is good for the other. Arg. Cro. E. 469. (bis) Paſch. 38 Eliz. B. R. in caſe of Wright v. Mayor, &c. of Wickham.

which is ancient demeſne land, and the record ſhall ſtand for the remainder. Per Vaviſor. Kelw. 43. a. pl. 10.——F. N. B. 98. (P.) cites 7 H. 4. 44. 17 E. 3. 31. 21 E. 3. 20.——S. P. but it ſhall not be cancelled, nor taken off the files. Br. Fines, pl. 36. cites 7 H. 4. 44. and 8 H. 4. 23. Per Hull.——Ibid. pl. 47. cites 21 E. 3. 20.——Jo. 374. in caſe of Done v. Smithurſt.

9. *So* where a fine was levied in Cheſter, and D. as heir male brought error to reverſe it, and the defendant appeared, and *pleaded a common recovery*, in which the *conuſor came in as vouchee*, and he vouched over, and the plaintiff *replied* by *non-tenure in the* party ſuppoſed to be *tenant in the recovery*, upon which they are at iſſue, and *found* that he was *tenant of parcel, and not of the other parcel*; the queſtion was, whether the plaintiff ſhall be barred for all; and agreed not, but for parcel only, and therefore rule was given that the land ſhould be examined. Jo. 352. Mich. 10 Car. B. R. Donne v. Smithurſt.

This point is held per Hobart, Ch. J. Hob. 278. in Clanrickard's caſe.

10. *So* where an *infant tenant in tail, remainder to B. in fee, join* in a fine, this may be reverſed againſt the infant for non-age, and ſhall ſtand againſt remainder-man. Arg. 2 Jo. 182. cites Hob. 278. Engliſh's caſe there cited, and 17 H. 7. Kelw. 43.

——Le. 115. cites English's caſe thus (viz.) a fine was levied *by tenant for life*, [and reverſioner] and he in *reverſion being within age* brought error, it ſhall be reverſed as to the reverſioner, and not as to the tenant for life.

2 Sid. 96. per 2 J. againſt Glyn. Ch. J. Kow v. Evelyn.

11. Error of a fine levied by 4 *conuſors*, and aſſigned the *death of* 2 *before the fine engroſſed or ſilver paid*; and if by this the fine ſhall be reverſed in toto or quoad thoſe two, was the queſtion? and it was argued by Newdigate ſerjeant, that it ſhall be reverſed for all; for by it the writ was abated, and ſo it is a fine without original. 2 Lev. 127. in caſe of Biddulph v. Harriſon, cited it to have been ſo adjudged .Hill. 1662. B. R. Rot. 1179. in caſe of Roe v. Yeatley.

Cro. E. 124. Pigot. v. Ruſſel.

12. A fine may be reverſed *quoad one*, and ſtand in force againſt others. 2 Jo. 182. Mich. 33 Car. 2. B. R. Cockman v. Farrer.

——Popham Ch. J. ſaid it was otherwiſe of a fine *at common law.* Ow. 76. Hunt. v. King.

(L. b. 2) Nient Comprize.

1. A fine cannot be levied but of that which is ſpecified in the writ of covenant, and *not of a foreign thing, unleſs it be conſequent.* Br. Fines, pl. 97. cites 18 E. 4. 22.

S. P. If it does *not iſſue out of the ſame thing contain'd in the writ* of covenant, or other original. Co. R. on Fines, 11.

2. *As* in a writ of covenant of land, he acknowledges the tenements to be the right of the plaintiff, &c. there the plaintiff may grant and render 20 s. rent to the conuſor, and it is good; for *this is conſequent to the land to grant a rent out of it.* Ibid.

S. P. Co. R. on Fines, 11. cites 19 E. 3. Br. tit. Grant, 90. —— *But* ſee there for the ſame caſe in 9 E. 4. adjudged, that a writ of *covenant* was brought *of 5 s. rent*, and the *fine was* levied *of an annuity*. Co. R. on Fines, 11.

3. *And* in the ſame caſe where a writ of covenant to levy a fine makes mention of land, where the *party has only in reverſion*, and *acknowledges all his right in the land*, &c. to be the right of the other, there the reverſion paſſes. Br. Fines, pl. 97. cites 19 E. 4. 9. which Chocke agreed the ſame year. Fo. 3.

4. *And* it is adjudged in our books, that where one R. brought *aſſiſe of darrein preſentment* againſt a prior, who came into court, and levied a *fine and releaſe of the advowſon* to the plaintiff, for which the ſaid R. by aſſent of the ordinary, *granted an annuity* to the ſaid prior and his ſucceſſors *imperpetuum, percipiend. per manus perſonæ eccleſiæ quicunque fuerit*; and it was adjudged a good grant, and yet the *annuity was not contained in the writ* of covenant, *nor iſſuing out of the thing contained* in the writ. Co. R. on Fines, 11. cites 31 E. 3. Br. tit. Fines, 90.

5. If a writ of *covenant* be brought *of a manor except a meſſuage*, and of this the *fine is levied without any exception*, yet the meſſuage ſhall not paſs, becauſe it was not contained in the writ. Co. R. on Fines, 11. cites 38 E. 3. 17.

6. In *warrantia chartæ, quod warran. unam acram*, if the defendant will levy a fine *of the ſame acre, and of one other acre*; the fine is not good for the other acre, for it is not comprized within the original. Co. R. on Fines, 10. cites 20 H. 6. 3. a.

So, if *quod permittat* be brought *of a way*, and the defendant levies a *fine of the way, and alſo of a mill, and of paſture*, which was not compriſed in the writ, it is adjudged that the ſuit was void for all the things not compriſed in the writ or covenant, and yet in ancient time, ſuch fines have been received. Co. R. on Fines, 11. cites 2 E. 3. 19. 19 E. 3.

7. A *ſcire facias* lieth ſometimes of things not compriſed in the writ; as if *in a fine ſur releaſe*, the *conuſee render rent in tail.* 48 E. 13. 8. Weſt's Symb. ſ. 179.

8. In a formedon a fine with warranty was pleaded, and as *to part* the tenant ſaid, that himſelf was *ſeiſed tempore finis* levati, and *to the reſt* he ſaid *not compriſed*, &c. Br. Fines, pl. 26. cites 46 E. 3. 14.

9. Scire facias upon a fine levied of the *manor* of D. and was of 40 *acres of land, and* 10 *s. rent as parcel of the manor*, and the tenant ſaid, that the 40 acres and 10 s. are not comprized in the fine, and

Br. Comprize, pl. 5. cites S. C.

it is held there that he ſhall ſay, *not parcel at the time of the fine levied*, &c. for if he does not deny, but that the fine was levied of the manor, and that this is parcel, then this is comprized, &c. Br. Scire facias, pl. 47. cites 48 E. 3. 11.

10. Forcible entry; in ſcire facias upon a *fine* brought *of* 3 *acres*, which is *alleged to be parcel of the manor of D.* of which manor the fine was levied, where their intention is of 3 acres parcel of a manor, which was recovered, there *not parcel is no plea*, but *ſhall ſay, not parcel and ſo not comprized*; and in recovery of aſſiſe he ſhall ſay, that it was not put in view, and ſo not parcel; quod non negatur. Br. Compriſe, &c. pl. 9. cites 36 H. 19, 20.

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In this caſe *iſſue may be taken which manor the conuſor intended* to paſs. For it is matter of fact not apparent in the fine, of which the judge cannot take conuſance, but ſtands well with the fine, and may be tried by jury. 8 Rep. 155. a. Trin. 8 Jac. in Althom's caſe.——Br. Compriſe, pl. 21. cites 12 H. 7. 6.——Br. Scire Facias, pl. 168. cites S. C.

11. A fine is levied of the *manor of D.* and I have *another manor of D. in the ſame county*, and after a ſcire facias is brought againſt me to execute the fine of my manor; if I plead nient comprize generally, it will be found againſt me, but I may well ſay, that I have 2 manors of D. in the ſame county, that is to ſay, one called *Eaſt Dale, and* another called *Weſt Dale*, and that the fine was levied of Weſt Dale, without this, that my manor of Eaſt Dale was comprized within the fine, and this was adjudged in the ſci. fa in the 10th year of H. 7. Keilw. 49. pl. 6. Ld. Brook v. Ld. Latimer.

Roll. R. 103, 117. S. C. but ſays the two other meſuages deſcended to A.

12. *A. ſeiſed of the manor of W. and* 2 *meſuages in W. bargained and ſold his manor of W. and all his lands and tenements in W. to B.* and covenanted to levy a fine for further aſſurance of all his lands in W. B. tendered a fine to be levied by A. by the name of 4 meſuages comprehended in the ſaid indenture of covenant. A. after entering into the covenant, and before the tender of the notes of the fine, had *purchaſed two other meſuages*, and therefore refuſed to acknowledge. Coke Ch. J. held clearly, that A. was not bound by his covenant to acknowledge this fine, and that a nient compriſe cannot be pleaded againſt an *expreſs thing*, and cited 48 E. 3. 11. and Dodderidge J. agreed; and yet per Dodderidge and Houghton J. if the fine comprehend 4 meſuages, 2 only ſhall paſs, and per tot. Cur. the refuſal was no breach of covenant, and judgment was given againſt the plaintiff. 2 Bulſ. 317. Hill. 12 Jac. Wilſon v. Welſh.

Roll. R. 118. per Coke and Doddridge. in S. C.

13. A man cannot plead nient compriſe in a fine upon intention that he did not intend to paſs more than is contained in the indenture, when the *certain number of acres is comprehended in the fine.* Per Coke, Ch. J. Roll. R. 103. Hill. 12 Jac. in caſe of Wilſon v. Welſh.

14. A fine was levied in the iſle of Ely, in court of record there, by the name of *one meſuage, one garden, one orchard, and common of paſture.* In a formedon in deſcender for one meſuage and 15 acres of land, the queſtion was whether thoſe 15 *acres of land* were contained in the fine, and ſuch fine was a barr? and upon demurrer, judgment was given for the demandant; for admitting the fine to be good, which will be difficult to maintain, it is but a diſcontinuance of the eſtate tail. Lutw. 959. 2 Jac. 2. White v. Auſtin.

S. C. cited 2 Bulſ. 318.

15. A. the *conuſor had ten acres in D. and* B. the *conuſee had ten*

acres in the ſame vill; and A. levied a fine to B. of 20 acres, and *B. granted and rendered* 20 *acres to A. in fee*; yet A. ſhall not have the ten acres of B. unleſs there had been *an eſpecial agreement* between them to ſuch effect; for otherwiſe the conuſee ſhall be ſaid to render more than he received, 2 Rep. 76. b. cites it as agreed upon a reference to the judges out of chancery in Taverner's caſe. Hill. 12 Jac. in caſe of Wilſon v. Welch.

(L. b. 3) Pleadings at what Time. And how.

1. It was agreed, that the *note of a fine* is pleadable before the fine be engroſſed, and *ſhall ſhew the place, where it was acknowledged, and before whom*, &c. but after the fine is engroſſed, he ſhall not plead the note, but the fine itſelf, which fine *ſe levavit in C. B. coram*, &c. Quod nota. Br. Fines, pl. 41. cites 12 H. 4. 16.

2. A ſecond fine, *before it be engroſſed*, cannot be pleaded to a writ of error brought for reverſing the firſt, and the engroſſing was ſtaid on purpoſe by the conuſee of the ſecond. Noy. 59. Hart v. Ameredith.

(L. b. 4) Pleadings of Fines. What Good, and in what Caſes neceſſary. [349]

1. A fine is no plea in *aſſiſe*, or in any other action, unleſs it be ſhewn *ſub pede ſigilli*, which is the great ſeal of England. Br. Fines, 103. cites 24 E. 3. 35.

2. In pleading a fine, *every one of the juſtices of C. B. muſt be named by their names*, though other writs which come out of chancery are directed to J. S. capitali juſticiario de communi banco & ſociis ſuis, without expreſſing the names but contrary of a fine. Br. Fines, pl. 125. cites 1 H. 7. 10.

3. He who pleads a fine ought to *ſhew in what term, and what place, as at Weſtminſter*; for the party may ſay no ſuch record or fine. Br. Pleadings, pl. 167. cites 10 H. 7. 28.

4. Note, per Fitzh. and the prothonotaries, that in pleading of a fine, they ſhall not ſay that the fine was levied generally, but *that ſuch one was ſeiſed, &c. and ſo ſeiſed the fine was levied.* Br. Fines, pl. 3. cites 27 H. 8. 4.

5. And if ceſty que uſe levies a fine, which is pleaded by ſuch words ut ſupra, viz. *that he was ſeiſed and levied* the fine, &c. and the *other ſays, that the parties to the fine had not any thing*, it ſhall be found againſt the other; for ceſty que uſe, had nothing in fact; but in this caſe he ſhall plead that J. N. was ſeiſed, &c. to the uſe of P. and ſo ſeiſed to the uſe finis ſe levavit. Br. Fines, pl. 3. cites 27 H. 8. 4.

6. Fines are as *effectual to bind the right* of the intail, when they are *found by ſpecial verdict*, as when they are pleaded in bar. per Cur. 2 Le. 37. Hill. 31 Eliz. C. B. in caſe of Johnſon v. Bellamy. Goldſb. 107 Johnſon v. Carliſle.

7. One cannot be ſaid ſeiſed upon a fine ſur render, without an *entry alleged.* And the pleading *by force whereof he was ſeiſed*, &c. doth not ſupply the entry; but upon a fine ſur conuſance, &c. come ceo, *But* Cro. E. 917. S. C. Hill. 45 Eliz. They held that if

was well enough. For when it is pleaded, *virtute cujus* he was ſeiſed in fee, it is to be *intended, that he entered.* For otherwiſe he could not be ſeiſed, which is the uſual pleading in ſuch caſes upon fines with render, and have been always admitted to be good, as appears in Plow. 503. GRENDON's CASE. And ſo are all the precedents. Wherefore this exception was diſallowed.

ceo, &c. it is otherwiſe. For that is executed, per Cur. Cro. E. 903. Mich. 44 and 45 Eliz. B. R. Buſtard v. Coulter.

8. Exception was taken to the pleading a fine; becauſe it was *quædam finalis concordia facta fuit & poſtea conceſſum & concordatum*, where the uſual form is *quidam finis ſe levavit*, which includes all. But when they would plead by parts, they ought to ſhew the whole, and that perhaps no king's ſilver was paid. But the exception was over-ruled; for the ancient courſe of pleading was as here, 2 Lev. 31. Mich. 23 Car. 2. B. R. in caſe of Hudſon v. Benſon and Baron.

9. The defendant pleaded a fine *with proclamations*, and concluded it with demanding *judgment, if againſt this fine which contains warranty, the plaintiff ſhall be received* to bring error; and the court held it ill pleaded, and that he ought to ſay, *if againſt this fine with proclamations ſo levied*; for a fine at common law makes a diſcontinuance, but does not bar the right; and by the concluſion it ſhall be intended to be without proclamations, and as a fine only at common law, nor will the word *(ſo)* aid it. For the *concluſion* ought to take the ſubſtance of the bar, that it was a fine with proclamations, and not a fine only. Palm. 243. Mich. 19 Jac. B. R. Darcy v. Jackſon.

[350] (L. b. 5) Pleadings. As of what Term.

1. The iſſue in tail brought a *formedon in deſcender*, and the defendant pleaded in bar, and *confeſſed the eſtate tail*, but *ſaid, that before the death of the tenant in tail, J. S. was ſeiſed in fee* of the lands in queſtion, *and levied a fine* to him, and 5 *years paſſed, and then tenant in tail died*, and whether this plea be a bar to the plaintiff or not, was the queſtion; and it reſted upon this whether J. S. upon this general plea ſhall be *intended to be in by diſſeiſin or by feoffment?* for if in by diſſeiſin, then he is barred; if by feoffment, not; and the opinion of the whole court was clear, without any debate, that he ſhall be intended in by diſſeiſin, and ſo the plaintiff is barred as the books are. 3 Rep. 87. a. Pl. C. STOWELL's caſe. And Bankes Ch. J. ſaid, that it ſhall not be intended, that tenant in tail had made a feoffment to bar his iſſue, unleſs it be ſhewed, and it lies on the other part to ſhew it; and a feoffment is as well an unlawful act as a diſſeiſin, for it is a diſcontinuance. Mar. 195, 196. Paſch. 18 Car. Taylor's caſe.

S. C. 10. Mod. 40. to 48.

2. A fine was thus; Hæc eſt finalis concordia facta in cur. regis apud Weſtm. a die ſancti Michaelis in tres ſeptimanas anno decimo Willielmi tertii coram Thom. Trevor, &c. & poſtea in craſt. ſanctæ Trinitat. 1 Annæ, conceſs. & recordat. coram eiſdem juſticiar' ſo that the *concord of* the fine *was of one term, and the recordat.*

dat. of another term *following*; and therefore the queſtion was, of which term this ſhould be ſaid to be a compleat fine. Per Cur. it is a fine of that term when the concord was made, and of which the writ of covenant was returnable; for the *concordia facta in curia is the compleat fine*, the conceſſit recordat. is the leave of the court to inroll it. 1 Salk. 341. Mich. 10 Annæ, B. R. Lloyd v. Viſcount Say and Seal.———cites 6 Rep. 68. Hob. 330. 2 Vent. 47.

(L. b. 6) Pleading. Partes Finis nihil habuerunt. By whom.

1. *A ſtranger* may plead this plea. Vid. Prynn's Abr. Cott. Rec. 30. Stanton v. Stanton. 14 E. 3. But the *heir of one* of the parties cannot aver, that the parties had nothing at the time of the fine levied. Br. Fines, pl. 81. cites 31 Aſſ. 24.

2. Note, that in the Exchequer Chamber it was ſaid by Yelverton and affirmed by others, that if my *father* tenant in tail, or in fee ſimple, *grants land by fine*, if *I* will *convey by the anceſtor*, I *ſhall not ſay that thoſe, who were parties to the fine, had nothing, but ſuch a one whoſe eſtate I have*. Br. Confeſs & Avoid, pl. 5. cites 33 H. 6. 18. S. P. for he ought to ſhew who had any thing in the land at that time. *But* where a *recovery* of my anceſtor is pleaded againſt me, it is ſufficient to ſay that the anceſtor had nothing in the land at the time without ſhewing who was tenant thereof. Br. Fines, pl. 43. cites 14 H. 4. 33.

3. *But* it is ſaid that I *ſhall ſay, that after the fine ſuch a one was ſeiſed of it in fee and enfeoffed me* in fee. Quære, if without ſhewing how he came by it after. Br. Confeſs and Avoid, pl. 5. cites 33 H. 6. 18.

4. Diſſeiſor *levied a fine to A. B.* and after *diſſeiſee re-entred and enfeoffed diſſeiſor*, and *A. B. re-entred*, the *diſſeiſor brought aſſiſe*, and A. B. pleaded the fine; diſſeiſor ſhall avoid the fine by the matter aforeſaid, and ſo ſhall take advantage of his own wrong; per Littleton. Br. Confeſs and Avoid, pl. 21. cites 15 E. 4, 5.

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5. N. D. is *ſeiſed of* 2 *parts* of certain land *in common with J. S. who hath the third part* of it, and N. D. *levies a fine* to W. P. *of the third part*, and he brought ſcire facias againſt the feoffee of J. S. It is dangerous to ſay quod *tempore* finis levati N. D. had nothing, &c. by which it was agreed that he may ſay, quod tempore finis levati *N. D. had nothing but in common with J. S.* whoſe eſtate he hath. Br. Fines, pl. 2. cites 26 H. 8, 9.

6. 4 *H.* 7. 24. enacts, that *the exception that none of the parties, nor any to their uſe had any thing in the lands at the time of the fine levied is ſaved to all perſons, except parties and privies.*

7. *A. B. and C. coparceners* of a manor; *A. enfeoffed J. S.* of his part to the *uſe of himſelf for life*, and after his deceaſe to the uſe of *his eldeſt ſon and heir apparent in fee*, and after *A. levied a fine de tertia parte*, 200 acrarum terræ 400 acrarum paſturæ, &c.

(amounting to more acres than the whole manor contained, *ſur conuſance de droit come ceo*, &c. *with warranty of him and his heirs*, and *re-took by the ſame fine for his life only*, and then died, and his ſon entered. The queſtion was, if the third part of the ſaid acres be ſevered from the manor by this fine againſt the heir, or that againſt the fine he ſhall be received to aver a continual poſſeſſion and continuance of ſeiſin ante finem, tempore finis, & poſt finem, &c. in the tenant for term of life. It was held ſtrongly by Plowden, Bromley ſolicitor and Lovelace, that this averment by him in remainder, who was a *ſtranger to the fine*, ſhould be received *quia neque pars finis nec partium hæres*, &c. But Dyer, Saunders, Manwood, Southcote, Harper and Catlin, held the law clear contrary, and that ſuch fine amounted to a feoffment of record, which makes diſcontinuance of the remainder or reverſion. D. 333. b. 334. a. pl. 30. Paſch. 16 Eliz. Anon.

Le. 83. in caſe of Zouch v. Bamfield. —Mo. 251. in S. C.

8. Parties and privies are concluded to ſay *parties ad finem nil habuerunt*, &c. by the ſtatute of 4 H. 7. but a ſtranger may plead this plea. Hob. 334. Mich. 19 Jac. in Mackwilliams's caſe.

(L. b. 7) Exception; That the defendant was always ſeiſed; And by whom to be taken.

1. 27 *Ed.* 1. *ſtat.* 1. *c.* 1. enacts, that *it ſhall be no good exception to a fine, that before, or at the time of the fine levied, the demandant, or his anceſtors were ſeiſed of the land contained in the fine, or ſome part thereof.*

2. In aſſiſe, *fine upon render of the anceſtor of the plaintiff* was pleaded in bar, and the *plaintiff ſaid, that he was continually ſeiſed at the time of the fine, before the fine, and after, till he was diſſeiſed*; and the court held, that he ſhall have the plea, notwithſtanding the privity of blood. M. 9 E. 3. The reaſon ſeems to be, becauſe he claims of *himſelf and not by ſuch anceſtor*. And for tenant in tail, this *averment lies well, that his father was ſeiſed, and died ſeiſed after*, notwithſtanding the fine upon render levied by the father, and that he entered after as heir. H. 17 E. 2. and M. 18 E. 2. But Sharde made a great *diverſity between ſuch fine* of render, *and* * *fine ſur conuſance de droit come ceo*, &c. For this is *executed*, *and* the other is but *executory*. And therefore *the heir is remitted by the entry by deſcent before the execution*, as he thought. Vid. ſtatute de finibus inde. Br. Fines, pl. 74. cites 13 Aſſ. p. 8.

* Br. Fines, pl. 96. cites 12 E. 4. 15, and 19.

3. A. was tenant in tail, remainder to B. and A. levied a fine come ceo, &c. B. the *remainder-man* may aver continuance of poſſeſſion, notwithſtanding the fine; for he *is not party nor heir to the conuſor*. And the ſame law of a *feme covert*, where the baron alone levied the fine. Br. Fines, pl. 95. cites 12 E. 4. 12. per Fairfax, to which Littleton agreed.

(L. b. 8) Pleadings. In what Caſes *ſeiſin* muſt be *alleged* in the Cogniſor.

1. In *replevin*, the defendants made cognizance as bailiffs to R. M. who was ſeized of the place where, &c. as a *remainder-man under a marriage ſettlement made by S. M.* the father, *and a fine* levied thereof, &c. the former tenant in tail and remainder-man being dead. The *plaintiff traverſed the ſeiſin in fee of S. M.* at the time of levying the fine, &c. and upon this they were at iſſue, and after a *verdict for the plaintiff*, it was moved in arreſt of judgment, that this was an *immaterial iſſue*, whether S. M. was ſeiſed in fee at the time, &c. becauſe the tenant in tail who claimed under him, joined with him in the fine, and conveyed the lands to R. M. and his heirs, and therefore the ſeiſin of S. M. was but formal and to induce the matter, and not traverſable, and ſo the judgment was ſet aſide. ——Serjeant Lutwych ſays, that he could not diſcover what were the particular reaſons given by the court for the ſaid reſolutions, and therefore (citing the caſes, † &c. in the margin) obſerves, that it is ſaid by Fitzherbert in 27 H. 8. 4. a. that in pleading a fine, ſeiſin ſhall not be intended if not ſhewn, and that the prothonotaries ſay, he who pleads a fine ought to ſhew ſeiſin of one of the parties, and that ſo are all the entries. But in Dyer, 291. a. it is ſaid, that the antient courſe was otherwiſe, and that to ſay generally, quidem finis ſe levavit; was well enough; for it might be of a reverſion, of which ſeiſin cannot be alleged. But admitting that the conſtant form of pleading hath been to allege ſeiſin in one of the conuſors, yet it does not follow that a traverſe may be taken to the particular eſtate, for the fine is good if any of the parties hath an eſtate in the lands. * Br. tit. Fines 109. And if a fine ſur cognizance de droit, &c. be pleaded in bar, and the averment be quod partes finis nihil habuerunt, the demandant need not reply and ſhew a ſeiſin; for the defendant ought to have concluded his bar to the country, without any rejoinder, and ſo it is held in 2 Inſt. 527. and by Lord Coke in his R. on fines, lect. 22. Nor is there any caſe that gives countenance to the traverſing the ſeiſin in fee in this caſe, but that of ZOUCH and BAMFIELD. 1 And. 185. Sav. 84. and 1 Le. 75. in reporting which caſe, the Ch. J. Anderſon makes no mention at all of a traverſe of the ſeiſin in fee; ſo that upon the whole, it ſeems that the alleging of ſeiſin, &c. is only matter of form to induce a plea to a fine, and not of ſubſtance to be traverſed. 2 Lutw. 1608 to 1625. Trin. 1 Anne. Walters v. Hodges and al.

† Stat 1 R. 3 of uſes Stat. 32 H. 8. 4 H. 7. Old Entries, 121. a. Raſt. Ent 380. b. 10 H. 6. 21. pl. 71. 3 H. 7. 9. a. Mich. 10 H. 6. 21. b. pl. 71. 22 H. 6. 57. a. 33 H. 6. 21. pl. 21. 12 E. 4. 13. a. 8 H. 4. 7 & 8. 46 E. 3. 14. pl. 20. 3 H. 6. 27 & 28.

* Mr. Nelſon in his Lutw. page 518. ſays this is a miſtake, and that there is nothing relating to it. But Mr. Nelſon might have found it at Br. Fines, pl. 57.

(L. b. 9) Pleadings, *Profert* or Monſtrans neceſſary, in what Caſes.

1. *Aſſiſe* by an infant; the tenant pleaded a fine in bar, and becauſe he did not ſhew it ſub pede ſigilli, nor any part of it, the aſſiſe was awarded, and this for that cauſe only as it ſeems, and not becauſe the plaintiff is an infant to enquire of the circumſtances. But note, that the jury cannot find matter of record in their circumſtances. And it is ſaid elſewhere, that if a fine be *pleaded in the ſame court*, it ſuffices to be *exemplified* in the ſame court. *But* if he pleads it *in another court*, he muſt ſhew it exemplified *under the great ſeal of England in Chancery*, if he would plead it, but he may *give it in evidence under the ſeal of C. B.* Br. Monſtrans, pl. 68. cites 24 E. 3. 46.

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2. *Formedon in deſcender* and the writ rehearſed, that *N. granted the reverſion of a tenant for life to the baron ana feme in tail by fine*, and for default of iſſue, the *remainder to the anceſtor of the demandant in tail*; and made the deſcents to him; and notwithſtanding that he might have declared upon an immediate gift, and now has made mention of the fine; yet by the beſt opinion it is only ſurpluſage, and he need not *ſhew the fine*, becauſe the action is of a gift *executed*; for in formedon in deſcender, which is always executed, a man need not ſhew deed, quod nota; and ſo ſee that *before the remainder be executed*, deed or fine *is neceſſary to be ſhewn*, and e contra after it is executed. Br. Monſtrans, pl. 34. cites 11 H. 4. 39. and 14 H. 4. 31. accordingly.

Br. Nugation, pl. 4. cites S. C.— Ibid. pl. 10. cites S. C.

3. In *quare impedit*, the plaintiff makes his title to the advowſon by grant by fine to J. N. in fee, who after *granted it to W. for life, and after* [*by another deed*] granted the *reverſion to the plaintiff*, and that W. is dead, and ſo makes title to himſelf; and the plaintiff was compelled to ſhew the deed of grant of reverſion; for it belonged to him, but not the grant for life to W. and per Hank. he ſhall ſhew the fine alſo, and ſo he did. Br. Monſtrans, pl. 40. cites 14 H. 4. 10. 11.

(L. b. 10) Pleading in Bar in General.

1. An exception was taken to the pleading of a fine, by ſaying, *that a final concord was made*, and becauſe it did *not* ſay, *that a fine was levied*, as the uſual form is; but it was anſwered, that the matter and ſubſtance of the fine is ſhewn as fully by this form of pleading, as by the other, ſo that there is no variance in ſubſtance, and in ſuch caſe a man is not bound to a form of pleading; but if he ſhews his matter effectually, it is ſufficient. Pl. C. 431. a. b. Paſch. 15 Eliz. Smith v. Stapleton.

2. Another exception was taken, becauſe it was *not ſaid that the fine was levied in C. B.* to which it was anſwered, that the *uſual form*

form is to say, that *the fine was levied in curiâ dominæ reginæ apud Weſtmonaſterium*, as before was pleaded, and not to ſay in C. B. Pl. C. 431. b. Smith v. Stapleton.

(M. b) Taken by Dedimus Poteſtatem.

1. 15 *E.* 2. *ſtat. of Carliſle* enacts, that *if the party be not able to come before the juſtices in the court, then two or one of them (by the aſſent of the reſt) ſhall go to the party, and receive his cognizance, and if but one go, he ſhall take with him an abbot, prior, or knight being of good fame and credit.*

The commiſſioners, that take the cognizance, ſhall make a certificate thereof to the juſtices, to the end the fine may be lawfully levied according to the former ordinance.

Coke's R. on Fines 9. ſays, that taking cognizance by one judge, ſerjeant or knight by ded. pot. is directly contrary to this ſtatute —— If a *knight be created an earl*, yet he may take cognizance by ded. pot But if an abbot was created a baron, he could not. Co. R. on Fines 10.

2. If a perſon, able to take a fine, *takes the conuſance of a fine to himſelf*, it is utterly void. Becauſe he is judex in propria cauſa Co. R. on Fines, 10. cites 8 H. 6. by Martin.

3. One juſtice alone with a *dedimus poteſtatem* may take it; and the Ch. J. of C. B. without *dedimus poteſtatem*, may take conuſance of the fine, as well as other juſtices by ded. pot. But the *Ch. J. of B. R. cannot without ded. pot.* and therefore there is a ſpecial writ in the regiſter for him of *dedimus poteſtatem*. Denſh. R. of Fines 7. [354]

4. Conuſance of a fine Hill. 20 H. 8. where the ded. poteſtat. *made no mention of the county*, and *all is certified the ſame term*, and the king's ſilver entered, but the fine was *not engroſſed*, but remained in the office of the chirographer. And it was reſolved that it may be now engroſſed: but becauſe it is at the election of the party to have it either with or without as before 4 H. 7. and he *is dead*, ſo that now no election may be made, it ſhall be a fine without proclamations, as at the common law. D. 254. pl. 104. Trin. 8 Eliz. Compton's caſe. Vid. (J. b.) S. C.

5. Dedimus was to take the conuſance of a fine *of four perſons*. —The commiſſioners *return the conuſance of three only*.—The name of the fourth may be *razed* out of the dedimus, and make the writ of covenant to accord therewith, and it was ſaid to have been ſo done about 30 years ſince. Cro. E. 576. pl. 24. Trin. 39 Eliz. C. B. Anon.

6. A dedimus was awarded to take the conuſance of a fine from *baron and feme*, and the *conuſance of baron only was returned*, and the feme would not acknowledge it. Lord-Keeper ordered, that a *new dedimus* pot. ſhould be awarded to take the conuſance of the baron only, and that it ſhould be of the ſame date as the firſt was, and that the return of the commiſſioners ſhould be annexed thereto; and Anderſon ſaid, ſo it might be done here, or otherwiſe, if the fine be levied between the plaintiff and *the three others only*, it ſhall be good without queſtion; for there is no prejudice to the *fourth*; for the

writ of dedimus might be amended, and the writ of covenant made to accord with it, and any of the three ways it would be well enough. Cro. E. 576, 577. Trin. 39 Eliz. C. B. Anon.

7. If a dedimus pot. be to take the conuſance of a fine of three perſons, the commiſſioners may take the *conuſance of one at one time, and of another at another time*; for it may be they cannot come to one place at the ſame time; and when the conuſance of one is duly taken, it is againſt reaſon, that the refuſal of the other ſhould impeach it. Quod alii juſticiarii conceſſerunt. Cro. E. 577. Trin. 39 Eliz. C. B. Anon.

Mich. 12 Jac. Roll R. 113. Day v. Hungate. S. C. In the Star-chamber.

8. A fine by dedimus was taken of an *infant*, but becauſe it was not apparent to the commiſſioners, that the infant was within age, the court acquitted them. 12 Rep. 122, 123. Hungate's caſe.

Per North and Windham, J. there is a great truſt repoſed in the commiſſioners, and they are to imform themſelves of the party's age, and a *voluntary ignorance* will not excuſe them. Mod. 246, 247. Paſch. 29 Car. 2. C. B. in caſe of Barrow v. Parrot.

9. The court of C. B. ordered the reverſioner to proſecute an *information againſt commiſſioners for taking conuſance of a fine of an infant*, Mich. 33 Car. 2. C. B. 3 Lev. 36. Hutchinſon's caſe.

10. A ded. pot. was directed *to two*, and *one of them executes it, the other cannot certify it*; for the execution of it ought to be upon his own knowledge. Godb. 356. Trin. 21 Jac. B. R. in Leonard's caſe.

11. A ded. pot. is directed *to four*, to take a fine of lands in *ſeveral counties*. If *two take it in one county and certify*, and the *other two take it in the other and they certify it*, none of the certificates are good. Godb. 356. per Haughton J. in the caſe above.

A dedimus was *directed to A. B. eſq.* and was *returned by A. B. knight*, and held good. Jenk. 279. pl. 3. cites Arundell v. Arundell.——Yelv. 33. S. C.——Cro. E. 677. Trin. 41 Eliz. B. R.——Cro. J. 11. Paſch. 1 Jac. B. R. S. C.

12. A *dedimus poteſtatem*, to take a conuſance of a fine is *directed to J. S. knight*, and he takes the conuſance and certifies it by the name of J. S. knight; whereas in truth he is *not a knight*; this is not erroneous, nor aſſignable for error that he is not a knight; for it is againſt the record. Jenk. 280. pl. 3.

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13. Though now moſt fines are in fact taken by dedimus, yet they *are recorded as taken in court*, and this to prevent queſtions about captions. per Cur. 10 Mod. 45. Mich. 10 Annæ, B. R. in Ld. Say and Seal's caſe.

(M. b. 2) The ſeveral *Parts* of a Fine.

1. It was reſolved by all the court, that there are *five parts* of every fine, viz.

1. *Original writ.*

For without original writ a fine cannot be levied, as appears by the ſtatute de modo levandi fines, that the order of the law

law ſuffers not, that final accord be levied in the king's court without original writ, and ſo it is held 37 Aſſ. pl. 17. 5 Rep. 38. b. Trin. 34 Eliz. B. R. in Tey's caſe.

2dly, *Licence*, or leave to accord. For which licence there is a fine due to the king, which is the ancient revenue of the crown, and this is called the *king's ſilver*, and this appears fully by the ſaid ſtatute de modo levandi fines, and the entry of the *king's ſilver* in ſuch caſe at bar was thus, Robertus Drury armiger dat dnæ. reginæ ſeptem libr. pro licentia concordandi cum Tho. Tey armigero & Elianora uxore ejus, de placito conventionis, de maneriis de, &c. & habet chirographum per pacem admiſſum, coram Jacobo Dyer. Et nota bene, the cuſtom is, that *he in whom the fee is repoſed pays the king's ſilver*, and not the other conuſee, who had only for life; and all the precedents are according to this. And note, *the king's ſilver* is entered upon the writ of covenant, and it ought to expreſs, firſt the ſum given for licence to accord. 2. The party that paid it, viz. he in whom the fee is repoſed. 3. The plea, and between whom, &c. 4. The land, for which the fine is paid; and all this was well obſerved in the principal caſe. 5 Rep. 39. Trin. 34 Eliz. B. R. in Tey's caſe.

3dly, The *concord*. The *concord* commences thus. Et eſt concordia talis, ſc. quod præd' Tho. & Elianora recognoverunt maneria, &c. eſſe jus, &c. Et notandum eſt, that this is the foundation and ſubſtance of the fine; for if upon this the *king's ſilver* be entered, though the conuſor dies after, the fine is good, as was adjudged in CARREL'S CASE. 3 Eliz. D. 220. b. and the note and the foot of the fine are not only abſtracts out of it, but the concord is the ground and ſubſtance of the fine.——5 Rep. 39. Trin. 34 Eliz. B. R. in Tey's caſe.——Co. R. on Fines, 3. calls the concord the foundation, ground, life, and heart of the fine.

4thly, The *note of the fine*. This is only an abſtract out of the original and the concord, and commences in this manner, ſc. inter Robertum Drury and Thomam Cannock querentem, and Thom. T. & E. uxorem ejus deforcian. de maneriis, &c. unde placitum conventionis ſummonit. fuit inter eos, ſc. quod prædict. Tho. Tey & Elianora recognoverunt maneria, &c. but it was obſerved, that in ancient books, the note of the fine is taken for the concord, as in 12 H. 4. f. 16. a. that the note of the fine is pleadable before the fine engroſſed; and 22 H. 6. 51. accordingly. But this is intended of the concord itſelf; and all the pleadings in quid juris clamat, &c. that the leſſee had fee the day of the note levied, are to be intended of the concord itſelf. 5 Rep. 39. Trin. 34 Eliz. B. R. in Tey's caſe.——The note of the fine may be *entered three or four years after the record made*, Co. R. on Fines 3.

5thly, The *foot of the fine*. This commences thus, viz. Hæc eſt finalis concordia facta in curia domini regis apud Weſtm. a die Paſchæ in quindecim dies, anno, &c. coram Jacobo Dyer, &c. ſo that the foot of the fine includes all, and has the day, year and place, and before what juſtices the concord was made. 5 Rep. 39. a. 39. b. Trin. 34 Eliz. B. R. in Tey's caſe.

The foot of the fine *may be entered three or four years after the record made*. Co. R. on Fines, 3.

(M. b. 3) Effect. At what Time Fines take Effect.

1. Note, that a fine, before *it is ingroſſed, is a perfect record*, and may be executed; and the conuſee muſt ſue his quid juris clamat, per quæ ſervitia, or quem redditum reddit as his caſe is, before the ingroſſment of the fine; for the fine being ingroſſed, the conuſee has no means to compel the tenant to attorn; and then the conuſee may by this way loſe his ſervice, and all actions, that the law after attornment, gives him. Co. R. on Fines, 3. Br Fines pl. 56. cites 22 H. 6. 13. [356]

(M. b. 4) Sur Releaſe. To whom good. In Reſpect of Eſtate, &c. And How.

1. If land be given *to the baron and feme in tail, for jointure of the feme, by the anceſtor of the baron*; and after the *baron dies*, and the *feme ſuffers a recovery againſt the ſtatute of* 11 *H.* 7. by covin, and after *the iſſue in tail releaſes all his right by fine*, and dies, *his iſſue may enter*; for the ſaid ſtatute ſays, that the recovery ſhall be void, being ſuffered by ſuch feme, unleſs he in reverſion aſſents to it by matter of record, which ought to be by voucher in the ſame action, or ſuch like; for if there be *meſne inſtant between the recovery and the aſſent* as above; then if the recovery be once *void by the ſtatute*, an aſſent by fine after, which is matter of record, will not make the recovery good, which was once void before. Br. Judgment, pl. 148. cites Doct. & Stud. lib. 1.

2. *Tenant in tail* made a *leaſe for his own life*, and he in *reverſion releaſed to the leſſee for life by fine, and to his heirs*; it ſeems to me, that this releaſe is utterly void.—For though Littleton ſays, that in every caſe, where he, to whom the releaſe is made, hath a freehold in deed or in law, ſuch releaſe is good; this is true, but not in all caſes. And therefore I have taken a diverſity, viz. In all caſes, when a releaſe ſhall enure by way of *mitter l'eſtate*, it is not ſufficient to him, to whom the releaſe is made, to have freehold only, but there ought to be *privity between releaſor and releaſee*; but when a releaſe ſhall enure by way of *mitter le droit* to him without privity (as if the diſſeiſor makes a leaſe for life, and after the diſſeiſee releaſes to the tenant for life,) this is good; *but* if *tenant in tail* make a *leaſe for another's life*, the *releaſe of the donor* is good to ſuch leſſee. Co. R. on Fines, 6.

3. If a man makes *leaſe for years*, and *before* the *entry of the leſſee* the *leſſor by fine releaſes to him and to his heirs*; now this is a void releaſe, for the leſſor, againſt his own fine might ſay, that the leſſee had not entered into the land before the fine levied; and yet 31 Aſſ. 24. it is adjudged contra, in ſuch a caſe; but other books are all contrary, and ſo is the law. Co. R. on Fines 6. cites 16 H. 7. 5. 50 E. 3. 37. 3 H. 6. 23. 46 E. 3. 13. 15 H. 7. 14. 47 E. 3. 27. &c.

(N. b) The *ſeveral Sorts* of Fines, and what are executed, &c. and how enure.

1. THERE are 2 kinds of fines, viz. one *executed*, and the other *executory*. Executed; that is, where the preſent eſtate paſſeth unto, or is ſuppoſed in the conuſee; for ſuch a fine is a feoffment of record, as this fine *come ceo*, or *ſur releaſe or confirmation*, *or*

Weſt. Symb. ſ. 20.—If a fine ſur cogniſance de

or ſur ſurrender; executory, as when no eſtate is veſted in the conuſee, until it be executed by entry or action; as fines *ſur grant and render* by the conuſee, which muſt be made upon a fine come ceo, or ſur releaſe, &c. or other fine which is executed; or otherwiſe the conuſee could not make any grant and render of that land, &c. which he had not. 2 Inſt. 513.

droit *come ceo*, &c. be levied *of a reverſion by the name of the land*, it is not executory.

Weſt. Symb. ſ. 179. cites 43 E. 3. 15.——It is not called executed, becauſe the conuſee is in poſſeſſion; but *becauſe* the fine *is executed between the parties*; ſo that the conuſee cannot ſue execution, becauſe the fine in itſelf is ſuppoſed to be executed. A fine is called executory, becauſe the fine does not ſuppoſe any execution, but the conuſee may execute it, either by entry or by ſcire facias. Co. R. on Fines, 4.

6. Fines are either *without proclamations*, or *with proclamations*. The firſt at common law, the other by *ſtat.* 4 *H.* 7. 24. Weſt's Symb. § 19. [357]

7. *And* they are either *ſingle* or *double*, and are ſuch as are either *with render or without render*. See Weſt's Symb. § 21.

8. A. leſſee *for life*, remainder *for life* to B. *A. levies* a fine *to B.* ſur conuſance *de droit*; this in truth enures by way of *ſurrender*. Co. R. on Fines, 5. cites 3 Aſſ.

But if B. accepts a fine from A. ſur conuſance

de droit *come ceo*, &c. this is a *forfeiture* of both the eſtates of A. and B. and ſhall not enure by way of ſurrender; but he in reverſion may enter immediately for the forfeiture. Co. R. on Fines, 5. cites 1 H. 7.

9. If a *leaſe* be made *for life*, the remainder *to the feme in fee*, and *tenant for life levies a fine* ſur conuſance de droit *to the baron and feme, and to the heirs of the baron*; in this caſe, if the *feme dies without heir*, the lord ſhall have the land by eſcheat, for this amounts to a ſurrender in law. Co. R. on Fines, 5. cites 39 E. 3. 30 Aſſ. Oſborn's caſe.

But if a leaſe be made *for life*, the remainder in tail to B. remainder in fee to C.

Tenant for life levies a fine to A. and his feme in fee. A. dies without iſſue. C. enters for the forfeiture, this is not a ſurrender. Co. R. on Fines, 5. cites 41 E. 3. 41 Aſſ.

10. Of fines there are 4 *kinds*. 1ſt, A fine *ſur cognizance de droit come ceo que il ad de ſon done*, (i. e.) upon acknowledgment of the right of the cogniſee; as that which he had of the gift of the cognizor. It is a ſingle fine, and admits the poſſeſſion (at leaſt in law) of the lands, by virtue of a feoffment or former gift of the cognizor, and works by way of releaſe; a fee ſimple paſſing without the word heirs, and nothing being rendered back to the cognizor. This is the principal and ſureſt fine, and is a fine executed; ſo that the cognizee may preſently enter.

There are 5 *ſorts* of fines, of which 3 are *executed*, viz. ſur conuſance de droit *come ceo*, &c. ſur *releaſe*, and ſur *ſurrender*; and 2 *executory*, viz. ſur conuſance *de droit tantum*, ſur *grant and render*. Co. R. on Fines, 4.

2d, A fine *ſur done*, * *grant* and *render*; which is a double fine (being in a manner two fines, (viz.) a fine *ſur cognizance come ceo*, &c. and a fine *ſur conceſſit*, &c.) and where the cognizee, after a releaſe and warranty made to him by the cognizor, doth grant and render back to the cognizor, the lands, &c. limiting often times thereby remainders to ſtrangers not named in the writ, if the party is in poſſeſſion, this fine is executed, otherwiſe he muſt enter, or have the writ of *habere facias ſeiſinam*, &c.

3d, A fine † *ſur cognizance de droit tantum*; which is commonly uſed to paſs a reverſion. It may be expreſſed in ſuch fines, that the particular eſtate is in another, whom the cognizor is willing ſhould

Fines upon *ſurrender* are either † *expreſſly* ℔, or *amounting to* a ſurrender. Co. R. on Fines, 5.

—‡ A fine upon expreſs ſurrender, is when the leſſee for life, or for other's life or tenant in tail after poſſibility, tenant in dower, or by the curteſy, by fine

ſhould have the reverſion. Sometimes it is uſed by tenant for life, to make a grant and releaſe to him in reverſion. In a fine ſur cognizance de droit tantum, the cognizee hath a freehold in law in him before he enters.

4th, A fine *ſur conceſſit* is, where the cognizor is ſeiſed of the lands contained in the fine, and the cognizee hath no freehold therein, but it paſſeth by the fine. It is commonly uſed to grant away eſtates for life or years. And if the cognizees are not in poſſeſſion, they muſt enter, or have a writ of *habere facias ſeiſinam*, &c. Wood's Inſt. 240.

ſurrender their eſtates *to him in reverſion*; and the form of the fine is ſuch in effect, as the fine ſur conuſance de droit; ſaving that theſe words *ſurſum reddidit* are in the fine upon ſurrender, and the clauſe of the *warranty omitted*. Co. R. on Fines, 5.

* This fine is executory only, and therefore the law pre-ſuppoſes, that he who rendered is ſeiſed; yet if the other, at the time of the fine levied be ſeiſed, the fine is good, and executed preſently; and therefore the court will receive this conuſance de droit only; and that the conuſee by the ſame fine, renders to the conuſor the ſame land, that he who ſurrendered by the conuſance, ſhall have nothing in the land; the conuſee in this caſe, cannot grant rent to the conuſor by the ſame fine, &c. Denſh. R. of Fines, 6.

† This fine pre-ſuppoſes the conuſor to be in poſſeſſion at the time, &c. and therefore may be executed by *entry*, or *ſcire facias*; and though the conuſee be in poſſeſſion, the fine is good. Denſh. R. of Fines, 6. cites 10 E. 3. 1.

[358] (N. b. 2) What Fines *proper for what Eſtates.*

1. It was agreed that a fine ſur conuſance de droit *come ceo*, &c. is *always intended of fee ſimple*, and no leſs eſtate; and that after the party is ſeiſed by the fine, ſcire facias lies not, but a formedon. Br. Fines, pl. 13. cites 42 E. 3. 5.

2. *Tenant for life* may levy a fine *ſur grant and releaſe* of the lands which he holdeth for life, to hold to the cognizee *for life of the tenants for life*, and it is no forfeiture 44 Ed. 3. 36. But if the eſtate were larger, or the fine ſur cognizance de droit come ceo que, &c. it were a forfeiture of his eſtate. Weſt. Symb. § 13. cites 4 H. 7. fol.

3. *So* of ſuch fines by *tenant in tail after poſſibility*, tenant *in dower*, or *by the curteſy*, 39 Ed. 3. 16. *But* ſuch fine *of a rent* ſeemeth to be no forfeiture, 2 H. 5. 9. Yet a particular tenant as in dower, by curteſy, or for life, cannot by fine *grant and ſurrender* their eſtates to the owner of the reverſion, or remainder, but may by fine grant and releaſe the ſame. Weſt's Symb. § 13. cites 17 Ed. 3. 62. 24 Ed. 3. 26. 20 Ed. 3. & 14 Ed. 3.

4. A *leſſee for years* levies a fine *ſur conuſans de droit come ceo*: This fine is void; for he had no freehold; partes ad finem nihil habuerunt. Jenk. 254. pl. 45.

In the argument of this caſe, it was ſaid, that the fine ſur conceſſit was deviſed to be levied

5. *Feme tenant for life*, remainder *to J. S. in tail*, remainder *to the baron of the feme for life*, * remainder over. *Baron and feme* by fine ſur conceſſit *granted tenementa prædicta & totum, & quicquid habent in tenementis prædictis pro vita of the baron and feme, with warranty*, which deſcended upon J. S. The queſtion upon this was, whether this ſhall be conſtrued to paſs one entire eſtate for the lives

lives of the baron and feme, or ſeveral diſtinct and divided eſtates for the lives of them? Hale Ch. J. & Wild J. held clearly, that the intent here was to prevent a forfeiture; but what operation it ſhould have as one entire freehold for both their lives, or a divided eſtate they would conſider & adjornatur. The parties agreed, ſo no judgment was given. 2 Lev. 154. Hill. 27 & 28 Car. 2. B. R. Piggot v. Ld. Saliſbury.

by thoſe who had *eſtate for life, and alſo remainder in fee expectant on eſtate tail*, and that it is more innocent than

fine ſur conuſance, and is like to a grant of totum ſtatum ſuum. But then this fine ſhould expreſs the eſtate of the conuſors: and if it does not, even this fine ſur conceſſit may be a *forfeiture*. 2 Jo. 69. S. C.——cites 17 E. 2. 66. 44 E. 3. 36.——2 Mod. 109. S. C. Pollexf. 146. S. C. 2 Keb. 580. S. C.——* Remainder to the feme in fee. 2 Jo. 68.

(N. b. 3) The *Operations* of the ſeveral Sorts of Fines.

1. As well the fine ſur conuſance de droit *come ceo*, as ſur conuſance *de droit tantum*, *gives a fee ſimple* to the conuſee, *without* the words *his heirs*; for every fine ſur conuſance de droit is intended fee ſimple. Co. R. on Fines, 7.

A fine *ſur conuſance de droit come ceo, &c. generally imports a fee ſimple*; but it is only *by implication*, and therefore there is *no repugnancy to limit an eſtate for life* to the conuſee; for the precedent donation or feoffment, which is ſuppoſed, might be for life only, or in tail, and the general intendment of the conuſance may be *qualified by an expreſs limitation*. 1 Salk. 340. in caſe of Hunt v. Bourne.——cites 41 Ed. 3. 14. Co. Litt. 9. b.——Lutw. 781. S. C.

2. Any eſtate by fine that operates by way of *grant*; the law, to avoid wrong, *expounds* it ſo, that every one grants, what he lawfully may. Arg. Raym. 147. cites 10 Rep. 98. Mich. 10 Jac. Sir Edward Seymour's caſe.

3. *A. tenant for life, remainder to B. in tail; B. levies a fine with proclamations ſur conceſſit to A. & C. for their lives:* this fine bars the intail, during the ſaid two lives only, and is not a diſcontinuance omnino: for B. was not ſeiſed by force of the tail, and the fine is ſur conceſſit; it ſeems that *A.'s acceptance* of this eſtate to him and C. *is a ſurrender* of the former eſtate which he had: as in caſe of a leaſe for years made to A. and during the years he accepts a leaſe for years of the ſame land to him and B. Jenk. 321. pl. 28. [359]

4. A fine *ſur cognizance de droit come ceo, &c.* is a feoffment upon record of the lands compriſed in the fine, and doth *imply a livery and ſeiſin* of thoſe lands, Hill. 1649. 26 Jan. B. S. *to paſs the eſtate out of the conuſor* to the conuſee, *but* if another perſon were in by tort, it will *not* amount *to an entry*, as a feoffment will, to purge that tort. L. P. R. 615.

(N. b. 4) Ancient Demeſne. The Force and *Effect* of Fines *in Ancient Demeſne.*

1. In aſſiſe the tenant pleads that the land is parcel of the manor of D. which is ancient demeſne, judgment, &c. He ſhall not be received to ſay that it is ancient demeſne; for a *fine of releaſe* was levied between us and you of the ſame land, and becauſe this is a judgment in curia regis, therefore though *there was no tranſmutation of poſſeſſion, yet it is a judgment which made it frank-fee between the parties*; but the *lord and ſtrangers ſhall not be bound by it*, but ſhall have advantage of ancient demeſne, per Wilby. Br. Auncient Dem. pl. 17. cites 21 E. 3. 25.

2. *And* note, that *the lord himſelf was one of the defendants in the aſſiſe, and* becauſe he *pleaded by bailiff*, and did not take the tenancy upon him; it is ſaid that *it does not eſtop him in a writ of deceit to reverſe the fine*, and to make it ancient demeſne again; and ſo ſee, that though it was ſur releaſe, which is not tranſmutation, yet it is a judgment in curia regis, and ſo *frank-fee for the time*; and it ſeems there that *none can plead ancient demeſne but only the tenant.* Br. Auncient Dem. pl. 17. cites 21 E. 3. 25.

3. A fine levied in ancient demeſne is *not good*, for *it is no court of record*; but at this day *common recoveries* by ſufferance are uſed there to bind the tail, per Knivet, which note, and well; for the land ought to be impleaded there by writ of right-cloſe, and not elſewhere; contra of a fine. Br. Auncient Dem. pl. 47. cites 50 Aſſ. 9.

If a *fine* or recovery paſs in *bank of land, which is ancient demeſne, and the lord brings deceit and reverſes it*; the fine or recovery is by this *reverſed between the parties, and is void*; becauſe now it was, *coram non judice*; and he who had the land before may enter, per Littleton and Needham. Br. Auncient Dem. pl. 39. cites 8 E. 4. 6. S. P. Br. Fines, pl. 36. cites 7 H. 4. 44. ——& 8 H. 4. 27. and ſays that the beſt opinion is ſo; for that it is reverſed as a judgment is reverſed by writ of error as it ſeems, and that Hull ſaid, that the judgment proved that the court had no juriſdiction of it, and therefore was void againſt all. —— Br. Fines, pl. 47. S. P. cites 21 E. 3. 20.

4. By the beſt opinion, if a fine levied of land, which is ancient demeſne, be reverſed by deceit, yet it *is good between the parties.* Br. Fines, pl. 101. cites 7 H. 4. 44. And alſo 17 E. 3. 31. that nothing is effected by the reverſal, but to reſtore the land to be ancient demeſne, but it remains good between the parties. Ibid.

*[360] Fine *ſur conceſſit* levied in ancient demeſne, makes a *diſcontinuance and that all the effects of a fine levied in C. B. except that it*

5. If in ancient demeſne, a writ of *right cloſe* be brought againſt A. and it be proſecuted *in the nature of a formedon* in the deſcender, a fine levied there, and *without proclamations* by the cuſtom there, *is a bar.* If this judgment be reverſed in the Common Pleas, the Common Pleas ſhall only judge that the plaintiff ſhall be reſtored to his action in the court of ancient demeſne, unleſs there be ſome other cauſe which * takes away the juriſdiction of the court of ancient demeſne, for which the judgment given for the plaintiff in ancient demeſne is reverſable; the court of Common Pleas ought not to judge the ſaid plea in bar bad; for the *ſtatute* of the 4 *H.* 7. *that fines*

fines ſhall bar an eſtate tail, and the ſtatute of *Weſt.* 2. *c.* 1. *quod finis levatus* by tenant in tail *ipſo jure ſit nullus*, are to be underſtood of fines at the common law; and *not to extend* to the ancient cuſtom of ancient demeſne. The formedon in the deſcender and eſtates tail, were at the common law: ſuch tenant had power to alien, only after he had iſſue. 10 Ed. 2. Fitz. Formedon 55. and *generally ſtatutes* are not to be conſtrued to deſtroy the cuſtoms of ancient demeſne, which by intendment of law, concern agriculture and the ſubſiſtance of the king and his ſubjects. Jenk. 87. pl. 68. cites Hob. 47. Barnſly and Coxe's caſe.

is no bar, which is only by force of the ſtat. 4 *H.* 7. reſolution the ſecond. Lutw. 781. Hunt v. Bourne.—1 Salk. 340. S. C. and ſays the diſcontinuance is becauſe the freehold is recovered in the action. For every recoveror recovers a fee ſimple, and a recovery of a fee ſimple, muſt work a diſcontinuance; and if this be allowed to be a fine, it ought in conſequence to have the effect of fines. But note, that it is *no bar to the entail*; for it is by the ſtatute 4 *H.* 7. that a fine with proclamations ſhall bar an eſtate tail, and no fine, but with proclamations is within the ſtatute, nor can bar an eſtate tail.——It is only a diſcontinuance. Lutw. 959. White v. Auſtin.——Lutw. 781. S. P. Hunt v. Bourn.——D. 373. a. b. pl. 13.

6. *And though* Coke in the 3d part of his inſtitutes ſeems of another opinion: for it ſeems to him that *no cuſtom ſhall prevail againſt a ſtatute made within term of memory.* Under correction neither the ſtat. 4 *H.* 7. of fines, *nor* the 18 *Ed.* 1. of fines concerns this caſe; for neither of them *ſays* in expreſs words, that *fines with proclamations ſhall bar the intail:* theſe ſtatutes only ſay, that fines with proclamations *ſhall be bars to all parties and privies, and to ſtrangers, if* the ſtranger doth *not* bring his action, or *make* his *claim within* 5 *years after* ſuch fines levied with proclamations. And the true intention of the 4 H. 7. was to take away and repeal the ſtatute of non-claim the 34 Ed. 3. c. 16. and not to bar the eſtate tail any more than 18 Ed. 1. had done, as appears by the ſtatute of 32 H. 8. c. 36. which ordains fines levied as above, and non-claim as above to bar the tail. Jenk. 87. pl. 68.

(N. b. 5) Scire facias. *In what Caſes.* And *How.*

1. Sci. fa. lies to execute a fine levied *of an acquittal.* Br. Fines, pl. 100. cites 3 E. 5. 23.

2. Land is *rendered* by fine *to* an *huſband and wife, and* to *the heirs of their two bodies*; they have *iſſue A.* the *huſband and wife die*; *A. enters and enfeoffs B. with warranty*; A. *dies*; D. his iſſue brings a ſcire facias againſt B. to execute this fine; it does not lie; for executio facta eſt, & non reſtat facienda, as Weſt. 2. c. 48. ſpeaks; and if this ſcire facias ſhould lie, the feoffee ſhould loſe his warranty. Reſolved, that the heir in tail is put to his *formedon* in this caſe; in a ſcire facias, a voucher doth not lie; the feoffee ſhall not loſe his warranty, and therefore a formedon only lies for the heir in tail in this caſe. Judgment affirmed in error. Jenk. 18. pl. 34. cites 20 E. 3.

3. Scire facias upon fine *levied to T. R. and W.* and to the *heirs of the body of R.* the *remainder to the right heirs of the ſaid W.*—*T. died*, and *R. died without iſſue*, and *W. ſurvived and died*; his heirs need

S. if a fine be *levied to a baron and feme, and to*

need no ſcire facias to execute this fine, becauſe it is executed in his life, by the *fee and franktenement in W.* Weſt's Symb. § 179. cites 40 E. 3. 20.

W. and his heirs, and he *dieth*; and then the *baron and feme do die*, the fine is *executed for one moiety in the life of W.* Weſt's Symb. ſ. 179. cites Fitzh. Sci. fa. 19. 43 Ed. 3. 9. 24 Ed. 3. 57.

4. Scire facias upon a fine, the *tenant for life prayed in aid of him in the remainder in tail*, and had it notwithſtanding that delays are ouſted in ſcire facias by the ſtatute, quod nota. Br. Sci. fa. 16. cites 41 E. 3. 16.

[361] 5. After the *party is ſeiſed by the fine* a ſci. fa. does not lie, but a *formedon*. Br. Fines, pl. 13. cites 42 E. 3. 5.

6. If the plaintiff have *ſeveral eſtates created by one fine*, he needeth but *one writ* of ſci. fa. 43 E. 3. 11. *though* it be *of ſeveral things againſt ſeveral tenants*. 11 H. 4. 15. 21 Ed. 3. 14. 24 Ed. 3. 25. Weſt's Symb. § 179.

7. If land be given by fine *for life*, the *remainder to baron and feme in tail*, and the *baron dieth*; and then the *tenant for life dieth*, and the *feme entereth*, the fine is executed, ſo as their iſſue needeth no ſcire facias. Weſt's Symb. § 179. cites 49 E. 3. 12.

8. Per 4 juſtices and ſerjeants, where a fine is levied *to the baron and feme in ſpecial tail, remainder to the heirs of the body of the baron*, the *feme dies without iſſue*; the remainder is executed in the baron, becauſe he is not as tenant for life, and then the remainder in the heirs of his body veſts the tail in him, quod vide ibidem; and yet notwithſtanding this, and a bar in aſſiſe by judgment againſt the plaintiff himſelf in this ſcire facias he had execution; quod mirum! for it ſeems that it was executed before, and alſo the judgment in the aſſiſe, being in force, binds him. Br. Fines, pl. 33. cites 7 H. 4. 23.

Co. R. on Fines 12. Br. Fines, pl. 59. cites 14 H. 7. 16. —Br. Scire facias, pl. 120. cites 14 H. 7. 17. —Br. Executions, pl. 60. cites S. C.—None ſhall have execution of a fine, which is in C. B. without a new commandment to them to make execution, unleſs he only, at whoſe ſuit it was brought into C. B. per Cur. For per Choke, the writ is ad proſecutionem A. B. Quære of his *heir*, quod nemo negavit. Br. Fines, pl. 67. cites 9 E. 4. 15.

9. If a fine be levied to *A. in tail*, the *remainder to B. in tail*, the *remainder to C. in fee*. And the *record is ſent into the chancery*, and the *firſt tenant in tail died without iſſue*, and the record cometh back into the bench by *mittimus at the ſuit of him in the firſt remainder*, and thereupon he had a ſcire facias to execute the fine, and *died without iſſue before execution had*; he in remainder in fee, ſhall not hereupon have a ſcire facias without a new commandment, becauſe the record was once out of the court, and came in again at the ſuit of him in the firſt remainder, unto whom he in the remainder in fee is a ſtranger; yet the * iſſue of him which removed the record, in this caſe might have a ſcire facias without any new commandment, becauſe he is *privy*. Weſt. Symb. § 176. cites 14 H. 7. 16. 9 E. 4. 15. 11 E. 4. 13.

* D. 29 pl. 196. Hill. 28 H. 8. Anon. cites 14 H. 7. and 11 E. 4. fo. ultimo accordingly. But in Dyer it is ſaid that the heir muſt have a *new certificate* of the fine, by a new writ out of the chancery; for the mittimus was to impower the juſtices to proceed *ad proſecutionem of ſuch an one* (the anceſtor) and when he is dead, the warrant is determined, and the court cannot proceed at the proſecution of another.

10. If

10. If a man grant the *reverſion of an acre of land*, where he *hath nothing in the land*, by fine executory, and *afterward he purchaſeth the reverſion*; now the grantee ſhall enter when the reverſion doth fall, or ſhall have execution thereof, by a ſcire facias. Perk. § 66.

11. Upon a fine *ſur conuſance de droit come ceo*, &c. with a grant and render; the *fee was limited by the word remanere*, as a remainder when it was a reverſion, it was doubted if a ſci. fa. lay; for the fine was executed before, and ſci. fa. lies only on fine executory. But now he is put to a *formedon*. See D. 199. pl. 55, 56. Paſch. 3 Eliz. Gale v. Gale. —— And ſee Dal. 29. pl. 4. —— The opinion of the court was againſt the plaintiff. D. 199. b. pl. 56. S. C.

A. and M. his wife and B. levied a fine to C. with grant and *render to B. in tail, remainder to M. and her heirs.* J. S. brought ſci. fa. in remainder, as heir of M. after B.'s death without iſſue, and had judgment. D. 199. pl. 55. Marg. cites M. 13 & 14 Eliz. Ld. Shandois's caſe.

12. *But* where 3 *deforceants* granted and rendered *to the plaintiff in tail*, with diverſe remainders over in tail, the *reverter to the grantors, and the heirs of one* of them in fee, *without any conuſance de droit come ceo que, &c. at the beginning*, and the heir of him who had the fee ſimple limited to him, brought the ſci. fa. ſuppoſing all the *tails ſpent*, ſo that there ſeems difference between this and the caſe above. D. 199. a. b. pl. 56. cites a precedent in T. 18 H. 6. Rot. 111.

(N. b. 6) Scire facias. *At what Time* it lies *to execute* a Fine. [362]

1. A ſcire facias may be ſued upon the note of the fine, *before it be ingroſſed* by the chirographer. Weſt. Symb. § 179. cites 22 H. 6. 13.

2. *But* of a fine *levied before time of memory*, a man ſhall not have execution by ſcire facias. Weſt. Symb. § 179. cites * 1 E. 4. 6. but cites † 16 H. 7. 9. contra.

* Br. Fines. pl. 90. cites S. C.—† Br. Fines, pl. 126. cites S. C. accordingly.

(N. b. 7) Scire facias. *By whom.*

1. If land be given by fine *to A. for term of life, remainder to B. and C. and the heirs of their two bodies*, and *each have iſſue and die*; the *tenant for life dies*; the *one iſſue and a ſtranger enter*; the *iſſues ſhall have ſeveral writs*; for the inheritance is ſeveral, and the iſſue held out may have action of *ſcire facias* againſt the ſtranger * only *to execute the fine for his moiety and not join the other iſſue*; *for he is in by title in his moiety*, and the ſtranger in the other moiety by tort; and when he has recovered, he and the other are tenants in common. Br. Brief, pl. 444. cites 24 E. 3. 29.

* *Orig.* (tamen.)

2. Fine was levied to *A. and M. his wife in tail*, remainder *to M. in fee*. They had *iſſue a ſon* named *B.* The baron died, and *M.* *by*

Br. Executions, pl. 67. cites S. C.

by an after huſband had iſſue C. then M. died, and *B. entered and died without iſſue.* C. ſhall have ſci. fa. to execute the fine, and not the collateral heir of B. For B. was ſeiſed in tail only, and the fee was in abeyance and not executed in him; and now C. is heir of the whole blood to A. though but of the half blood to B. And whoſoever is *heir to the anceſtor when the fee fails*, ſhall have execution thereof. Br. Scire facias, pl. 126. cites 24 E. 3. 30. 62. and 37 E. 3. lib. Aſſ. 4.

3 *J. N. acknowledged all the right* which he had in 100 acres of land in D. *to be the right of W. N. and his heirs, and obliged himſelf and his heirs to warranty, and to acquit W. N. and his heirs*; and the *lord paramount diſtrained W. N.* and *he brought ſcire facias*, which is *returned warned*, and the ſaid *J. N. did not come* to acquit him, *by which he prayed execution*; and per Belknap, he ſhall have writ of meſne; but per Kirton, he ſhall have writ of execution by ſcire facias; for *the thing is executory*, and this by the ſtatute de hiis que recordata ſunt, &c. Br. Scire facias, pl. 50. cites 49 E. 3. 8.

4. A fine ſur conuſance de droit, &c. *levied to A. and B. and to the heirs of A.* the *jointenant for life ſurvived and died*; *the heir* of the other who had the inheritance, ſhall not have ſcire facias to execute the fee; for it was executed before. Co. R. on Fines 4. cites 11 H. 4. 5. b. per Hill & Thirning.

But (as I think) *if B. dies before* A. then is the fine executed in the tenant for life, and he ſeiſed in fee.

5. *But* if a fine be levied ſur conuſance de droit, &c. *to A. for life, remainder to B. in tail, remainder to A. in fee*; there B. after the death of tenant for life, ſhall have ſcire facias to execute the eſtate tail, and the ſon alſo of tenant for life, after the death of tenant in tail. Co. R. on Fines 4.

As if land be given for life, remainder in tail; remainder to the right heirs of the tenant for life, and tenant in tail dies, the tenant for life is ſeiſed in fee. Co. R. on Fines, 4. cites 40 E. 3. 9. 33 H. 6. 5.

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6. If *two ſue a ſci. fa.* to execute a fine, and the *one dieth*, the ſurvivor ſhall have a ſcire facias without any new commandment. Weſt. Symb. § 179. cites 1 E. 4. 13.

But if diverſ perſons, as heirs unto A. B. pray a ſcire facias, it is not grantable until they have ſued *ſeveral writs* to the juſtices of the bench, commanding them to make execution. Weſt. Symb. ſ. 179. cites 11 E. 4. 13. T. 21 E. 4.

7. A fine was levied *between the prior of B. and J. S.* that the prior ſhould find ſo many maſſes in the manor and chapel of C. and, *for non-performance, the heir of C. brought ſci. fa.* and yet *C. was a ſtranger to the fine.* However becauſe it was an *ancient fine in the time of H. 3.* and alſo the heir of C. was to have advantage of the fine, the ſci. fa. was awarded to lie. Br. Fines, pl. 126. cites 16 H. 7. 9.

(N. b. 8) Execution. *Of what* Conuſee ſhall have Execution.

1. A man gives in *tail by grant or render, ſaving to himſelf the reverſion*, and dies; and the tenant in *tail dies without iſſue*; and R. enters and *endows the feme of the tenant in tail*; the *heir of the donor brings*

brings ſci. fa. againſt R. *of two parts*, and recovers, *and another ſcire facias againſt the feme of the third part*, and ſhe prays to have aid of R. And *ſo ſee a ſcire facias of a reverſion that was reſerved*, and never was out of the donor and his heirs, and which was not given by the fine, but reſerved, and yet the ſcire facias lies. Br. Sci. fa. pl. 95. cites 21 E. 3. 12.

2. If the ſervices *eſcheat after a fine levied of the ſeigniory*, the cogniſee ſhall have execution of the land eſcheated. Weſt. Symb. § 179. cites 48 E. 3. 11.

So if the fine be levied to A. for life, remainder to B. The *remainder-man after the death of tenant for life*, ſhall have ſci. fa. of the land eſcheated. For now it is parcel of the manor, and is come in lieu of the ſervices; and yet it was not properly comprized in the fine. Br. Scire facias, pl. 47. cites S. C.

3. A man ſhall have writ of execution, of *things* which are *not comprized in the writ of covenant*, by ſome. Br. Sci. fa. pl. 50. cites 49 E. 3. 8.

As of a fine *upon a releaſe*. Br. Sci. fa. pl. 50. cites 49 E. 3. 8.

4. If the conuſee *renders rent*, ſcire facias lies upon it. Ibid.

5. *So*, where a man levies a fine *in tail rendering rent*, ſcire facias will lie for the rent, per Belknap. And ſo ſee that a *thing executory* ſhall be executed by ſcire facias. Ibid.

6. Scire facias lies of a *common* or *corody* upon fines levied of them. Per Aſhton quod not fuit contradictum in entry in nature of aſſiſe. Br. Scire facias, pl. 171. cites 4 E. 4. 2.

4 E. 2. b. & Ibid. 2. b. 3. as to a corody cites 18 H. 6.

(N. b. 9) *Pleadings* in Scire Facias.

1. In a ſcire facias *by* him in the *remainder upon an eſtate tail* againſt A. B. *ſuppoſing the donee to be dead without iſſue*, if A. B. *plead that he is iſſue* to the donee, and the plaintiff *replieth*, that he is *a baſtard*, it is a good *replication*. Weſt's Symb. ſ. 179. cites 40 E. 3. 16.

Br. Sci. Fa. pl. 15. cites S. C.

2. Scire facias upon a fine, the *tenant ſaid, that thoſe who were parties to the fine, had nothing*, &c. *but one J. was ſeiſed*, &c. *whoſe eſtate he has*, &c. and the *plaintiff ſaid, that J. had nothing at the time of the fine*, &c. and no plea, but he ought to maintain his writ, that the parties to the fine were ſeiſed, &c. Br. Maintenance de Brief, pl. 22. cites 40 E. 3. 30.

3. In ſcire facias upon a fine, Berk. prayed judgment of the writ, for the writ is *quare deſcendere non debet*, which *proves poſſeſſion*, & non allocatur, by which he demanded judgment of the writ becauſe the fine *in itſelf proves execution*. For it was ſur conuſance de droit *come ceo*, &c. To have and to hold to him, and the heirs of his body, &c. And the opinion of the court was, that it is executed; ſo that formedon lies, and not ſcire facias. Nota. Br. Brief, pl. 47. cites 41 E. 3. 13. [364]

4. In formedon in reverter or remainder, the demandant muſt *mention the death of every one that had eſtate, and ſurvived his anceſtor*,

ceſtor, but not ſo in a ſcire facias ſur fine. Symb. ſ. 179. cites 42 E. 3. 19.

5. If in a ſcire facias the ſheriff *returns the party ſummoned*, and he *appear not*, execution ſhall be awarded. Weſt's Symb. ſ. 179. cites 43 E. 3. 13.

6. Where a man *alleges the death of ſeveral in ſcire facias to execute a fine*, which he need not, it is only ſurpluſage. Br. Nugation, pl. 21. cites 43 E. 3.

7. *Feoffment with warranty from the plaintiff's anceſtor* is a good plea in ſcire facias upon a fine. Weſt's Symb. ſ. 179. cites 22 H. 6. 39.

* Br. Sci. Fa. pl. 13. cites S. C. Brook ſays, and ſo ſee that the coſinage is not compriſed in the writ, but is entered in the roll. Quod nota.

8. In a ſcire facias, *to execute a fine as couſin and heir* to him in the remainder or reverſion; after the death of the particular tenant the plaintiff *needed not to ſhew how* couſin and heir, ſo long as the plea hath continuance by *idem dies*, &c. given to the tenant, nor at his appearance, nor *until the plaintiff pray execution*; and then the coment coſin and heir is to be entered thus in the roll only, *et prædictus J. dicit, quod ipſe eſt conſanguineus & heres J. W. videlicet filius, & hæres T. W. fratris & hæredis ejuſdem. J. W.* Weſt's Symb. 179. cites * 33 H. 6. 54. 41 Ed. 3. 13. & 24. 8 H. 4. 31.

* In the ſmaller editions it is pl. 246.

9. *If the tenant* be one who *entered by title prior to the fine*, it *ought to be ſo pleaded*; for it ſhall be intended, that he is in under the fine, if it be not pleaded *ſpecially*. Per Priſot. Br. Brief, pl. * 242. cites 36 H. 6. 16, 17.

10. In ſcire facias to execute a fine *of lands in D.* the *tenant ſhall not ſay*, that *no ſuch vill as D.* for that would avoid the fine; per Chocke, quod fuit conceſſum. Br. Eſtoppel, pl. 172. cites 21 E. 4. 51. 53, and 54.

11. Scire facias to execute a fine *of* 200 *acres of land*, Sulyard ſaid, that *pending this ſcire facias, J. B. had brought a formedon of* 100 *of the acres* of land *(inter alia) and had recovered and had execution, and pray'd that the writ ſhould abate of this parcel*; it is no plea, becauſe he pleaded *inter alia*; for recovery ſhall be pleaded *certain to every intent*, and theſe words (inter alia) is not certain to any intent; for he *ought to have ſaid that he brought formedon of* 100 *acres, and recovered and had execution, of which theſe* 100 *acres which are now in demand are parcel.* Br. Pleadings, pl. 115. cites 22 E. 4. 8.

(N. b. 10) Scire Facias. *How the Writ ſhall be.*

Br. Fines, pl. 45. cites S. C.

1. Where the writ of ſcire facias *againſt a prior for not ſaying of maſſes, upon a fine* levied *by his predeceſſor to P. M. and his heirs* was brought *by W. ſon of R. M.* againſt the ſucceſſor, and *did not make himſelf heir to P. it was held good, becauſe he was heir to him*, and it was *quare executio fieri non debet*, and *did not ſhew what execution*, and yet good; for it *refers to the fine*, and therefore good, though he does *not ſay, quare diſtringi non debet*, and the *writ ſaid nothing of ſucceſſor* to the prior, for *it appears that he is ſucceſſor, and that the plaintiff is heir to P.* and therefore the writ is good, and judgment that the plaintiff diſtrain the prior to make the chantery. Br. Sci. Fa. pl. 91. cites 38 E. 3. 33.

2. Scire

2. Scire facias upon fine, the writ was *quare querenti* ‖ *deſcendere non debet*, where it ſhould be *executionem habere non debet*, judgment of the writ; & * non allocatur, for the *writ is judicial.* Next he demanded judgment of the writ, becauſe it is *brought* † *as coſin and heir, and not ſhewn how coſin*, & non allocatur; for though *this ſhall be ſhewn in formedon, yet in ſcire facias the one or the other is ſufficient.* Then he demanded judgment of the writ, becauſe the writ is * *quare deſcendere non debet*, which proves poſſeſſion, and ſo executed, & non allocatur; and again demanded judgment of the writ, becauſe the *fine was ſur conuſance de droit come ceo* que il ad, *&c. habendum* & tenendum *ſibi & heredibus de corpore ſuo*, and therefore by the opinion of the court, this proves it executed, and this goes to the action. And per Finch. an original writ, which wants form, ſhall abate; for it is made in the chancery, and pleadable here; otherwiſe of a *judicial writ as* ſcire facias, for if this *wants form, and hath matter ſufficient, it is good*, and therefore (deſcendere debet) for (executionem habere non debet) is not material. Br. Sci. Fa. pl. 18. cites 41 E. 3. 13.

‖ Br. Sci. Fa. pl. 40. cites 45 E. 3. 18. accordingly. But Brook ſays, quod mirum; becauſe 44 E. 3. fol. 18. it was abated.— But it ſeems by the year book of 44 E. 3. 18. b. that the writ was abated for not alleging ſeiſin of the father, and for other matter;

but as to the miſtake of (deſcendere debet) inſtead of (remanere) it was amended, and nothing here mentioned of quare executionem, &c.—— † S. P. Br. Sci. Fa. pl. 148. cites 38 H. 6. 39. that the writ was abated.

3. Scire facias to execute a *fine levied of one manor, and of two parts of another manor to one for life*, the *reverſion in tail to R. D. of one part*; and *of another part to A. for life, the reverſion in fee to R.* And the *heir of R. brought ſcire facias to execute the tail*, and ſet forth that the tenant for life, on whom this depended, was dead, and alleged A. dead alſo, which was pleaded to the writ, becauſe he alleged the one and the other dead; where he need ſay nothing of *the death of A.* till he demands fee ſimple; & non allocatur, for it is only ſurpluſage And another exception was, that the writ was, that it ought to *revert* to him; *where it ſhould be, that it ought to remain*, becauſe no poſſeſſion was in him before; & non allocatur, becauſe it agrees with the fine. Br. Sci. Fa. pl. 24. cites 43 E. 3. 11.

Br. Nugation, pl. 21. cites S. C.

4. Scire facias upon a fine, *againſt A. and C. of two manors*, (and ſet forth) *that A. entered into the one manor, and C. into the other manor*; and after it was *quod ſint apud Weſtmonaſterium oſtenſuri*, &c. and yet the writ is good; and they *anſwered ſeverally and not jointly*, for the *writ was alſo* quod *ipſi ſeparatim ea tenentes*; *and* it was *quare to the baron and feme plaintiffs remanere non debet, where it was de jure uxoris*, and yet good; for it cannot remain to the one without the other; *contrary in formedon* in deſcender, reverter, *or* writ of *eſch at.* Per Hill. which was not denied. Br. Sci. Fa. pl. 72 cites 11 H. 4. 15.

5. Scire facias to execute a fine, *ſuppoſing* the fine to be levied *to the baron ſur conuſance de droit come ceo, which the baron and feme have of the gift* of the conuſor, *and to the heirs of the baron*, and *ſuppoſing that they are dead*, and now the plaintiff, as coſin and heir to the baron, brought this writ, to execute the fine in fee. Per Norton, if the feme ſurvived, the writ well lies. But Hill denied it.

Per

Per Thorne, if this matter ſhall aid, as I do not think it will, yet it ſhall not come by ſurmiſe, but *ſhall be expreſſed in the writ.* Per Culpeper, the writ cannot lie, becauſe the fine was levied ſur conuſance de droit come ceo, &c. which is always executed, by which it was awarded, that the tenant go ſine die; and ſo ſee that *it is not alleged that the feme ſurvived*, and therefore it ſeems that it is not very clear. Br. Sci. Fa. pl. 77. cites 11 H. 4. 55.

(N. b. 11) Scire facias. *How* the Writ muſt be, *in reſpect of the Fine. Writ varying from* the Fine.

Br. Brief, pl. 148. cites S. C.

1. Scire facias to execute *a fine of lands in C.* according to the fine, the tenant ſaid that *C. is neither a vill nor a hamlet*, and yet becauſe it was according to the fine, the defendant was compelled to anſwer over. Br. Variance, pl. 88. cites 21 E. 3. 14.

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2. Scire facias upon a fine; the fine was *to J. S. & hered' quos ipſe procreavit* de corpore, &c. and the *writ was*, & hered' quos *procrearet*, and yet well by judgment; for all is one and the ſame meaning, quod nota bene. Br. Variance, pl. 91. cites 24. E. 3. 28.

3. In ſcire facias the caſe was, that *W. acknowledged the manor except one acre to be the right of F.* who *rendered the ſame manor as is aforeſaid, to W. in tail*; and *R. as heir of W. ſued execution* by ſcire facias of the manor, (quære, it ſeems that it ſhall be *intended* the ſame manor which was given to F. by the fine; for) per Thorp the *writ is good without exception.* Br. Brief, pl. 139. cites 38 E. 3. 17.

S. P. and becauſe he did not put in the vill, in which the land lay, therefore the writ

4. Though the ſcire facias iſſues out of the record, and therefore, as the books ſay, ought to accord with the fine in all points, yet if the *vill be omitted in the fine*, the *ſcire facias ought to expreſs it*, though by this means the Sci. Fa. varies from the fine. Co. R. on Fines, 12 & 13. cites 38 E. 3. 19.

was abated, quod nota. Br. Variance, pl. 86. cites S. C.——Br. Fines, pl. 44. cites S. C. acc.

Thorp ſaid, he had ſeen, that a *fine* had been

5. *So* it is ſaid in ſome books, that if a fine be levied *in a hamlet*, the *ſci. fa. ought to be* brought *in a vill.* Co. R. on Fines, 13. cites 21 E. 3. 14. 38 E. 3. 19.

levied in a hamlet and the *ſcire facias* had been ſued, *ſuppoſing the tenements to be in the vill in which the hamlet is*, and this challenged for variance from the fine, and the writ was maintainable. Br. Variance, pl. 86. cites 38 E. 3. 19.

6. Scire facias of tenements *in Eſtgrave*, and the fine was of tenements *in Depegrave*, and therefore the writ was abated for the variance. Br. Variance, pl. 16. cites 42 E. 3. 3.

Weſt's Symb. ſ. 179. cites S. C.

7. A fine executory was levied of a *ſeigniory*; and then *land eſcheated to the ſeigniory*, or the tenant was forejudged, &c. the conuſee ſhall have ſci. fa. *of the land inſtead of the ſervices.* Br. Fines, pl. 99. cites 48 E. 3. 11.

8. Scire facias upon a fine *to have execution of a manor and hundred*, the tenant demanded judgment of the writ, becauſe the *hundred is parcel of the manor*, and ſo he demands one thing twice, & non allocatur; for he cannot vary from the fine, and therefore the writ is good by award; contrary upon a recovery; for if the writ be not good, he may have a new ſuit, but not a new fine as here, and ſo note the difference. But quære if a hundred may be parcel of a manor. Br. Sci. fa. pl. 7. cites 27 H. 6. 2.

S. P. Br. Fines. pl 8. cites 27 H. 8. 2. but it ſhould be 27 H. 6. 2. —Br. Brief, pl. 20. cites S. C.—Br. Variance, pl. 84. cites S. C.——*So of manor and advowſon*, where the advowſon is *appendant*, or of manor *and three acres*, where the three acres are *parcel*. Br. Scire facias, pl. 147. cites 36 H. 6. 16.——Br. Variance, pl. 58. cites S. C.——And he, who is party or privy to the fine, or comes in under it, ſhall be concluded. Br. Brief, pl. 242. cites 36 H. 6. 16, 17.

9. In ſcire facias upon a fine, if the defendant be *made a knight meſne between the fine and the ſcire facias*, he ſhall be named knight, per Cur Br. Variance, pl. 98. cites 5 E. 4. 5.

10. Scire facias out of a recovery *of a manor to have execution in A. and B.* the tenant demanded judgment of the writ; for the *manor extends into A. B. and C.* Per Brian, this is no plea; for it ought to agree with the recovery or fine, whence it iſſues. Br. Brief, pl. 315. cites 4 H. 7. 7.

11. Scire facias was brought upon a *fine*, by which A. *gave land to B. for life, remainder* to himſelf *in tail*, where it ſhould be *reverter*, and the writ was *remanere debet* according to the fine; and it was held by all the juſtices, that the *writ ought to be revertere debet*, as the fine ought to have been, and not remanere according to the fine; becauſe, though in fact the fine was remanere, yet *in law it is a reverſion*, and ſo the *writ ought to accord to the form of the law and not to the form of the fine.* For in many caſes the writ ought to vary from the words of the fine. Dal. 29. pl. 4. Paſch. 3 Eliz.

The caſe was, *B. rendered to A. in tail*, and for default of iſſue *remanere to B.* the conuſee *& hæreditus ſuis in perpetuum quiet. de aliis hæreditus* dicti *B.* &c. See D. 199. a. pl. 55. Paſch. 3 Eliz. Gate v. Gate. S. C.——Becauſe the ſcire facias iſſues out of the record of the fine, it is therefore ſaid in the books, that it *ought to agree with the fine in all points.* Co. R. on Fines, 12. cites 4 H. 7. 7.

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12. *So*, where a *remainder is limited to a feme ſole, who takes baron* the ſcire facias ſhall be *remanere, &c. to the baron and his wife.* Dal. 29. in pl. 4. 3 Eliz.

Br. Scire Facias, pl. 72. S. P. cites 11 H. 4. 15. For that it cannot remain to the one without the other.——Br. Scire facias, pl. 88. cites 38 E. 3. 16. that in caſe of a *reverter* to feme covert it is good to ſay, revertere debet to the baron and feme; for that it cannot revert to the one without the other. But that it is ſaid contra there of a remainder; but Brooke makes a quære of the remainder.

13. *So* where a fine is levied to the baron and his wife, and *in the fine the name of the feme is put before the name of the baron*; yet in the ſcire facias the name of the baron ſhall be put firſt. Dal. 29. in pl. 4.

14. *So* where a fine was levied *to A. for life, remainder to a monk, remainder to B. in fee*, or in tail. B. ſhall have ſcire facias *without mentioning the monk*; becauſe he is no perſon in law. cited to have been adjudged. Dal. 29. in pl. 4.

(N. b. 12) Scire facias *awarded in B. R.* in what Caſes.

1. Note, that the *chancellor delivered a fine levied* of land *in C. B. to the juſtices of B. R.* by which the party brought ſcire facias in B. R. to execute the fine levied in C. B. and the defendant pleaded to the juriſdiction the ſtatute of magna charta, quod communia placita non ſequantur curiam noſtram, &c. and yet Hank. ſaid that becauſe the record was there, they would hold plea thereof, *though it does not come there by certiorari nor mittimus*; quod mirum inde mihi. Br. Juriſdiction, pl. 84. cites 5 H. 5. 1.

2. If a *fine* be *removed into B. R. for error*, and after it is *affirmed*, the *juſtices may award ſcire facias of execution*; for it ſhall not be remanded, and ſo that, which at firſt was not within their juriſdiction, ſhall be now within their power, and yet if the fine had been levied there it had been error. Br. Juriſdiction, pl. 77. cites 18 E. 4. 6.

(N. b. 13) Scire facias. Bar. What is a *Bar to the Execution* of a Fine by Scire facias.

1. Scire facias to execute a *fine levied to J. for life*, the *remainder to B. in tail*, and *J. is dead*; and the plaintiff as *heir to B. brought the action*, the tenant pleaded the confirmation of B. father to the plaintiff with warranty for term of the tenant's life, and aſſets deſcended, judgment if execution; and admitted a good bar, and ſo ſee that *confirmation with warranty and aſſets of the tenant in tail is a bar*; contrary without warranty. Br. Scire facias, pl. 23. cites 43 E. 3. 9.

2. In ſcire facias upon a fine, the *tenant pleaded jointenancy to part, and nontenure to the reſt*, and *ſhewed who was thereof tenant* as he ought; the plaintiff prayed execution of this parcel at his peril, and could not have it; by which he *maintained the writ, that ſole tenant as the writ ſuppoſes, abſque hoc that the other any thing has*, priſt, &c. Br. Nontenure, pl. 12. cites 11 H. 4. 16.

3. Scire facias upon a fine, the tenant *pleaded that R. brought formedon in reverter againſt W.* 22 E. 3. *and recovered and had execution*, and ſet forth all in certain, *and after enfeoffed F. who enfeoffed the tenant*, and the *fine* * *meſne between the gift and the recovery of the execution of it*; judgment if you ought to have execution; and the plaintiff ſaid nothing to it, therefore it ſeems a good bar. Br. Fines, pl. 53. cites 8 H. 6. 28.

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* *Orig.* (meſne.)

4. In ſcire facias the defendant demanded judgment of the fine, for *it was levied of ſeveral manors, and in divers counties, and the perclose was unde placitum conventionis ſum. fuit inter eos*, where it ſhould be *placita convention.* Per Brian, the fine is good; for there

is

is no other form, and alſo it is good for the manor in the county, where the writ is brought, though it was not good for the other lands, by which he was awarded to anſwer. Br. Fines, pl. 58. cites 15 E. 4. 33.

(N. b. 14) Scire Facias. *New Writ.* In what Caſes there muſt be a new Writ.

1. Fine is ſent into bank by *mittimus*, *at the ſuit of R. S.* commanding them, *that they proceed to execution of the fine at the proſecution of the ſaid R. S.* and he brought ſcire facias, and *died*; and the *heir prayed another ſcire facias*; and ſome held that they could not proceed without another writ, commanding them to proceed at the proſecution of the heir, and ſo the heir ought to ſue a new writ. Per Choke, the heir may have ſcire facias by the firſt removal, for *he is privy to R. S. his father* who brought it; contrary of him in remainder, for he is a ſtranger. And Trin. 21 E. 4. it was done according to the opinion of Choke, and the like H. 15 E. 3. where the heir had a writ commanding the juſtices to proceed, and 16 E. 3. it is ſaid, he ſhall ſue a writ to bring in *another tranſcript of the fine*. Br. Sci. fa. pl. 184. cites 11 E. 4. 13.

2. *And if a fine comes* into bank *at the ſuit of two, who ſued ſcire facias*, and after the *one dies*, the other ſhall have ſcire facias by force of the firſt mittimus, without ſuing a new writ. Br. Sci. fa. pl. 184. cites 11 E. 4. 13.

3. *And by* Littleton, if *divers perſons come as heirs* to R. S. and pray a ſcire facias, the court will not grant it without ſuing *ſeveral writs* to the bank, commanding them to make execution. Br. Sci. fa. pl. 184. cites 11 E. 4. 13.

4. If a fine is levied with *remainder over, and, after death of the tenant, a ſtranger abates*, and he in *remainder recovers by ſci. fa.* and after the *recovery is reverſed for error*. Now he ſhall have a new ſci. fa. or his heir, though it was once executed; for the cauſe now ceaſes. D. 60. b. pl. 23. Paſch. 36 & 37 H. 8. B. R. in Trewinniard's caſe.

(N. b. 15) Scire facias. *Abatement* by what, and How.

1. Scire facias upon a fine levied *to baron and feme, and to the heirs which the baron ſhould beget of the body of the feme*; the heir brought the writ, and *made himſelf heir to the baron of the body of the feme begotten*; and becauſe he *did not make himſelf heir to both*, therefore the writ was abated; quod nota. Br. Sci. fa. pl. 103. cites 21 E. 3. 43.

2. Scire facias upon a fine *againſt three, by ſeveral demands of a manor*, &c. *that J. M. into the aforeſaid manor, cum pertinentiis, except two carves* of land, *and J. L. into one carve* of land *without* the words

words (*cum pertinentiis*) and *M. P. into one carve of land, cum pertinentiis, which are parcels of the manor aforesaid entered*; and exception was taken, because that the *one carve had not (cum pertinentiis)* and yet Wilby awarded the writ good; because that after the *manor was* put *(cum pertinentiis)* which *goes to all.* Thorp said, that never
[369] was such a writ before now awarded, nor ever will be again; and the fine *was levied by A. C. to W. of B. for his life*, the *remainder to R. in tail*, and *if he die without issue, living P. of B. then* the remainder *to P. of B. in fee*; and the writ was ac jam *ex* * *insinuatione T. son and heir of the aforesaid P. of B. accepimus that the aforesaid W. and P. died, and that the aforesaid R. died without heir of his body*, &c. *and the aforesaid Peter surviving, and that I*, &c. *entered as above.* Defendant prayed judgment of the writ; for where it is *that the aforesaid W. and P. died*, &c. it ought to be that the aforesaid W. and R. died without heirs of their bodies, &c. P. surviving, and P. died, &c. Per Grene, all is of one effect, by which he awarded the writ good. And held there that scire facias against three severally in itself and the perclose of the summons joint is good; quod nota. Br. Brief, pl. 194. cites 24 E. 3. 23. † 37, 38.

* But it seems that at first, the writ was (ex insunatione) instead of insinuatione, and therefore it abated. See 24 E. 3. 22. a. pl. 10.

† This fol. 37. should be omitted, this case being only at fol. 23. pl. 1. & 38. pl. 13.

3. Scire facias to execute a fine *by two*, the *one was summoned and severed*, and the tenant *pleaded the death of him who was severed*, and *did not say, if he died before the severance or after*, and the writ was awarded good, by reason of the severance. Br. Brief, pl. 55. cites 42 E. 3. 8.

4. Scire facias to execute a fine levied *to A. for life*, remainder *to B. father of the plaintiff in tail*, and that *A. is dead*, and the *defendant* had entred, &c. the *defendant said that B. father of the plaintiff confirmed his estate for* term of his *life with warranty, and that the plaintiff has assets by descent*, and it was held a good bar. Br. Barre, pl. 12. cites 43 E. 3. 9.

5. Scire facias upon *fine levied of the manor of D.* to have execution *of* 12 *acres parcell of the manor in D.* and the tenant pleaded to the writ; because it *was not brought in a vill*; & non allocatur, inasmuch as it is parcell of the manor of D. and manor is sufficient without vill. Br. Brief, pl. 470. cites 43 E. 3. 9.

6. Scire facias upon fine against B. because *H. acknowledged* 100 *l. of land in D. to be the right of B. come ceo, &c.* for which *B. granted and rendred again to H. and the heirs of his body*, and that the tenant entered into parcel of the tenements, and the plaintiff sued execution as heir of H. in tail; Belknap prayed *judgment of the writ*, because *no mention is made of the value of the land in demand*; for if it was of a carve of the land, the writ shall be, that the tenant entered into the 3*d* part, 4*th* part, &c. & non allocatur; quod mirum inde. Br. Sci. fa. pl. 204. cites 43 E. 3. 27.

Br. Sci. fa. pl. 34. cites S. C.

7. If a fine be levied *of the land which A. holds for his life, and of land which W. holds for his life*, and *which after their deaths ought to revert to the conusor, the remainder to the conusee and his heirs*, and the *conusee brings scire facias* against the several tenants of those lands *supposing that A. and W.* tenants for life *are dead*; there *it is a good plea for the one to say, that A. who is supposed to be dead is alive*, judgment

judgment of the writ for this parcell; but by this all the writ ſhall not abate, quod nota. And ſo ſee that writ may abate in parcell. Br. Brief, pl. 70. cites 44 E. 3. 39.

8. Scire facias to execute a fine, the *writ was*, in the premiſſes, *cum quidam finis levaſſet* (but cum pertinentiis was wanting) and in the *render* it *was* manerium *cum pertinentiis*, and this was pleaded to the writ, & non allocatur; therefore the tenant *ſaid, that E. who is ſuppoſed to be dead without iſſue, had iſſue* * *W. who ſurvived him, and prayed judgment of the writ*, & non allocatur; *contrary* of ſuch omiſſion *in writ of formedon*; note the difference. Br. Sci. fa. pl. 35. cites 44 E. 3. 40.

* Br. Omiſſion, pl. 3. cites S. C.

9. Scire facias upon a fine, per Philippum D. & Johannam his wife, &c quare prefatæ Johannæ uxori dicti Philippi revertere non debet; becauſe *Philippi was razed in the original*, the writ was abated. Br. Sci. fa. pl. 39. cites 45 E. 3. 18.

10. In ſcire facias upon a fine, *one is received by the default of the tenant, and pleaded a gift in tail by the anceſtor of the plaintiff* by deed with warranty, *judgment if againſt deed with warranty, &c.* and the other *demurred, becauſe* the *leaſe to the tenant for life is a diſcontinuance of the tail*; for *he is received by reverſion in fee, and pleaded in bar by eſtate tail*, and yet well, per Cur. becauſe it was by way of *rebutter*; *contrary*, if it was *by way of voucher*; for there the vouchee warrants only the eſtate tail. Br. Sci. fa. pl. 206. cites 45 E. 3. 18.

Br. Barre, pl. 13. cites S. C.

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11. Scire facias upon a fine *by the heir of him in the remainder*; the tenant ſaid that the fine was *levied to H. for life*, the *remainder to the father and mother of the plaintiff in tail*, and that the *mother* of the plaintiff, *after the death of the tenant for life, entered* into the land *and was ſeiſed* by force of the fine, *judgment of the writ*; and admitted a good plea to the writ; quære, if it be not to the action of the writ, and the other ſaid, that H. infeoffed his mother, and prayed execution. And per Perſey, Kirton and Clopton, *this is a ſurrender*, and ſo ſeiſed by force of the fine; and if the ſaid H. the tenant for life had charged, and infeoffed him in remainder, yet he ſhall hold charged for life of the tenant for life and not after, and yet Belknap awarded the writ good; quod mirum! Br. Sci. fa. pl. 53. cites 50 E. 3. 6.

12. In ſcire facias upon a fine *as coſin and heir* the writ was general, and *did not ſhew the coſinage, but in the count*, and good; for it is a *writ judicial*; *contra in writ original*, as formedon, &c. Br. Brief, pl. 518. cites 8 H. 4. 22.

13. Scire facias upon a fine *againſt three, who, as to one parcel, ſaid that they had nothing but for term of years of the leaſe of J. N.* judgment of writ; *and another anſwer for the reſt.* Paſton ſaid as to the parcel of which they have pleaded *ſpecial non-tenure*, viz. the leaſe for years only, that the defendants are tenants in common, Priſt, &c. and ſo it ſeems the ſpecial non-tenure is a *good plea* in ſcire facias; *but* it is ſaid elſewhere that *general non-tenure is no* plea, *but there the plaintiff may have execution at his peril.* Br. Sci. fa. pl. 108. cites 7 H. 6. 25.

Br. Sci. fa. pl. 107. cites 7 H. 6. 16.— Ibid. pl. 110. cites 8 H. 6. 32. S. P.

14. In ſcire facias the defendant *pleaded to the writ*, becauſe it was

was *of land and rent, & quod terram tenet & redditum deforceat*, and ſaid, *that the defendant is pernour of the rent, and* therefore it *ought to be redditum tenet*; but *where he is ter-tenant, it ſhall be redditum deforceat.* Babb. Ch. J. ſaid, where there is lord meſne and tenant, the meſne is called pernour of the rent, and in aſſiſe of rent the pleading is, that the defendant anſwer as pernour of the rent, and where there is deforceant it is that ſuch a one deforc. dict. &c. and therefore ruled him to anſwer, quod nota, and ſo the writ good. Br. Brief, pl. 171. cites 8 H. 6. 27.

15. Scire facias upon fine *of rent levied to one in tail, the remainder in fee to the plaintiff*, and that the *tail is extinct*, &c. Markham ſaid, that thoſe who were *parties to the fine had nothing in the rent* at the time, Priſt, & non allocatur; wherefore he ſaid *that one A. was ſeiſed of the land, whereof, &c. diſcharged and infeoffed him, without* that, that *thoſe who were parties to the fine had nothing.* Br. Sci. fa. pl. 113. cites 19 H. 6. 59.

16. A man brought ſcire facias to execute a fine *as coſin and heir*, and *did not ſhew that the anceſtor is dead*; and yet good; for it ſhall be *intended*; for he is not heir in the life of the anceſtor, therefore this word heir intends that the anceſtor is dead. Br. Brief, pl. 497. cites 33 H. 6. 54.

17. Scire facias upon a fine *of the manor of C. and two houſes and 20 acres of land*, and becauſe *it is not ſhewn in what vill the houſes and land lie*, therefore the writ was abated; *contra if* it had been *of one manor only*; for a manor may be out of any vill, and known by the name of a manor; quod nota. Br. Brief, pl. 383. cites 19 E. 4. 9.

[371] (N. b. 16) Fines. Of the *Ingroſſing, Inrolling and Tabling* of Fines and Recoveries; and the further Ordering them.

1. Immediately after the fine is ingroſſed, it ſhall be *ſent into the treaſury.* Co. R. on Fines, 12. cites 17 E. 3.

See (N. b. 14)

2. *And then* when the fine is *ingroſſed and ſent into the treaſury*, he that will have *execution ſued muſt remove it out* of the treaſury *by a certiorari* directed to the treaſurer and chancellor of the exchequer in the chancery, and from the chancery ſend it into C. B. by a *mittimus*, and then out of this the conuſee, or his heirs, or he in remainder (as the caſe is) ſhall ſue execution by *ſcire facias.* Co. R. on Fines, 12.

Note that *before this ſtatute* the *cuſtos brevium* had not any record of the fine, but the

3. 5 H. 4. 14. enacts, that *all writs of covenant, and all other writs whereupon fines ſhall be levied with the writs of* dedimus poteſtatem, *with all knowledges and notes of the ſame before they be drawn out of the common bench by the chyrographer ſhall be inrolled of record, to remain in cuſtody of the chief clerk of the common bench for the old fee of* 22d. *for entring of the concord.*

chirographer, and nothing remained with the *Ch. J.* of the common bench, but the *licence* to accord. Trin. 34 Eliz. B. R. 5 Rep. 39. b. in Tey's caſe.

The

The *cuſtom is* to direct *one writ* of error *to the Ch. J. of the bank, another to the cuſtos brevium* to certify a *tranſcript pedis finis*, and another *to the chirographer* to certify *tranſcriptum notæ* finis. And note theſe words are added in the writ to the cuſtos brevium, cum omnibus eundem finem tangen. by force of which words he certifies the original writ. 5 Rep. 39. b. Trin. 34 Eliz. B. R. in Tey's caſe.

Before this ſtatute 5 H. 4. 14. the *cuſtos brevium had nothing to do* with fines; but it is given by the ſaid ſtatute, *that the chief clerk of C. B.* who is the cuſtos brevium, *ſhall keep a record*, viz the note *of the fine*, or fine: *and* if the notes in the cuſtody of the chirographer, or the notes of the fines are imbezzelled, &c. that a man ſhall have *recourſe to the ſaid roll to have execution*, &c. Upon which it appears clearly that the record remains with the chirographer, [and] if it be not imbezzelled, it is ſufficient whereof execution may be ſued. Co. R. on Fines 12.

4. 23 *Eliz.* 3. § 1. enacts, that *fines and recoveries, and all matters concerning them, now extant and in being, may be enrolled, which inrollment ſhall be of as great validity as the ſame ſo extant and remaining in being.*

§ 6. That *there ſhall be an office of the inrollment of writs for fines and recoveries, and one of the juſtices of the Common Pleas (other than the Chief Juſtice) ſhall have the care thereof.*

And aſcertains *the fees for inrollment of fines and recoveries.*

And directs *the juſtices to aſſeſs fines for miſpriſion, contempt, negligence.*

§ 7. That *a table, containing the content of every fine, ſhall be ſet up in the Common Pleas, and at every aſſiſes.*

And aſcertains, *the chirographer's fee for writing the content of the fine.*

§ 9. *The record ſhall not be carried forth of the office.*

5. A fine is *ſaid to be ingroſſed, when the chirographer makes the indentures* of the fine, *and delivers them to the party*, to whom the conuſance was made. 5 Rep. 39. b. in Tey's caſe. Co. R. on Fines, 3.

6. A *fine was double*, viz. *ſur cognizance de droit come ceo, &c.* and *ſur conceſſit*, in one and the ſame concord, and therefore the chirographer refuſed to make out the indentures. It was urged for the paſſing the fine that a fine is a real agreement and ought to be conſidered as a conveyance, and that the party at his peril may have it in what manner he pleaſes; but per Cur. ſuch double fine is unprecedented; and after on agreement of the counſel to ſtrike out the conceſſit part of the fine, it was ruled, that it paſs as a fine ſur conuſance de droit come ceo, &c. Barnes's Notes of Caſes in C. B. 144. Paſch. 8 Geo. 2. Lazenby v. Knight.

(N. b. 17) Of the *Certiorari* and *Mittimus* to remove Fines. [372]

1. Scire facias upon a fine which came out of chancery into bank by mittimus, which *mittimus makes no mention, that the fine came there at the ſuit of the plaintiff*; and this notwithſtanding, becauſe the fine is * *brought in*, the opinion was, that it is good; and ſo ſee that *the bank awarded the ſcire facias and execution, and not the chancery.* Br. Sci. fa. pl. 33. cites 44 E. 3. 18. * *Orig.* (ciens).

2. In a ſcire facias in B. R. to execute a fine levied in C. B. the tenant took *exception, that certiorari was ſued, but no mittimus* to ſend it *But* Br. Sci. fa. pl. 203. cites 9 E. 4.

15. Contra. That if the chancellor of England write to the treasury for it into this court, and the execution of this record belongs to C. B. But Hank. said, that *the chancellor himself delivered it* to him, which countervailed mittimus, and so ruled defendant to answer, quod nota. Br. Cause de Remover, pl. 15. cites 5 H. 5. 1.

a fine by certiorari, and it comes into chancery, and the *chancellor brings it in his hand into C. B.* yet the justices there shall not execute it; for it *must come by mittimus.*

3. Where *scire facias* issues *upon transcript of a fine* sent into C. B. by mittimus, *if no roll be made of it*, it is ill by the best opinion. Br. Brief, pl. 412. cites 11 H. 6. 43.

S. P. they make no other mention but 4. Neither the mittimus nor the certiorari to the chamberlaine do make any *mention if the fine be ingrossed* or not. Br. Scire facias, pl. 115. cites 22 H. 6. 13.

cuni quidam finis levasset; though the fine be levied in one term, and engrossed in another. Br. Fines, pl. 56. cites S. C. per Browne.

5. A certiorari with a mittimus to remove a fine *bearing date before the fine comes into chancery*, is good enough. West's Symb. § 193. cites 1 R. 3. 4.

(N. b. 18) *Exemplification* of Fines.

1. When any of the parts of a fine are inrolled according to the statute 23 *Eliz.* 3. then may the same be exemplified either *under the seal of the office*, or under *the great seal of England.* But to exemplify such a fine under the great seal, hath this discommodity, that if any *errors appear in the record* of the same fine, they *are not amendable after the exemplification* thereof. West's Symb. § 175.

2. *But* it seems that this *extends only to fines levied before the same statute.* West. Symb. § 175.

3. And he says, that these inrolments and exemplifications seem very necessary, because of the privity and warrant of the said court, many errors happening in the former records thereof, may be amended, and these inrolments will suffice, if the *former record or any part* thereof *be embezzelled or otherwise defaced.* Ibid.

(N. b. 19) Pleadings. *Variance* between the Fine and the Writ on which the Count, or Pleadings are.

1. Fine was levied, by which *J. and Alice acknowledged their right to K. as that which W. and K. his feme* had of his gift, and
[373] *W. and K. rendered to J. and A. for life rendering* one mark a year *to K. and the heirs of her body, begotten by W. her baron*, the *remainder to K. and her heirs aforesaid*; the demandant *sued execution as heir to W. and K.* where he ought to have been made heir to K. only; for W. is not named, but to shew what heirs of K. shall inherit,

herit, and therefore the writ was abated. Br. Sci. fa. pl. 20. cites 41 E. 3. 24.

2. Error was aſſigned, where a fine was *levied of the manor, except* 10*l. rent to one who rendered again* to conuſor *for life, remainder over in tail*, and he in *remainder brought ſcire facias to execute the fine, and rehearſed how the fine was levied of the manor, except* 10*l. rent*, &c. and now, *ex inſinuatione*, &c. *accipimus, quod A. & B. duas partes manerii prædicti ingreſſi ſunt, without making mention of the exception, and execution was awarded of the two parts of the manor, without mentioning of the exception, and* therefore error. Br. Error, pl. 27. cites 47 E. 3. 7.

3. *Alſo* it was *quare executionem of two parts of the manor habere non debet without mention of the exception*, and therefore error ut ſupra. Ibid.

4. *And* aſſigned error in the *return*, which *was* quod *ſcire feci*, &c. *eſſendum apud Weſtm. ſecundum tenorem hujus brevis*, and *ſays not ad faciendum quod iſtud breve requirit*, &c. Ibid.

5. *And to parcel, the defendant ſaid that he had nothing now, nor the day of the writ purchaſed*, &c. and it was permitted. And ſo ſee *nontenure* in error, and this *by him who was named as tenant.* But Brook ſays it ſeems that it *is no plea for the heir*; for it lies againſt the heir, be he tenant or not; and per Perſey where there is one *error in law in a record, and another error in fact*; there they may reverſe the judgment as to the error in law, and take averment of the reſt, quod non negatur; and therefore it ſeems that record may be reverſed in part, and good for the reſt; and this ſeems to be *where the record is ſeveral in itſelf*, as where a man pleads *ſeveral pleas to ſeveral parcels*, and otherwiſe not. Ibid.

6. In waſte, ſuppoſing that he had the reverſion of the aſſignment of J. S. who had it of the aſſignment of W. and ſhewed a fine of the 1ſt aſſignment, which would that *W. and R. granted the reverſion*; and deed of the 2d aſſignment; the *defendant pleaded to the writ for the variance*; and the plaintiff *averred that R. never had any thing*; and it was not received contrary to the fine; for as the ſaid J. S. is bound by the fine, ſo ſhall the plaintiff who claims by him; and ſee that the defendant, who is a ſtranger to the fine, pleaded this to the writ upon the ſhewing of the plaintiff; but note that it was but as a variance, and by demurrer, and not by pleading, as by way of eſtoppel. Br. Fines, pl. 37. cites 11 H. 4. 1.

(N. b. 20) *Execution.* At what *Time* it may be.

1. A. brought a ſci. fa. and *had execution* of the fine, *and made a feoffment upon condition to B.* and after *re-entered for the condition broken*; after which the *tenant in the ſci. fa. reverſed the judgment by writ of diſceit* it being found upon examination, that he was *not warned.* And upon arguing whether ſuch ſeiſin and execution and feoffment conditional, reverſed by entry, be a diſcharge of execution, iſſue was taken, if the feoffment was in fee ſimpliciter, or upon condi-

tion; quod nota. And hence it follows, that though he had made feoffment, and the *judgment* had been *reverſed before the re-entry*, it *ſhould* be a *bar and diſcharge* of *the execution for ever*. *But by* his *re-entry* for the condition broken *before the reverſal of the judgment*, ſo that the feoffment is avoided, *the reverſal* of the judgment *revives the execution, ſo as it may be ſued again*. Quod nota. Br. Scire facias, pl. 88. cites 38 E. 3. 16.

It is a record, though not engroſſed,

2. A fine executory, may be executed *before that the fine be engroſſed*; before the indentures of the fine made and delivered to the parties. Co. R. on Fines, 12.

and when the court is ſeiſed of the fine, it has ſufficient warrant to award ſcire facias. Br. Fines, pl. 56. cites 22 H. 6. 13.——And diverſe fines have been executed, which never were engroſſed. Br. Scire facias, pl. 115. cites 22 H. 6. 13.

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(O. b) Equity and Defects ſupplied.

1. SUCH *aſſurances* as are uſed *for the common repoſe of men's eſtates*, the chancery will not draw in queſtion; for a fine with proclamation ought, after the 5 years, to be a bar in conſcience, as it is in law; ſo ſhall it be of a common recovery for docking the intail. Cary's Rep. 6. cites Doctor & Stud. 33. 155.

2. A fine and recovery *got by circumvention*, the party who got it may be *compelled* in equity, *to recompence the party circumvented*; as the Maſter of the Rolls was of opinion, at the hearing of the cauſe. 1 May 1595. Toth. 164. Welby v. Welby.

3. The plaintiff (being *ſimple*) was drawn in to levy a fine of his lands, yet ordered that the lands ſhould be *re-aſſured*, if the defendant did not pay a valuable conſideration; or if he failed of payment thereof, then the ſaid lands ſhould be re-aſſured. 3 Jac. li. B. fo. 508. Toth. 166. Wright v. Booth.

4. Becauſe a fine was *not levied according to covenant*, a power became void to make leaſes; but decreed in May 13 Car. Toth. 166. Scambler v. ——.

5. *Tenant in tail*, upon marriage, covenants to levy a fine for further aſſurance of land which he had ſettled, and of which he had covenanted that he was ſeiſed in fee. He *acknowledged a fine, but died before it was perfected*. Equity will not ſupply this defect againſt the iſſue in tail. The defendant's title being per formam doni. Tr. 1686. 2 Vern. 3. Wharton v. Wharton.

2 Vern. R. 56. Paſch. 1688. S. C. cited in the caſe of Baden v. E. Pembroke.——Mich. 1682. 1 Vern. R. 93. S. P.

6. Fines *purſuant to a decree*, ſhall *operate* no farther than the decree intended they ſhould. Paſch. 16 Car. 2. Chan. Caſes, 49. Goodrick v. Brown.

Mich. 27 Car. 2. Ch. Caſes 268. Clifford v. Aſbley.——Hill. 1682. Vern. 148. Bovey v. Smith.——6 Car. 1. fo. 644. Chan. R. 51. E. of Newcaſtle v. E. of Suffolk.

7. Fine or recovery of a *ceſty que truſt* ſhall *bar* and *transfer* the truſt, as it ſhould an eſtate at law, if it were on a conſideration. Ch. Caſes 49.

8. A

8. A fine *fraudulently obtained*, and much razed to make it correspond, is not relievable in chancery; and were it examinable here, it would be a great weakening of fines, and can only be *examined here* to punish the party criminaliter that did it, and in * GELLYBRAND's case, where one was *personated*, yet the fine was not set aside but a re-conveyance ordered per Ld. Wright, who dismissed the bill. It was argued that the examination, as of a judgment irregularly entred, or obtained at law, is proper only for the examination of that court, where the fine was levied, or judgment entred. Hill. 1700. Ch. Prec. 150. ‡ Clark v. Ward.

* S. C. cited Roll. R. 115. Mich. 12 Jac. in the Star-Chamber, in case of Day v. Hungate.— ‡ See (G. b) S. C. cited in the case of Lord Say & Seale.

9. On a bill brought to have a fine set aside, or to have a reconveyance, it was held by the court, that though *chancery has a power* to relieve as much against a fine obtained by fraud or practice, as any other kind of conveyance; yet that such relief was *not by decreeing a vacate of the fine, but by ordering a reconveyance*; but that, for any error in the fine, or irregularity, or ill practice in the commissioners; it was a matter properly cognizable in that court where the fine was levied, and for which that court may vacate the fine; and there being no proof of fraud or practice in this case, the bill was dismissed. Hill. 1700. Abr. Equ. Cases, 259. St. John v. Turner.

10. The *intention of marriage articles*, for a settlement to be made afterwards, will be so considered in equity, that if a fine be levied to different uses, the court of chancery will set a fine aside. [375] 10 Mod. 436. Trin. 5 Geo. In chancery. Trevor v. Trevor.

11. Whether a fine and non-claim can *skreen a fraudulent purchase?* and whether the *conusor* shall not be *deemed a trustee?* quære. For this was compounded. MS. Rep. said to be Ld. Harcourt's, tit. Fines. 6 March 1724. Martin v. Martin.

First-Fruits and Tenths.

(A) Original thereof; and Statutes relating thereto.

1. NOTE, annates, primitiæ, and first-fruits, are all one; it was the value of every spiritual living by the year, which the pope, claiming the disposition of all ecclesiastical livings within christendom, reserved out of every living. Mich. 5 Jac. 12 Rep. 44.

2. Decimæ, id est, the tenths of spiritualties, were perpetual, which in ancient times were paid to the pope, until Pope Urban gave them to R. 2. to aid him against Charles, king of France, and others who supported Clement the 7th against him. 12 Rep. 45.

By the 26 H. 8. 3. First-fruits are due *upon institution*, and *before induction:* and the profits of the vacation are given by the 28 H. 8. 11. for the payment of them. And even in the case of the king's presentee, or an usurper to a benefice of his gift, though the church is not so filled by institution, but that the king may present another any time before induction; yet, as the church in such cases is full to other purposes, such clerk is intitled to the profits of the vacation, and chargeable with the payment of first-fruits, even though the king should present another before his induction. Watf. Comp Inc. 8vo. 754.

3. By 26 *H.* 8. *cap.* 3. § (2.) *The first-fruits and profits for one year, of all spiritual livings are granted to the K. to be paid or secured before actual possession of the benefice.*

§ 3. *Commissioners are to enquire into the value of the benefices and compound for the first-fruits and the money taken for the same to be delivered to the treasurer of the chamber.*

§ 4. *Whose acquittance shall be a sufficient discharge for the same. And bonds given for payment thereof, shall be of the same force with statutes staple.*

§ 5. *And persons entring upon benefices before composition made, shall forfeit double the value of the first-fruits.*

§ 6. *And first-fruits payable to other persons, shall cease and be paid to the king.*

§ 7. *Provided that bishops may institute and induct as before this act.*

§ 9. *A rent or* * *pension to the value of the tenth part of every benefice shall be paid to the king annually at Christmas.*

* It was held per Cur. that all pensions reserved by the king, or granted to him out of lands, are in nature of rents, and triable in the exchequer, and liable to be extinguished by unity of possession; but such as are reserved to the king, or vested in him by this statute, are of another nature, and collateral to the land, and not lost by unity, no more than proxies. Hard. 388. Mich. 16 Car. 2. in the exchequer. Bishop of Ely v. College of Clarehall in Cambridge.

§ 10. *The value of each benefice to be inquired of, and certified by the commissioners.*

§ 11. *Who are to be upon oath.*

§ 12. *Spiritual persons shall be charged for their tenths in their dioceses, where they are, though their possessions lie in other dioceses.*

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§ 13. *And bishops to be charged with the collection of them in their proper dioceses.*

§ 14. *And process to be awarded against them for payment thereof.*

§ 15. *Which they are impowered to levy in their dioceses by ecclesiastical censures, distress, or otherwise at their discretion.*

§ 16. *And in the vacation of a bishoprick, the dean and chapter thereof are chargeable in the same manner.*

In ejectment it was found specially, that an apparitor came to *church* to the parson, and there said to him, that he must pay his tenths to such a one; that the parson refused and his default was certified; upon which another person was presented, and the question was, whether the demand was made according to the statute. And all the justices held it was not; for that a *summons to pay* is not a sufficient demand, but it must be an *express demand* to pay. Mo. 541. Mich. 39 & 40 Eliz. Reyner v. Parker,——* It was held that the demand must be *at the house* of the incumbent, and there the refusal must be. Mich. 29 & 30 Eliz. Mo. 915. Q. v. Blanchel.——Sav. 1. pl. 2. Pasch. 22 Eliz. Anon. S. P.

§ 17. *Every incumbent, who, being reasonably demanded, and required at their dignities, &c. or* * *houses, by the bishop or person* ‡ *charged with the collection of the tenths, or by their servants or officers, to pay the same, shall neglect to pay it within* 40 *days after such request, shall, upon* † certificate *of such default given into the exchequer under the seal of the bishop, &c. be adjudged* ipso ¶ facto *deprived of his benefice, which shall be adjudged* void, to all intents and purposes *as if he were dead.*

‡ It

‡ It was held by all the juſtices, that a demand of tenths, by virtue of the ſtatute, ought to be by one who has authority to receive them; and that an *appariter* has not ſuch an authority. Mo. 541. Mich. 39 & 40 Eliz. Reyner v. Parker.——It was held that the *biſhop muſt authorize one* to demand and receive them. Mo. 915. Q. v. Blanchel.——Cro. E. 80. Mich. 29 & 30 Eliz. In the exchequer. S. C. The Queen v. Blanchet.

† Upon a ſpecial verdict, whereby it appeared a ſufficient demand had not been made according to the ſtatute, all the juſtices held, that though the biſhop had certified a refuſal after a demand duly made, yet the judges are to rely upon the verdict, and not the certificate. Mo. 541. Mich. 39 & 40 Eliz. Reyner v. Parker.——And Popham cites it to have been adjudged ſo in Brooks caſe.——It was held that the certificate of the biſhop of a refuſal to pay tenths is not peremptory, but *traverſable*. Mo. 915. The queen v. Blanchel.——Cro. E. 80. Mich. 29 & 30 Eliz. in the exchequer, S. C.——Bro. Certificate of Biſhop, pl. 31. ſays it was held in time of E. 6. & H. 8 that in ſuch caſe there can be *no averment againſt* the certificate.

A certificate of a refuſal to pay firſt-fruits and tenths was in theſe words, adhibuimus omnimod' diligentiam per ſubcollectores noſtros per totam diœceſim Eborum, & *comperimus* J. C. vicarium de G. *recuſantem ſolvere* ſubſidia vicariæ ſuæ, qui nullo modo metu pœnarum hujuſmodi produci potuiſſet ad ſolutionem ſubſidii prædicti, ſed perſeverans in obſtinationi ſuæ malicia.—Quære, whether by this certificate the vicarage be void or not. Dy. 116. pl. 69. Paſch. 2 & 3 P. & M. The vicar of Gargrave's caſe.

¶ In caſe of an avoidance, by refuſal to pay the tenths, the benefice is void to all intents ipſo facto, as it would by the death of the incumbent. Dy. 237. pl. 29. Paſch. 7 Eliz. Anon.

In a qu. imp. the queſtion was, if a benefice becomes void for non-payment of tenths according to the ſtatute, and the default is certified into the exchequer, whether the ordinary muſt give *notice* thereof to the patron? and it was held by all the juſtices, that he need not; for the certificate is in the exchequer of record, and notorious to every one; and the ſtatute, which makes the avoidance, is a general law, of which all are to take notice; and the certificate is a temporal act, and made to the temporal judges; as where an incumbent is made a biſhop, and not like the caſe of a reſignation or deprivation, which is a ſpiritual act privately done, of which the biſhop himſelf is the judge, and muſt therefore give notice to the patron. Dal. 59. pl. 9. 6 Eliz. Anon.

§ 18. *Biſhops certifying ſuch default ſhall be diſcharged thereof, and proceſs ſhall iſſue againſt the defaultor.*

§ 19. *Acquittances by the treaſurer or commiſſioners ſhall be a full diſcharge.*

§ 20. *Nothing ſhall be taken of the biſhop or his collector for his account or quietus eſt.*

§ 21. *Perſons, which pay penſions to others out of their benefices, may retain the tenth thereof.*

§ 22. *No penſion ſhall be reſerved upon the reſignation of a benefice above the value of a third thereof.*

§ 25. *Perſons, which in one corporation have ſeveral poſſeſſions belonging to them, ſhall only pay for their own poſſeſſions, and not for others.*

§ 27. *No firſt-fruits ſhall be paid for a benefice not above the yearly value of* 8 *marks, unleſs the incumbent lives* 3 *years after induction thereto, and in bonds given by ſuch incumbent for payment of firſt-fruits, there ſhall be inſerted a proviſo to that effect.*

S. 30. *All fees payable by biſhops, &c. for temporal juſtice, ſhall be deducted out of the valuation of their ſeveral dignities.* [377]

4. By 26 *H.* 8. *cap.* 17. *Farmers of ſpiritual perſons ſhall not be charged with firſt-fruits and tenths.*

5. By 27 *H.* 8. *cap.* 8. *ſ.* 1. *Tenths to be allowed on compoſition for firſt fruits.*

S. 4. *Succeſſor may diſtrain the goods of his predeceſſor, if he leaves the tenths unpaid, or ſue in chancery or at common law for them.*

6. 28 *H.* 8. *cap.* 11. *ſ.* 3. *Directs at what time the firſt-fruits ſhall begin to be paid after an avoidance.*

7. 37 H. 8. *cap.* 21. *ſ.* 5. 17 *Car.* 2. *cap.* 3. *ſ.* 3. *Tenths and firſt fruits, how payable for churches united.*

8. By 32 *H.* 8. *cap.* 22. *ſ.* 5. *biſhops are diſcharged as to what they cannot levy.*

S. 7. *Exchequer is impowered to enter any promotion omitted.*

How to be anſwered, where a benefice is not certified.

9. By 2 & 3 *Ed.* 6. *cap.* 20. *ſ.* 3. *incumbent may be deprived only of the benefice for which the tenths are in arrear.*

10. By 7 *Ed.* 6. *cap.* 4 *ſ.* 2. *collectors are to indemnify biſhops.*

S. 4. *The crown may levy the tenths of a vacant benefice on the glebe.*

11. By 2 & 3 *P. & M. cap.* 4. *the aboveſaid ſtatutes are repealed.*

12. By 1 *El. cap.* 4. *ſ.* 26. *Revived again.*

S. 23. *Advowſons of vicarages reſtored to the crown.*

S. 29. *Small livings diſcharged of firſt-fruits.*

S. 30, 31, 32, 33. *What proportions of firſt-fruits an incumbent dying or removing ſhall pay.*

S. 34. *Grants of firſt-fruits to colleges ratified.*

13. If a man be inſtituted to a benefice, he ought to *pay* the firſt-fruits *before induction* by the ſtatute; but *by the common law it was otherwiſe*; for he is not now to have the temporalities till induction, and therefore he could not pay the firſt-fruits. Lane 20. Paſch. 4 Jac. in the exchequer. Anon.

14. A. recovers for the king in quare imp. becauſe the incumbent was preſented by the king, as in right of lapſe, where the king had the very patronage, which was a void preſentation; upon which A. for the king recovers, who was preſented, admitted and inducted; but for the aſſurance of his title, was *inſtituted and inducted again*, but never reſigned; per Walters Ch. B. firſt-fruits in this caſe ſhall not be paid *double*, there being no reſignation. Litt. R. 139. Mich. 4 Car. in the exchequer. Curtis's caſe.

15. 2 *Annæ, cap.* 11. *ſ.* 1. *enabled the queen to incorporate a body politick, and to grant to ſuch corporation the firſt-fruits and tenths of all benefices, for the maintenance of the poor clergy.*

S. 2. *Provided that all ſtatutes for levying the ſame, ſhould continue in force.*

S. 3. *And not to affect any grant of the ſame.*

S. 4. *Enabled perſons to convey lands or goods to the ſaid corporation.*

And the ſaid corporation to purchaſe lands, &c.

S. 5. *But not to extend to enable infants, &c.*

S. 6. *And directs one bond only to be given for the firſt-fruits and tenths, and the ſame to be paid according to former rates.*

16. By 5 *Annæ, cap.* 24. *ſ.* 1. *benefices under* 50 *l. per ann. are diſcharged of firſt-fruits.*

S. 2. *Biſhops to certify the ſeveral livings under* 50 *l. per annum.*

S. 3. *Saving for tenths already aliened.*

S. 4. *All curates and miniſters entitled to this bounty.*

S. 5. *To be taken as a* public act.

S. 6. *Not*

S. 6. *Not to be conſtrued to diminiſh any* ſtipend or penſion *granted and charged on the firſt-fruits.*

* 17. By 6 *Annæ, cap.* 27. *ſ.* 5. *Biſhops are allowed four years to pay their firſt fruits.*

S. 6. *Dignitaries to be uſed as beneficed clergymen.*

18. 1 *Geo.* 1. *cap.* 10. *ſ.* 1. *Biſhops are to certify the improved value of all livings in their dioceſes.*

S. 3. *Orders by the governors of the queen's bounty approved under the ſign manual to be good.*

S. 4. *Churches augmented to be perpetual cures, and the miniſters bodies corporate.*

Impropriators, patrons and rectors and vicars of the mother churches to have no profit by the augmentation.

S. 5. *Parſon of the mother church not to be diveſted of his rights.*

S. 6. *Such augmented cures to lapſe to the biſhop, if not filled in ſix months.*

S. 8. *Agreements made with benefactors to poor livings about the right of patronage ſhall be good.*

S. 9. *Agreements of guardians for infants, &c. good.*

10. *Patron and ordinary's conſent required.*

S. 11. *If any ſuch agreement be made by a perſon ſeiſed in right of his wife, he ſhall be party to the agreement, and ſeal and execute the ſame.*

S. 13. *Exchanges of lands allowed.*

S. 14. *Donatives augmented are to be ſubject to the biſhop.*

S. 16. *Agreements made with a patron, impropriator and parſon of a mother-church for yearly allowances to the miniſter, ſhall be good.*

S. 19. *Governors, &c. impowered to adminiſter oaths.*

S. 20. *Augmentations to be recorded.*

S. 21. *Settlement of any augmentation to be valid after inrolment.*

By 3 *Geo.* 1. *cap.* 10. *ſ.* 1. *biſhops are diſcharged from collecting the tenths.*

S. 2. *A general collector appointed.——Who is to give ſecurity to account truly.——And ſhall keep his office in London.——And perſons not paying him their tenths ſhall forfeit double the value,*

S. 3. *Proceſs to iſſue out of the exchequer againſt perſons in arrear.*

S. 4. *Statutes concerning firſt fruits and tenths, not hereby altered, to remain in force.*

(B) How First Fruits and Tenths were to be received and accounted for before 2 Annæ, 11.

1. BY. the ſtat. of 26 *H.* 8. 3. the revenue of the firſt fruits and tenths of the clergy was granted to the crown, and *the ſeveral biſhops were thereby appointed collectors* thereof, in their reſpective dioceſes. The *auditor was to make up their reſpective accounts*, which were by him tranſmitted into the office of the pipe, according to the courſe of the exchequer, where the biſhop had his quietus

quietus eſt, and where all accountants accountable in the exchequer have their quietus eſt at this day. *But* the auditor *was not* thereby *enjoyned to give the biſhop a duplicate* of his account; and it was needleſs then, becauſe he had his *quietus eſt from the pipe*, without fee or other reward for the ſame.

The ſtatute of 32 *H.* 8. 45. *altered this courſe, and a court of firſt fruits and tenths was erected*, conſiſting of a chancellor, treaſurer, attorney, and two auditors, who were to make up the *accounts of that revenue*, and *being fairly ingroſſed, were to remain in the ſame court* as the king's record, and not tranſmitted into the pipe: but *no quietus eſt or duplicate* of his account *was thereby enjoined* to be made and given to the biſhops.

[379] By the ſtat. of 7 *E.* 6. *c.* 1. the *auditors were enjoined to make* forth and give *duplicates* of their accounts, *at the* reaſonable requeſt and *coſt of the accountant*, wherein the biſhops were included, and accordingly the practice has gone ever ſince the beginning of queen Elizabeth: and I never heard it was diſputed by any, until the archbiſhop of York, when the biſhop of Carliſle was pleaſed to call his duplicate of his account a quietus eſt, and ſo would pay nothing for it.

By an act made, the 1 *Mar. ſeſſ.* 2. *c.* 10. ſhe by her letters patents *diſſolves the ſaid court* of firſt fruits, *and* then *creates a new office and officer*, viz. the remembrancer of the firſt fruits and tenths, who was to take all compoſition and enter all accounts, and to make out all proceſs againſt non-ſolvents and all proceedings therein, to be under the ſurvey of the court of exchequer.

In the 2 *and* 3 *Phil. & Mz.* the *clergy* were *exonerated from payment of* firſt fruits and tenths.

In the 1 *Eliz. c.* 4. the *payment* of firſt fruits and tenths *was reſtored to the crown, and all things concerning the ſame, that remained untaken away* the 8*th of Auguſt* in the 2 *and* 3 *Phil. & Mar. was* then *reſtored and ſettled under the ſurvey* and government *of the exchequer*; but the court of firſt fruits was not revived; for that was diſſolved before the ſaid 8th of Auguſt, and the remembrancer being then eſtabliſhed, continues to this day in every degree, ſort or condition, as it was, at or before the 8th of Auguſt, in the ſaid 2 *and* 3 *Phil. & Mar.* at which time the clergy were exonerated from payment of firſt fruits and tenths.

The *archbiſhop ſent up an account* for the years 1675, 1676 and 1677, which he required the auditor to examine ſtate and paſs, but the ſame was not purſuant to the auditor's truſt, and would be prejudicial to the king, by the loſing to him all arrears owing by the incumbents; for in his ſtate thereof *no arrears of the clergy are continued in charge*, not underſtanding the true nature of thoſe accounts, in that they *relate not barely and ſimply to the biſhop's receipts and payments, but to the whole revenue of the reſpective dioceſes* each incumbent is thereby charged and diſcharged. And if no arrears are continued in charge upon the incumbents, they all, or any of them, *may plead the account*

* *made*

made out in the biſhop's name (when entered on record) in their diſcharge. Raym. 312, 313, 314. Trin. 31 Car. 2. in the exchequer, in caſe of Bambridge v. Bates & al.

Forcible Entry and Detainer.

(A) At Common Law, and now. What is, and where the Writ lies, and for whom.

1. IT ſeemeth that (before the troubleſome reign of K. Richard the 2d) the *common law permitted any perſon (which had good right* or title to enter into any land) to win the poſſeſſion thereof by force if otherwiſe he could not have obtained it. For a man may ſee (in Britton fo. 115.) that a *certain reſpite of time was given to the diſſeiſee*, (according to his diſtance and abſence) in which it was lawful for him to gather force, arms, and his friends to throw the diſſeiſor out of his wrongful poſſeſſion. And at this day, if (in a common action, or indictment of treſpaſs for entering into land) the defendant will make title thereunto; the matter of the force alledged againſt him will reſt altogether upon the validity of his title, as appeareth 7 H. 6. 13. and 40. *But* after the rebellious tumults, and inſurrection of the villains, and other, the baſe commons, which happened the fourth year of the reign of R. 2. the parliament thinking it neceſſary to provide againſt all ſuch occaſions of further ſedition, uproar, and breach of the peace, did ordain among other things Lamb. Eiren. 127.——as follows, viz. Hawk. pl. C. 140. cap. 64. ſ. 1.

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2. 5 *R.* 2. *ſtat.* 1. *cap.* * 8. enacts that, *none ſhall make entry into lands but where entry is given by law, and in ſuch caſe not with ſtrong hand, nor with multitude of people, but only in lawful and eaſy manner. And if any do to the contrary, and thereof be convict; he ſhall be puniſhed by impriſonment, and ranſomed at the king's will.*

* So it is in Cay's Abridgment, but in Raſtall and Keble, it is cap. 7.

3. 8 *H.* 6. 9. *ſ.* 7. enacts, that *thoſe who keep their poſſeſſion by force in any lands, whereof they, or thoſe, whoſe eſtates they claim, have been in poſſeſſion three years, or more, ſhall not be endamaged by this ſtatute.*

4. If ſeveral enter with force *to the uſe of one, who does not enter, and he after agrees* to it; this makes him a diſſeiſor or trepaſſor, but not to be puniſhed for the force; for he cannot make forcible entry, *without an actual entry.* By the beſt opinion. Br. Forcible Entry, pl. 25. cites 2 H. 7. 16. S. P. Lamb. Eiren. 136

5. Forcible entry is, if * *one*, or more perſons, *come weaponed* to a houſe or land, *and violently enter*; or if they there *offer violence* to

* One perſon *alone* may commit a for-

cible entry. Lamb. Eiren. 135.

to any poſſeſſed; or if they forcibly or furiouſly *expel* another out of his poſſeſſion. Lamb. Eiren. 134.

6. If one *enters peaceably*, and when he is *come in, uſeth violence*; this is a forcible entry. Lamb. Eiren. 134.

* It was ſaid, for law in B. R. that if a man *come with more than he had accuſtomed to attend upon him*, that this is a force, which was not denied. Br. Forcible Entry, pl. 30. cites 10 *H.* 7. 12.——S. P. Lamb. Eiren, 135.——‡ S. P. and ſo of *drawing the latch*. Noy. 136. Beade v. Orme.——But ſee pl. 9. and 1 Hawk. Pl. C. cap. 64. ſ. 26. Where the ſerjeant is of opinion, that ſuch inconſiderable circumſtances, which commonly paſs between neighbours without any offence at all, can never bring a man within the meaning of the ſtatutes, which ſpeaks of entering with ſtrong hand or multitudes of people.

7. If one enter into an houſe, where *no man is in the houſe*, and the entry is with *men armed*, or * *company unuſual*; this is forcible entry: alſo the ‡ *putting back the bolt* or bar of the door, is force; though *no body is in the houſe*. Mo. 656. Mich. 44 and 45 Eliz. in the Starr Chamber. Pollard v. Moreton.

8. *A.* being *tenant for years*, *B. purchaſed the reverſion*, and A. *payed rent unto B. for* 15 *years*. Before the end of the term, one C. came to A. and perſuaded him, that D. had title to the land, and adviſed him to take a leaſe from him; whereupon he took a leaſe of him for 10 years, rendering 70 *l.* per ann. and the land was worth 140 *l.* per ann. and willed him to hold poſſeſſion againſt all perſons; and he, *at the end of the firſt term, kept the poſſeſſion with drum, guns, and holberts, &c.* (The drum was only to give notice, if any came to enter, but no body offered to enter) he was cenſured for this, being a riot and forcible detainer; although none other offered to enter; for it was held, that the poſſeſſion of the termor, was the poſſeſſion of the leſſor; and when, at the end of the term, he kept it againſt him, to whom he had paid the rent ſo long, it was a forcible detainment. And whereas the ſtatute is, that where one hath had poſſeſſion for 3 years quietly, he might hold the poſſeſſion with force; that is to be intended, where the eſtate is continued. Cro. J. 199. Mich. 5 Jac. in the Starr Chamber. Snigg v. Shirton.

Noy. 136, 137. S. P. if it be an ordinary dwelling houſe.

9. If one *break the houſe*, and ſo enter into the houſe, *none being in the houſe*, it was reſolved that this *is* forcible entry. But it ſeemed by them, that if he had *entered by the window*, or if he had *opened the door with a key*; this will not be forcible. Hill. 15 Jac. B. R. 2 Roll. R. 2. Anon.

If 3 *or* 4 *come to make ſuch a forcible entry*, and *one only uſe force*, all the reſt are

10. If *two come to make* a forcible entry, and *one breaks open the door* of the houſe, and 2 or 3 hours after, the *other enters peaceably*, without a weapon, the door being open; yet it is a forcible entry by him. Noy. 136. Beade v. Orme.

guilty with him. Lamb. Eiren. 134.

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11. If *A. claim common*, in the land of B. and *B. with force and arms keeps A. out from his common*, whereupon a juſtice of peace committed B. and another, who aſſiſted B. upon view of the force. It was held, per tot. Cur. abſente Brampſton, that this commitment was not warranted by the ſtatute of 15 *Ric.* 2. For although one may be diſſeiſed of a rent or common, by force, which is inquirable in aſſiſes, and puniſhable, if it be found: yet one may not be indicted or committed for entering his own land with force, *or holding*

holding his own land with force againſt a commoner; for it ought to be *ubi ingreſſus non datur per legem*; and one in his own land may enter lawfully, and may detain with force againſt any who pretend to have common there, he being allowed to be *owner of the ſoil*; and this ſtatute is not to be extended againſt any, but him who *enters unlawfully, and ouſts another of his lawful poſſeſſion*; wherefore the cauſe of committing and detaining them in priſon was held unlawful, and the priſoners were diſcharged. Cro. C. 486. Mich. 13 Car. B. R. Sydnam and Parr's caſe.

12. This writ lies, where one is *ſeiſed of any eſtate of freehold* in lands or tenements, and is thereof diſſeiſed *with force*; *or*, though he be diſſeiſed thereof *peaceably*, yet if it be *detained with force*, he may have this writ. F. N. B. 248. (C).——and 8 *H.* 6. 9.—— And though the words of the ſtatute are in the *disjunctive*; yet, if the *entry and diſſeiſin are both with force*, the writ lies. For the intent of the makers was to puniſh ſuch force, whether upon the entry and diſſeiſin, or upon the detaining, &c. F. N. B. 248. (D).

It lies where one is expuls'd of his *rent*, Hales's Notes on F. N. B. 248. (C) cites 20 H. 6. 11. and ſee ibid. 47. Co. Litt. 257. a. b.

13. A man ſhall not have action upon the ſtatute, [5 R. 2.] Ubi ingreſſus non datur per legem, where a man *enters with force, and his entry is lawful*; for the *force is only to be convicted for the king*, as vi & armis, & contra pacem, but *otherwiſe* it ſeems *upon* the ſtatute of 8 *H.* 6. per tot Cur. Br. Action ſur le Statute, pl. 7. cites 9 H. 6. 19.

14. One *jointenant*, or *tenant in common*, may maintain this action againſt his companion, if he be put out with force, &c. F. N. B. 249. (D)

(B) What is Forcible Detainer.

1. IF one perſon *obſtinately keep the door ſhut againſt the juſtice*, or if he find *perſons harneſſed*, or in other warlike ſort appointed, or furniture lying by them ready to be uſed; it is a forcible detaining. Lamb. Eiren. 136.

But, if one *peaceably enter* into a houſe, and there *find armour*, or other weapon for the war, the *ſuffering of it to remain there (without the uſe thereof)* will not charge him as a forcible holder. Lamb. Eiren. 136.

2. If a man, being entered into a houſe, *beſtow men with force and arms ſome other place, not far diſtant*, to the intent they ſhall aſſault them that would attempt entry upon him; this is a detaining with force. Lamb. Eiren. 137.

3. *Or*, if a *diſſeiſor foreſtall the way* of the diſſeiſee, *with force*, &c. ſo that he dare not enter for fear of death; it is a detaining with force. Lamb. Eiren. 137.

Or, if the diſſeiſor *threaten to kill him that hath right, if he come to enter*; this is a forcible holding. Lamb. Eiren. 137.

(C) Of

(C) Of what Things it may be.

* In Cay's Abr. of Stat. it is called cap. 8.

1. *The ſtatute of* 5 *R.* 2. *cap.* * 7. *Againſt forcible entry mentions* lands and tenements.

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2. *The ſtatute* 15 *R.* 2. 2. *mentions* lands, beneſices and offices of the church.

3. *The ſtatute* 8 *H.* 6. *cap.* 9. *ſ.* 2. *mentions* lands, tenements or other poſſeſſions.

Br. Forcible Entry, pl. 7. S. P. cites 22 H. 6. 23.—— * F. N. B. 249. (B) Cro. Car. 201. Mich. 6 Car. Anon ——

4. Forcible entry was brought *of* * *rent*, and awarded good, as well as of the land; for a *man may diſtrain for rent with force*, and therefore this ſhall countervail the entry with force, by which the defendant was awarded to anſwer. Br. Forcible Entry, pl. 1. cites 20 H. 6. 11.

5. An indictment on the ſtatute of 8 H. 6. was, that the late queen by her letters patents under the great ſeal, had granted to J. S. the *office of cuſtody of the caſtle of D.* with all profits, &c. and an annual fee for exerciſing thereof; and *that the defendant with force expelled her and diſſeiſed her of that office.* Exception was taken, that an indictment lies not on that ſtatute for ſuch an office; but that there ought to have been a diſſeiſin alledged of the tenant of the freehold of the houſe. But the court delivered not any opinion herein. Cro. J. 17, 18. Mich. 1 Jac. B. R. Lady Ruſſell's caſe.

This caſe was upon the ſtatute, 21 *Jac.* 15. Per Holt. Ch. J. Far. 123.——Yelv. 81. Hill. 3 Jac. B. R. Sir And. Nowell's caſe. ——Raym. 67. Hill. 14 and 15 Car. 2. B. R. The King v. Hardy.

6. Indictment of forcible entry lies of a *copyhold*. Poph. 205. M. 2 Car. The King v. Ployden, & al.

7. Forcible entry lies of *tithes*, though, it was objected, and agreed, that aſſiſe lies of tithes by the ſtatute 32 H. 8. and that they are recoverable as lay inheritance. Cro. C. 201. Mich. 6 Car. Anon.

And that there ought to be a *direct allegation of the life.* per Roll Ch. J. Ibid. cites the Lady Morley's caſe.

8. Indictment was of a *forcible entry on a leſſee for years upon ſtatute* 21 *Jac.* 15. Exception was taken, 1ſt. That it did *not appear* by the indictment that the leſſee had *any title* to the land *at the time of the force committed*, for the force is *ſuppoſed to be done before the leaſe commenced.* 2*d.* The leaſe is ſuppoſed to be a *leaſe for ſo many years, if J. S. ſo long live*, and it is *not averred, that J. S. was alive at the time* of the forcible entry made. And the indictment was quaſhed. Sty. 147. Mich. 24 Car. the King v. Bray.

The entry was into the *church and the parſonage houſe*, and it was held, that ſuch forci-

9. An indictment was of forcible entry *into a church*; and exception was taken, that indictments for forcible entry, is by ſtatute law only, and that they ſpeak of meſſuages or tenements, &c. and ſo extend not to a church, for which the common law has provided proper remedy, viz. *Breve de vi laica removenda.* But per Cur. The *ſtatutes for quieting poſſeſſions, ſhall have liberal conſtructions*,

ſtructions, and extend to churches, and in the ſtatute R. 2. churches are particularly named; & vi laica removenda, is but a feeble remedy; becauſe it does not reſtore the party to his poſſeſſion. Sid. 101. Hill. 14 and 15 Car. 2. B. R. the King v. March, Hollingworth, &c.

ble entry was within the ſtatute of R. 2. and alſo of 8 H. 6. and refuſed to quaſh the indictment. 1 Lev. 90. the King v. Larking & al. S. C.

10. An indictment was of a *meſſuage paſſage or way*; and it was objected, that a paſſage or way is no land or tenement, but an eaſement. And as to that, the court thought it not good; though otherwiſe, as to the meſuage. Mod. 73. M. 22 Car. 2. B. R. the King v. Holmes.

(D) Of what Poſſeſſions it may be. [383]

1. *LESSEE for years* cannot maintain the action, becauſe of the words, expulit & diſſeiſivit and tenant for years cannot be diſſeiſed. F. N. B. 248. (E).

Yet note, the words in the ſtatute are, *put out, or diſſeiſe*. Notes on F. N. B. 248. (E) and cites Br. Action ſur ſtatute, 17. And adds a quære, if a *leſſor* can have it; for he is not expulſed. cites D. 142.——Jenk. 118. pl. 37.

2. An *inquiſition* of forcible entry was *quaſhed*, for that it did *not appear, what eſtate* the party, on whom the entry was made, had; for if he were *tenant at ſufferance*, it would not lie. 12 Mod. 417. Mich. 12 W. 3. B. R. the King v. Dorney.

(E) Juſtifiable by whom, and in what Caſes.

1. IF a man continueth *three years in peaceable poſſeſſion, without interruption*, then he may hold the lands with force, and ſhall not be puniſhed for that force, and that by the ſtatute of 8 H. 6. 9. F. N. B. 249. (C).

If a manentereth with force into lands and tenements, to which he hath title and right of entry, and put the tenant of the freehold out of thoſe lands or tenements; now he, who is ſo put out with force, may indict him for this entering by force, and by this indictment, he ſhall be reſtored to his poſſeſſion again; but he, who is ſo reſtored, cannot maintain the poſſeſſion with force, although he has had a peaceable poſſeſſion for 3 years before the expulſion. For the poſſeſſion is interrupted. F. N. B. 248. (H) and the notes thereupon.——And if a juſt and lawful poſſeſſor *for 20 years* be once removed clearly and neatly from his poſſeſſion, he cannot retake poſſeſſion by force, and detain with force. D. 141. b. pl. 48. Paſch. 3 and 4 P. & M. Dalabar v. Lyſter.——S. P. Farr. 138. Hill. 1 Annæ, B. R. Hardeſty v. Goodenough.——See (E) the King v. Burgeſs.——Br. Forcible Entry, pl. 6. 17. cites 22 H. 6.

2. A *tenant at will* cannot juſtify a forcible detainer, *till he has been 3 years in poſſeſſion*; but he ought to quit poſſeſſion, and apply to the juſtices for a reſtitution upon the forcible entry. 11 Mod. 32. Paſch. 4 Annæ, B. R.

3. *Tenant at ſufferance* is not within the ſtatute of forcible entries. Arg. ſays it has been often adjudged. 11 Mod. 273. in pl. 18. Hill. 8 Annæ, B. R. Queen v. Depuke.

4. None

‡ Nor by forcible entry into the land *of his own tenant at will.* Sed quære. 1 Hawk. Pl. C. 147. cap. 64. ſ. 32.

4. None can be guilty in reſpect of land, whereof he *himſelf hath the * ſole lawful poſſeſſion*, and *another the bare cuſtody* ‡ (Ch. 64. ſ. 32.) but a † *jointenant* may be guilty (Ch. 64. ſ. 33.) ſo may every perſon, who has a ‖ *defeaſible poſſeſſion* (Ch. 64 ſ. 34.) So, alſo may an § *infant* or *feme covert*, acting in their own perſons, and not barely commanding others. (Ch. 64. ſ. 35.) 1 Hawk. pl. C. Ind. tit. Forcible Entry and Detainer (G). The book at large cites as follows, * Mo. 786. Cro. J. 18. 2 Keb. 495. † 8 E. 4. 9. a. 19. a. 10 H. 7. 27. a. Latch. 224. Palm. 419. ‖ Co. Litt. 256, 7. Crom. 69. b. Lamb. 160. 1. Dal. Ch. 77. § Dal. Ch. 77. Crom. 69. Co. Litt. 357. Br. Impriſon. 43, 45, 75, 101.

(F) Entry by whom. What Power the Juſtices of Peace, and other Officers have.

1. 8 *H.* 6. cap. 9. *ſ.* 4. enacts, that *when complaint is made of any ſuch entry or detainer, to any juſtice of the peace, he or they, by warrant or precept, ſhall command the ſheriff to ſummon a ſufficient* [384] *jury, to enquire of the force committed, and upon force found, the juſtice or juſtices ſhall cauſe the lands, &c. to be re-ſeized, and ſhall put the party diſſeiſed in poſſeſſion, in the abſence, as well as preſence, of the party offending; and every alienation of the premiſes, to have maintenance, ſhall be void.*

Every juror ſhall have lands or tenements to the value of 40 *s.* per ann. *and every ſheriff, not duly executing the ſaid precepts, to forfeit* 20 *l. to be divided between the king and the proſecutor.*

2. If any hold a houſe or land with force, it was agreed, that *one juſtice of peace may remove it*; and ſo may more, and ſo are the words of the ſtatute. Br. Forcible Entry, pl. 19. cites 21 H. 6. 5.

3. The juſtices of peace *may record without preſentment, if* any *aggregation with force be before them at their ſeſſions.* 7 E. 4. 18. a. per Yelverton.

4. *So if* the juſtices are *diſturbed to come to their ſeſſions with force.* Br. Peace, pl. 14. cites 7 E. 4. 18. a. per Yelverton.

5. *And* they *may enquire of coming together with force, and* of *diſſeiſin with force, and* this *before the ſtatute* of forcible entry; and *contra of entry with force before the ſtatute*; for they could not inquire it before the ſtatute. Ibid.

There may be an *indictment* of forcible entry upon the ſtatute

6. In no caſe *one* juſtice *only may make inquiſition*, if it be not given by ſtatute. Br. Peace, pl. 14. cites 7 E. 4. 18. per Yelverton.

8 H. 6. c. 9. *before one juſtice of peace*; and *reſtitution* may be made *by one juſtice*, by force of the ſaid ſtatute. Jenk. 221. pl. 74.

Dal. 25. pl. 8. 4 & 5. P. & M. cites 7 E. 4 17. —Dal. at the end of Kelw. 204. pl. 2.—11 Rep. 59. a. (b) * 11 Rep. 65. a.

7. *Commiſſioners of oyer and terminer* have no power to enquire upon the ſtatute of forcible entry; for the ſtatute of 8 *H.* 6. 9. which provides an enquiry and reſtitution in this caſe, *appropriates it to the juſtices of peace.* But the * *Judges of B. R.* are within this ſtatute; for the king ſits there, and where the king ſits eſt plenitudo poteſtatis. Jenk. 197. pl. 6.

8. An

8. An *order* made by juſtices of peace, upon conviction of force upon the view, may be *quaſhed upon motion*. Sid. 156. Mich. 15 Car. 2. B. R. the King v. Challoner.

9. Upon a *conviction* of forcible entry, the juſtices ought to *commit* the offender. If they *find force*, they are, upon the view, to remove it, and commit the offender; but not to award reſtitution without inquiſition; and this they may do, though the entry be peaceable, if the *detainer* be *with force*, in which caſe they may convict the offender upon the view. Per Holt, Ch. J. 12 Mod. 495. Paſch. 13 W. 3. Anon.

10. Juſtices of peace, upon their view of a force, *cannot meddle with the poſſeſſion*; *but* all they can do, is to *remove the force*, *and commit* them that uſe it, *and* to *make a record thereof*; and here the record of the commitment was *arreſtavi* in the preterperfect tenſe, and not in the *preſent tenſe*, as it ought to be; and all records of commitment are; as committitur mareſcallo in this court of B. R. and the record was quaſhed, niſi. per Holt, Ch. J. 12 Mod. 516. Paſch. 13 W. 3. the King v. Brown.

S. P. by Coke Ch. J. 3 Bulſ. 92. the King v Sagar.—— Sid. 156. S. P. 15 Car. 2. the King v. Challoner.— Vent. 308.

Paſch 29 Car. 2. Anon.——They may not alter the poſſeſſion *without an inquiſition*, nor does it become them to *go armed* on that occaſion, per Holt, Ch. J. and he ſaid, that if a J. of P. *convicts all the perſons in poſſeſſion for offenders, and ſet the doors open*, this is an altering of the poſſeſſion by neceſſary conſequence, and therefore it was ruled, that there ſhould be a reſtitution, niſi. Comb. 260. Paſch. 6 W. 3. B. R. Lady Lovelace's caſe.

11. Holt. Ch. J. ſaid, that the juſtices of peace, in the caſe of forcible entries and detainers, ought to adjourn their courts, and *give the party an opportunity to traverſe the force*, or elſe the party has no remedy but by certiorari; and every inquiſition is traverſable by the ſtat. of Weſtminſter; but generally the juſtices enquire into the poſſeſſion only, and award reſtitution without trying the forcible detainer or entry upon a traverſe. 11 Mod. 42. Paſch. 4 Annæ, B. R. Anon.

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12. A juſtice of peace may *ſet a fine*, but he ought to *commit him immediately*, where, by his *own view*, he finds a forcible detaining; and then, as he is a judge of record, he *may adjourn his court*, and then ſet a fine upon him, and commit him in the mean time. Per Holt Ch. J. 11 Mod. 47. Paſch. 4 Annæ, B. R. in Col. Layton's caſe.

And *ſo long as the party is under examination*, the J. of P. may adjourn. Per Holt, Ch. J. 11. Mod. 52. pl. 23. Paſch. 4 Annæ, Anon.

13. Upon the return of a habeas corpus it appeared that A. was convicted by Sir. B Lord *Mayor of London upon view*, by virtue of the 15 Ric. 2. 2. for a forcible detainer of the priſon of the Fleet, and that he was committed until delivered by due courſe of law, et quouſque he paid the fine of 100 l. ſet upon him; exceptions were taken, 1ſt. That it did not appear that the mayor was a juſtice, ſed non allocatur; for the 8 *H.* 6. gives the ſame power to mayors, &c. 2d. That the complaint was of a forcible entry and detainer, and here is no forcible entry at all; and a man's houſe is his caſtle, which it is lawful for him to defend with force. Curia adviſare vult. 1 Salk. 353. Paſch. 4 Annæ, B. R. the Queen v. Layton.

14. *And* at another day it was farther objected, that the *fine was ſet at another time*, but the court held that it might be ſet *after the conviction*, as in Lambard's Eirenarcha. 1 Salk. 353. Queen v. Layton.

(F. 2) Inquiry, as to the Force, prevented or diſcharged by what finding.

1. *If the ſpecial matter alledged* in the bar *be found for the defendant*, he ſhall be excuſed; and the force *ſhall not be enquired of*; and *if* it be found for the plaintiff, and *againſt the defendant*, the *defendant ſhall be attainted* of the force, *and ſhall pay treble damages and coſts*, * *without enquiry of the force*; and the ſame is the uſage at this day. F. N. B. 249. (D).

Br. Peremptory, pl. 87. cites S. C.— * And ſo it is on an indictment of forcible entry. † 7 H. 6. 13. Vide contra. where he pleads non eſt ingreſſus contra formam ſtatuti. 1 H. 7. 19. 15 H. 7. 17. Hales Notes on F. N. B. 249 (D).—† Br. Forcible Entry, pl. 2. cites 7 H. 6. 13. Acc.—*So if all the points of the writ are traverſed, and the title is found for the plaintiff*, he need not enquire of the force, as it is ſaid. Br. Forcible Entry, pl. 24. cites 1 H. 7. 19.

2. In forcible entry for entering with force and arms into a houſe, and 24 acres of land; the defendant ſaid, that J. S. was ſeiſed in fee, and enfeoffed him, and gave colour to the plaintiff, by which he entered peaceably, abſque hoc that he entered with force; the plaintiff made title and traverſed the bar, and the iſſue is found for the plaintiff; therefore by all the juſtices, the *force ſhall not be enquired where the title is found againſt the defendant, nor where it is found for the defendant*; *but* yet the *defendant, who intitled himſelf ought to traverſe the force*; but the title, found with the one or the other, makes an end of all as to the parties; *but he who made the force may be indicted*, and ſhall make fine to the king, *notwithſtanding that he has a good title*; and *he that enters peaceably, where his entry is not lawful, may plead* in this action, *that he did not enter contra formam ſtatuti*, and *there the force and diſſeiſin ſhall be enquired*; *but contra upon title made*, quod nota, and therefore this iſſue here ſhall ſerve him where the title cannot ſerve. Br. Forcible Entry, pl. 11. cites 15 H. 7. 17.

[386] (G) What ſhall be ſaid three Years quiet Poſſeſſion. And Pleadings.

1. THOUGH the diſſeiſor had held with force for three years before the indictment, *yet the party ſhall be barred, but contrary of the king*; and though he has kept by force for 20 years *upon* an *indictment the party ſhall have reſtitution*, and yet he ſhall not have an action per Fineux, to which Read and Tremail agreed. Br. Forcible Entry, pl. 10. cites 14 H. 7. 28.

2. One,

2. One, who has been ſeiſed peaceably for three years, may detain with force; *but if the diſſeiſor has continued his poſſeſſion for three years peaceably, and* after the *diſſeiſee re-enters*, (as he may lawfully) *and then the diſſeiſor re-enters*, he cannot detain with force; becauſe the firſt diſſeiſin is determined by the entry of the diſſeiſee, and the *diſſeiſee is thereby remitted*, and this entry is a new diſſeiſin. Br. Forcible Entry, pl. 22. cites 23 H. 8.

3. *But* if a man has been *ſeiſed by good and juſt title for three years*, and after is diſſeiſed by tort, and then he re-enters, he may retain with force, by ſome; for he is remitted and in by his firſt title, by which he firſt continued peaceably for three years; nevertheleſs, by others it is not law in this laſt caſe, therefore quære; for it ſeems to them, by the proviſo in the end of the ſtatute, that this is good law, and ſtands well with the ſtatute, quære. Br. Forcible Entry, pl. 22. cites 23 H. 8.

4. The three years poſſeſſion, which ſhall bar a reſtitution, muſt have an *uninterrupted continuance*, (ch. 64. ſ. 53) and regularly ought to be *lawful* (ch. 64. ſ. 53.) but perhaps does not neceſſarily require that the *firſt entry* was *peaceable*. (ch. 64. ſ. 54.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer (L.) The book at large cites Dal. ch. 79. 22 H. 6. 18. b. Crom. 71.

Note; he who is reſtored cannot maintain the poſſeſſion with force, although he has had a peaceable poſſeſſion for three years before the expulſion; for the poſſeſſion is interrupted. Hale's notes on F. N. B. 248. (H) cites Dy. 141.

5. *Poſſeſſion* for three years, *without ſhewing how*, is a good plea in forcible entry. Trin. 15 Car. 2. B. R. Sid. 149. The King v Burgeſs.

But after reſolved, that the plea was not good, becauſe it is not ſaid that the defendants were in *poſſeſſion three years before the inquiſition found* according to Dyer. Raym. 85. S. C.——Keb. 614. S. C.

6. It was objected that it ſhould *appear by the conviction, that* the *defendant had been three years in poſſeſſion*, upon the 8 H. 6. 9. But per Cur. that comes in by a *proviſo*, and he that would have the benefit of it, *muſt plead his poſſeſſion*. Vid. Cro. J. 199, and ſtatute 31 Eliz. Alſo, the 3 years poſſeſſion is intended where the eſtate is continuing, not elſe. 1 Salk. 353. Paſch. 4 Annæ, B. R. the Queen v. Layton.—cites Mo. 848.

And it has been holden that the plea of ſuch a poſſeſſion is good, *without ſhewing under what title, or of what eſtate* ſuch poſſeſſion was; becauſe it is not the title, but the poſſeſſion only, which is material in this caſe. 1 Hawk. Pl. C. 153. cap. 64. ſ. 55.

(H) In whoſe Name the Suit or Recovery ſhall be

1. IF *leſſee for years* be *expulſed*, he ſhall not have action in his own name, by himſelf, upon 8 H. 6. nor ſhall the reverſioner in his, by himſelf; but *he and reverſioner muſt join in the action*, and then reſtitution ſhall be awarded, and the *ſtatute ſhall be recited as* it is *in the disjunctive, but the concluſion of the court ſhall be, that the defendant expulſed and diſſeiſed* in the copulative. D. 142. a. Marg. pl. 48. cites Paſch. 36 Eliz. B. R. per Cur.

But ibid. cites Trin. 38. Eliz. Sir Mat. ARUNDEL's caſe, that leſſee for years muſt ſue in the name of the reverſioner.

2. If *leſſee for years of a copyholder by licence* is ejected by force, he *muſt ſue in the name of the lord* to have reſtitution; for the reſtitution ſhall be to the lord who has the frank-tenement. D. 142. a. Marg. pl. 48. cites Trin. 38 Eliz. Sir Mat. Arundell's caſe.

(I) *Reſtitution.* In what Caſes, and *at what Time.*

1. QUARE *impedit* by the king againſt the diſturber and incumbent; the *title of the king was found* for him, by which * his *clerk was inſtituted by writ*, and after the *firſt incumbent entered with force*, and great rout, *and took continually the profits*, and the *incumbent of the king prayed a writ to the ſheriff to remove the force*, and the court ſaid, that if the defendant had diſturbed the biſhop from putting the incumbent of the king in poſſeſſion, that he ſhould have ſuch writ, but when judgment is given here, and the *judgment executed*, then they have no more power. Br. Forcible Entry, pl. 20. cites 12 H. 4. 26.

* In all the editions of Brook, the word (ſi) Anglice (if) is inſerted, which confounds the ſenſe, and is not in the year book.

2. It is not uſual to make reſtitution to the party, unleſs theſe words *extra tenet* are contained in the verdict. Br. Forcible Entry, pl. 13. cites 14 H. 6. 16.

3. In indictment of forcible entry *it was not mentioned, that it was found at the complaint of the party according to the ſtatute*; yet the party had reſtitution. Br. Forcible Entry, pl. 16. cites 7 E. 4. 18.

Pr. Peace, pl. 14. cites 7 E. 4. 18.

4. By the words of the ſtat. (of H. 6.) no reſtitution can be made, *unleſs the forcible entry be found by inquiſition*. Quod nota, Bro. Forcible Entry, pl. 27. cites 4 H. 7. 18.

5. If a *writ of entry* be brought *upon the ſtatute* 8 *H.* 6. and it be *found with the plaintiff*, yet he ſhall not have writ of reſtitution of the ſame land. Bendl. 37. pl. 68. M. 1 and 2 Ph. and M. in C. B. Paſchall v. Tendring.——And ſays, that the like judgment was there. M. 6 E. 6.

6. If a man be *indicted* for a forcible entry upon 8 H. 6. and *before reſtitution, the force is pardoned by ſtatute or general pardon.* Now there ſhall not be any reſtitution upon that indictment; for the firſt force and offence is pardoned. *But* if the party had brought his *action for forcible entry*, &c. ſuch a pardon ſhall not reach the reſtitution. per Cur' that ſo it has been adjudged. Noy. 119. Fawcet's caſe.

When the K. has pardoned the *force*, the *ſtrength* of the indictment is gone. For the party is not to have reſtitution by means of the king, who has given away his title, (viz. his fine) by the pardon. Yelv. 99. S. C.——Fawcet had tendred a *traverſ* to the indictment. And after a ven. fac. awarded and returned, and a diſtringas with a niſi prius, the pardon came, which diſcharged the fine for the king. Whereupon 'twas moved, that the trial ought to be ſtayed, for there ought not to be any further proceedings thereupon; for it, being the king's ſuit, is diſcharged by his general pardon. But it was *ſhewn to the court, that the party indicted, was outed from his poſſeſſion by colour of this indictment, it being falſe*; the writ of reſtitution being awarded upon it. Wherefore he *prayed, that he might proceed, and he would relinquiſh any benefit of the pardon.* For he *had not any other means to be reſtored* to his poſſeſſion; and it was not reaſon, that the general pardon ſhould prejudice. And of that opinion were Fenner and Tanfield. It appearing here upon record, that his poſſeſſion was taken away by a writ of reſtitution upon this indictment, 'tis reaſon he ſhould proceed upon the iſſue joined before the pardon to be reſtored to his poſſeſſion, for which, otherwiſe, he had not any remedy. But Williams and Yelverton, (abſente Popham) held, that there ought not to be any proceedings upon

upon this indictment, the offence being pardoned by the general pardon, whereof they are to take notice, and the party cannot proceed to have reſtitution; when, if it ſhould paſs againſt him, the king ſhould not have the benefit of any fine. Afterwards, being moved again, Yelverton ſaid, they had conferred with all the judges in Serjeant's Inn in Fleet-Street: who held, that * the offence being pardoned, there ought not to be any proceeding to have reſtitution. Wherefore by the rule of the court, it was ordered to be ſtayed.—And Williams ſaid, it was ſo reſolved in this court upon conference with all the judges of England, by expreſs command from the queen, in a caſe betwixt the lord STAFFORD, and Sir THOMAS THYNN; and it was commanded to make ſearch for that precedent; but there could not any ſuch be found. Cro. J. 148, 149. Hill. 4 Jac. B. R. Fawcet's caſe—— * S. P. 1 Hawk. Pl. C. Abr. 181. cap. 24. ſ. 40. though the defendant would wave the benefit of the pardon.

7. Reſtitution upon forcible entry and detainer was awarded niſi cauſa, *where the jury found peaceable entry.* Mich. 14 Car. 2. and Hill. 14 and 15 Car. 2. Sid. 97, 99. the K. v. Sadler and Honeſty. [388] Vid Sid. 414.

8. If a juſtice *convicts all* the perſons *in poſſeſſion* for offenders, and *ſets the doors open*, this is an altering of the poſſeſſion, and therefore it was ruled, that there ſhould be a writ of reſtitution, niſi, per Holt. Paſch. 6 W. and M. Cumb. 260. Lady Lovelace's Caſe.

9. A motion was made for a reſtitution upon quaſhing an inquiſition of forcible entry; the caſe was, that the *leſſor arreſted the leſſee for rent, and, while he was in cuſtody, entered* the houſe, *under pretence of forfeiture by a proviſo in the leaſe*; but the motion was denied, becauſe here appears a title ſtanding out, which he ſhall not avoid by ſiniſter means, but ought to purſue his remedy by *ejectment* according to law; otherwiſe, had no title appeared. 2 Salk. 587. Hill. 10 W. 3. B. R. the K. v. Toſlin.

10. If *inquiſition be removed into B. R.* no reſtitution can be, if defendant *traverſes* or *pleads three years poſſeſſion.* Paſch. 11 W. 3. 1 Salk. 260. the K. v. Harris. Contra as to the traverſe, and that there is

no way to prevent reſtitution, but by *certiorari* or pleading *three years poſſeſſion.* 6 Mod. 115. Hill. 2 Anne, B. R. Morgan v. Tomkin.——And the juſtices ought to accept ſuch plea, and try it as well in forcible entry as in the caſe of reſtitution; and ought to ſtop reſtitution 'till ſuch iſſue is tried per Holt. Ch. J. 11 Mod. 47. in Colonel Laiton's caſe.

11. Inquiſition of a forcible entry was taken, and *reſtitution preſently granted*, which was *ſoon after ſet aſide by a vi laica removenda*, and *ſome years after*, (viz. two or three years or more,) *a new reſtitution was granted*, whereupon the inquiſition was removed by certiorari into B. R. and there the reſtitution was ſet aſide, by reaſon of the long delay, which might be a great inconvenience and prejudice to purchaſers; and they grounded this reſolution on 8 Rep. 19. Dr. BONHAM's caſe and Holt, Ch. J. ordered a *ſpecial entry* to be made, that becauſe it appeared on examination, that reſtitution was not avoided 'till three years after the inquiſition, that therefore reſtitution was granted to Harris. 12 Mod. 268. Hill. 11 W. 3. K. v. Harris. S. C. by the name of the KING v. HARNESS reports it thus, upon a vi laica removenda, a parſon had forcibly ſeiſed the church, and upon inquiſition, the force was found, but

the J. of P. did not reſtore the poſſeſſion (as he ought to have done) but *had a record of it made up and deferred the delivery of the poſſeſſion for two or three years*; and the court held this proceeding very irregular, and that reſtitution ought to be awarded. 5 Mod. 443.

12. After a man is *found guilty* of forcible entry, reſtitution muſt be *awarded preſently*; and where ſuch perſon was put out after 3 years

years after conviction, reſtitution was awarded to him. Trin. 11 W. 3. B. R. Carth. 496. the K. v. Harris.

13. Though *inquiſition* of forcible entry be *quaſhed*, yet reſtitution is *not of courſe*, contrary to Raym. 85. per Holt. Ch. J. Mich. 12 W. 3. 12 Mod. 423. Anon.

14. After *certiorari* to remove inquiſition of forcible detainer, juſtices cannot award reſtitution. But if after the certiorari there be a *new forcible detainer*, they may record the force. Paſch. 5 Annæ, 1 Salk. 151. Sir. Godfrey Kneller's caſe.

2 Salk 260, 2. Br. Force. 13. Lamb 153. Dalt. ch. 81.

15. No indictment can warrant a reſtitution, unleſs it *ſhew a continuance of the ouſter*, (ch. 64. ſ. 41.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer. (H) The book at large cites as in the marg.

[389] (K) Reſtitution. Of what Kind of Poſſeſſions. And to whom.

1. *COPYHOLDER for life leaſed for years to B. by licence* of the lord; *B. is ejected with force*, the *reſtitution ſhall be to the lord*, in whom the franktenement is, and *B. ought to ſue in the name of the lord*, to have reſtitution. D. 142. a. Marg. pl. 48. cites Trin. 38 Eliz. Sir Mat. Arundel's caſe.

2. Indictment was laid of an *entry into a copyhold tenement of B. of which A. was lord, and had the franktenement by diſſeiſing A. and expelling B.* thereof, &c. Though A. oppoſed a reſtitution to B. (the entry being in truth made by A.'s order upon B. who had forfeited his copyhold) and though it was objected, that reſtitution is to be made in reſpect of the franktenement, which A. does not deſire, but the contrary, yet the court granted reſtitution in reſpect of B. the copyholder; for ſince the indictment is a record, by which the expulſion by A. and the diſſeiſin of B. appears, the court in diſcretion, and the jury alſo, ought to reform the wrongs in their ſeveral degrees, and that is by firſt reſtoring B. who was expelled, and thereupon enſues conſequentially the reſtitution of the franktenant. Yelv. 81. Hill. 3 Jac. B. R. Sir And. Nowell's caſe.

3. *But if the indictment had been only of a diſſeiſin without any expulſion*, in ſuch caſe no reſtitution may be, but upon the prayer of him who has the franktenement. Yelv. 81.

4. J. S. was indicted of a forcible *entry upon the poſſeſſion of B. leſſee for years of A. and diſſeiſing A. and expelling B.* and though *A. oppoſed the reſtitution*, yet, nolens volens, it was granted to redreſs the tort done to B. the termor, who by the indictment was found to be expulſed; cited per Williams J. Yelv. 81. Hill. 3 Jac. B. R. as adjudged in Ld Norris's caſe.

5. By 21 *Jac.* 1. *cap.* 15. *Upon forcible entry or detainer, a* juſtice of peace *is impowered, after the indictment found, to give reſtitution of poſſeſſion to tenants for years, tenants by elegit, ſtatute merchant or ſtaple, and tenants by copy of court-roll, as well as thoſe who claim a freehold or inheritance.*

6. One

6. One was indicted upon the ſtat. 21 Jac. 1. for entring into a *houſe* in C. in the county of O. *adtunc exiſtens liberum tenementum* of ſuch a feme *ad voluntatem domini ſecundum conſuetudinem manerii*, &c. The party came into court, and, being put out of poſſeſſion upon this indictment by a juſtice of peace, prayed that the court would grant her reſtitution, and it was granted to her by Dodderidge and Whitlock, Jones abſent. The reaſon was, becauſe the words of the ſtatute gives power to a juſtice of peace, or to a judge, to make reſtitution to the leſſor for years, guardian in chivalry, or tenant by copy of court roll, at will, &c. But for any thing here alledged, the feme may be *tenant at will, by verge, and not by copy*, but the ſtatute ſhall not be taken by equity; and therefore he that will have reſtitution upon this ſtatute, *muſt be within the words of the ſtatute*. And at another day Dodderidge, and Whitlock, continued their opinion. But Dodderidge agreed, that if one has a *widow's eſtate by cuſtom after the death of her baron copyholder*, ſhe is within the ſtatute; becauſe her eſtate is mediately by copy. Lat. 182. widow Stacy's caſe.

7. Reſtitution can be awarded only of *tenements viſible and corporeal*, * (ch. 64. ſ. 45.) and *to one, who was ſeiſed of an actual freehold*, † (ch. 64. ſ. 46.) which alone ſeems neceſſary *whether* it were *by right or wrong*. ‡ (ch. 64. ſ. 47.) 1 Hawk. Pl. C. Ind. tit. Forcible entry and detainer. (J.) The book at large cites as in the margin.

* Dal. 81. Lamb. 153. Co Litt. 323. † Dal. ch. 83. Lamb. 153, 154. Cro J. 199.

‡ Crom. 162. b. 163. a. b.

(L.) Reſtitution. By whom. And How. [390]

1. BY 2 *E.* 3. commonly called the ſtat. of Northampton, if there be any uſe made of *arms to ſtrike a terror* into the perſons upon whom a forcible entry is made, any *juſtice of peace*, or other officer, who is within the purview of that ſtatute, *may ſeize the arms* for the king's uſe, *and alſo impriſon the offenders, but not reſtore* the party injured to his poſſeſſion. 1 Hawk. Pl. C. 141. cap. 64. ſ. 5. cites the books in the marg. *

(*) 3 Inſt. 161. Crom. 162. a. Dalt. cap. 80.

2. *None may grant* reſtitution *but* thoſe *juſtices before whom the force is found*; and the writ ſhall be under the teſte of one of them, and then *no other juſtices but thoſe of B. R. can grant a ſuperſedeas*. Hale's notes on F. N. B. 249. (A.) cites D. 187.

3. Upon an inquiſition, returned in the *King's Bench*, of a forcible entry, the court, upon argument, awarded a writ of reſtitution. Br. Forcible Ent. pl. 27.

4. Wray Ch. J. ſaid, that he never uſed to grant reſtitution without *hearing the party indicted*. Sav. 68. pl. 141. 19 Dec. 27 Eliz. at Newgate; and the reporter there ſays, that it ſtands with good reaſon. For in the principal caſe, the party that preferred the indictment had no eſtate but as tenant, by reaſon of an execution, who cannot prefer ſuch a bill upon this ſtatute of 8 H. 6. For he has no Freehold. ibid.

M. 2 & 3 Eliz. D. 187. a. b.—— Reſtitution cannot be awarded by any *juſtices* but thoſe *before whom the indictment was found, or the King's Bench* (ch. 64. ſ. 49.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer. (K.) The book at large cites Dal. ch. 82. D. 187.

5. An indictment of forcible entry was found before the juſtices of the peace at their quarter ſeſſions, or ſpecial ſeſſions; they grant a reſtitution: this writ of reſtitution *ought to be* made *under the teſte of one of the juſtices of peace before whom it was granted.* Jenk. 221. pl. 74.

Lamb 157. Dalt. ch. 82.

6. The ſheriff may *raiſe the poſſe* to execute it, (ch. 64. ſ. 52.) 1 Hawk. Pl. C. Ind. tit. Forcible Ent. and Detainer. (K.) The book at large cites as in the margin.

(M) Reſtitution ſtayed. For what Cauſes.

* N. B. the plea, in Dyer is 26. but it ſhould be only 24. but the next after is 25, and ſo goes on.—

1. IT was held in B. R. per Cur. that *notwithſtanding a traverſe* tendered to an indictment of forcible entry upon the 8 H. 6. they may grant or ſtay the writ of reſtitution *at their diſcretion, according as the truth of the title appears to them.* Nota. D. 122. b. pl. * 26. 2 & 3 Ph. & M. Anon.——But the book adds a nota, that there are precedents both ways.

Reſtitution is of duty, but re reſtitution is of grace. Per Twiſden and Keyling, J. Raym. 85. in the caſe of the King v. Burgeſs.——Vent. 265. cites the caſe of D. 122. But ſays Arg that now, *ſince the ſtatute of Eliz.* where ſuch plea is tendered, the court cannot grant reſtitution; though they would have done it in the principal caſe, if by law they might; for the *party that made the entry had loſt the land juſt before by verdict in ejectment*, and by this means the effect of it ſhould be diſappointed. M. 26 Car. 2. B. R. Anon.——D. 123. a. Marg. pl. 26 ſays, that it is a good plea for the ſtay of reſtitution to ſay, that the party had been in *poſſeſſion for three years*, before the day of the indictment, by the ſtat. 31 *Eliz.* 11. and that the *clerk of the peace, upon ſuch traverſe* tendered, may grant ſuperſedeas for the ſtay of reſtitution.——If the party, againſt whom the inquiſition is found, will traverſe the force, that was always a reaſon to ſtay reſtitution; and it has been held a *ſuperſedeas to the awarded reſtitution*, and that it was ſo in Sir RICHARD BRAY's caſe; where an inquiſition found a forcible entry; and the defendant offered immediately, before the juſtice, to traverſe the force; but the juſtice refuſed the traverſe, and granted reſtitution; and Keyling, Ch. J. granted re-reſtitution; per Holt, Ch. J. and Powell J. ſaid, that notwithſtanding the caſe in D. 122. a.——traverſe of the indictment was ſaid to be only a ſuperſedeas at election, yet laterly it had been held an abſolute ſuperſedeas. 2 Salk. 588. Paſch. 4 Annæ. B. R. in the caſe of the Queen v. Winter.——If an inquiſition of forcible entry be removed into B. R. there can be no reſtitution, if defendant * either traverſes the force, *or pleads the ec years quiet poſſeſſion* before the force. 1 Salk. 260. P. 11 W. 3 The King v. Harris.

*[391]

2. If juſtices of peace award reſtitution, and, *before reſtitution made, a certificate comes from the juſtices of B. R. to remove* the indictment, which is delivered to a J. of peace, who was not at the ſeſſions; he may award ſuperſedeas. D. 187. b. Marg. pl. 5. cites it as adjudged. Hill. 45 Eliz. in Fitzwilliam's caſe.

It ſeems clear, from the expreſs purview of this ſtatute, that wherever the defendant *pleadeth quiet poſſeſſion for three years*, in bar of reſtitution upon ſuch an indictment, either before the juſtices of peace, or in the King's Bench, *no reſtitution ought to be awarded till the* truth of the *plea be tried.* 1 Hawk. Pl. C. 153. cap. 64. ſ. 55. cites Keb. 538. the King v. Burges.—— and Salk. 261. pl. 1.

3. By 31 *Eliz. cap.* 11. *ſ.* 3. *no reſtitution upon any indictment of forcible entry, or holding with force, ſhall be made, if the perſons indicted had the occupation, or been in quiet poſſeſſion three years next before the day of ſuch indictment found, and their eſtate therein not ended, which the party indicted may alledge for ſtay of reſtitution; and if the other traverſe the ſame, and the allegation be found againſt the party indicted, he ſhall pay coſts.*

4. Reſtitution

4. Reſtitution muſt be ſtayed till the defendant have *notice of the charge* againſt him, * (ch. 64. ſ. 59.) and if he appears and tenders a *traverſe*, it muſt ſtay till ſuch traverſe be *tried*, † (ch. 64. ſ. 57.) *and* ſo much *found* as will warrant a reſtitution. ‡ (ch. 64. ſ. 58.) 1 Hawk. Pl. C. Ind. tit. Forcible Enrry and Detainer. (L.) The book cites as in the margin.

* Savil. 68. pl. 141. All. 78, 79 † 2 Keb. 343. 2 Keb. 49. 571. Sid. 284. Salk. 587, 588. ‡ Sid. 97, 99. Keb. 427.

(N) Reſtitution. Superſeded before or after Execution. How, and by whom.

1. AFTER an indictment of forcible entry upon the ſtatute 8 H. 6. before the *juſtices of peace* in Eſſex, *they awarded reſtitution, and before reſtitution made*, there was *a certiorari delivered* to Sir T. M. cuſtos rotulorum, which was not received by him; nor would he read it till after the reſtitution made. * And yet the judges thought clearly that the reſtitution was well awarded and made; and a diverſity was taken between an act judicial and miniſterial; the act of the juſtices of peace is judicial, and their negligence in not awarding the ſuperſedeas, ſhall not prejudice; but where a miniſter receives a countermand as if the ſheriff be ſuperſeded, this is a diſcharge of the authority which he had before. And if the juſtices of peace receive a certiorari, all that they do after is without warrant; but all that the ſheriff does after, upon their warrant before, is not erroneous; and yet their negligence is puniſhable by attachment, as contempt. Mo. 677. cites Hill. 45 Eliz. B. R. Fitzwilliams's caſe.

* Cro. E. 915. Hill. 45 Eliz. B. R. S. C. contra, that, as touching the reſtitution made after the writ of certiorari delivered, Gawdy and Yelverton conceived it to be void and ill; becauſe, by the ‡ certiorari delivered, the hands of the juſtices of peace were cloſed; for the writ is an expreſs prohibition unto them, viz. ulterius terminari coram vobis nolumus. So every act done by their authority, after its delivery, is void. And although the writ of reſtitution was awarded by all the juſtices of the ſeſſions, yet the writ of certiorari being delivered to any of them, they ought to have allowed thereof, and awarded a ſuperſedeas; quod Popham conceſſit. —— ‡ S. P. and it avoids any reſtitution which is executed after its teſte; but does not bring the juſtices into a contempt without notice, &c. 1 Hawk. Pl. C. Abr. 181. cap. 64. ſ. 39.

2. Where a writ of reſtitution is made, *no other juſtices* can award a ſuperſedeas to ſuch writ of reſtitution, *except thoſe who granted it*, and the *judges of the King's Bench*; for the law preſumes the king himſelf ſits there. Jenk. 221. pl. 74.

S. P. Hawk. Pl. C. Abr. 181. cap. 64. ſ. 39. the book at large cites D. 187. pl. 6. H. P. C. 140.

(O) * Re-Reſtitution. In what Caſes. [392]

* Vid. Z. pl. 1.

1. TWO were indicted of a forcible entry into a meadow, and *offered to traverſe the force, but the juſtices of peace refuſed it, and awarded reſtitution.* And the indictment being removed into B. R. was

2 Salk. 588. in pl. 3. has a nota, that the ſame

queſtion was, viz. whether re-reſtitution ſhould be granted, becauſe the juſtice had refuſed a traverſe to an inquiſition of forcible entry, but that it was not reſolved; and cites it as Tr. 11 W. 3. the King v. Scarlett.

was *quaſhed upon affidavit* that they were not permitted to traverſe the force, but reſtitution awarded preſently. And it was moved for a re-reſtitution; and the court ſaid, that the juſtices ought to have accepted of the traverſe; for *the firſt finding is in the nature of preſentment, which, upon traverſe* of the party, *ought to be tried immediately*; and if it be found no force, no reſtitution ſhall be; and therefore they awarded re-reſtitution. 1 Sid. 287. T. R. 18 Car. 2. B. R. the King v. Parker, Stacy, & al.

* Sav. 68. pl. 141. H. P. C. 140, 141. Cro. E. 31. † Cro. E. 41.

2. The court of * *King's Bench* has ſuch *a diſcretionary power* over theſe matters, from an equitable conſtruction of the ſtatutes, that if a reſtitution ſhall appear to have been illegally awarded or executed, the ſaid court may ſet it aſide, and *grant a* † *re-reſtitution to the defendant.* As where the *indictment*, on which the juſtices proceeded, is *quaſhed for inſufficiency*; or where it appears that the juſtices were irregular in their *proceedings*, as by refuſing to try a traverſe of the force, &c. or where the defendant *traverſes the force, and gets a verdict* in the King's Bench. 1 Hawk. Pl. C. Abr. 181. cap. 24. ſ. 40. The book at large cites ſ. 62. 65. as in the margin.

(P) *Indictment. Lies.* In what Caſes.

* He ſhall not maintain it on the ſtat. R. 2. See 9 H. 6. 19. but the party ſhall make fine to the king for his forcible entry.

1. IF a man enters with force into lands or tenements, in which he *hath title and right of entry*, and puts the tenant of the freehold out of thoſe lands and tenements; now he, who is ſo put out with force, ſhall not maintain an * action of forcible entry againſt him who had title or right of entry; becauſe that entry is not any diſſeiſin of him; but he may *indict him* for this entering by force. F. N. B. 248 (H).

See 31 H. 6. 39. (17 H. 7. 17.) That if the title be found for the plaintiff or defendant, they ſhall make fine, &c. Hales's notes on F. N. B. 248. (H)

2. After judgment in qua. imp. againſt the *incumbent*, he was' *by aſſent* of parties, to *continue in the vicarage* for a certain time. After the time ended, he *kept poſſeſſion*, and committed great waſt. Attachment is not grantable, becauſe his ſtay was not by rule of court, but by aſſent of parties. Vi laica will not lie, becauſe he is a parſon; but you muſt bring an indictment of forcible entry, or an ejectment. per Coke Ch. J. 3 Bulſ. 91. Mich. 13 Jac. the King v. Sakar.

(Q) Indictment. Good or not in reſpect of *not ſhewing what Eſtate* or Title.

1. IN preſentment of forcible entry, the defendant pleaded to the vi & armis, and to all that which is contra pacem, &c. *not guilty*, and yet he was *compelled to anſwer to the entry*; for otherwiſe this

this is not ſufficient; by which he *entitled himſelf by remainder, as heir of his father.* And * where the defendant juſtifies between him and the king, there the *king himſelf ſhall make title.* Br. Forcible Entry, pl 2. cites 7 H. 6. 13.

2. Exception was taken, that there *was no word of freehold* in the indictment, *or to prove that the party grieved had any freehold,* whereof he might be diſſeiſed, ſed non allocatur; becauſe * *expulit & diſſeiſivit were there,* which could not be true, if the party expelled and diſſeiſed had not freehold. 3. Le. 102. pl. 149. P. 26 Eliz. B. R. Wroth v. Capel.

4 *Le.* 197. *S. P.*——In an indictment on the 8 H. 6. it was *not ſhewn, in whom the freehold was,* and per Coke, Ch. J. clearly, this ought to be ſhewed, and to ſay, *diſſeiſivit & intraverunt*; and therefore *tenant by elegit or ſtatute merchant, cannot indict* one on the ſtatute of 8 H. 6. *but he ſhould ſhew, that he did expulſe and diſſeiſe the reverſioner*; *but* per Cur. *this may be on* the ſtatute of 5 *R.* 27. He ought to purſue the words of the ſtatute, *ubi ingreſſus non datur per legem ibi non,* &c. and the indictment was quaſhed. 3 Bulſ. 71. Tr. 13 Jac. Anon.——* *Expulſion muſt be poſitively charged,* and the words (*being expelled and diſſeiſed, they held him out*) are a concluſion without premiſes. per Holt, Ch. J. and the inquiſition was quaſhed. per Cur. 1 Salk. 261, 262. M. 12 W. 3. the King v. Dorney.——Indictment was quaſhed for not ſhewing what eſtate the party had, and though the word *diſſeiſivit had been in,* the court held it would not be ſufficient, though it might be taken to imply a freehold. 1 Vent. 306. Hil. 28 and 29 Car. 2. Anon.

3. *So* becauſe the words were, *in unum tenementum intravit,* it was objected, that the word tenementum is too general and uncertain; and as to that the party was diſcharged. 3 Le. 102.

4. *But* the indictment was further, *in unum tenementum & decem acras terræ eidem pertinent.* and therefore as to the ten acres, the party was inforced to anſwer. 3 Le. 102.

5. In every indictment of forcible entry, *the eſtate of the perſon grieved* ought to be ſhewn, and it is not enough to ſay, *quod poſſeſſionatus fuit,* &c. which ſhall be intended to be but as * tenant at will, which is not within the ſtatutes. 1 Sid. 102. Hill. 14 & 15 Car. 2. A note of the reporter's.

* 1 Salk. 260. Mich. 12 W. 3. B. R. the K. v. Dorney.

6. Nor is it enough to ſay, *quod fuit liberum* tenementum; but ought to be * *adtunc exiſtit,* &c. and † *adhuc exiſtens.* Sid 102. A note of the reporter's.

* S. P. Hill. 3 Car. Het. 73. Hobſon's caſe.

——Lat. 109. S. P. Anon.——S. P. Palm. 426. P. 2 Car. Turner's caſe.——Exception was taken, becauſe the word (adtunc) was omitted, to that non conſtat, whoſe freehold it was at the time of the entry, ſed non allocatur: for when it is found, that ſuch a day they entered into a meſſuage exiſtens ſolum & liberum tenementum, &c. this word (exiſtens) muſt neceſſarily refer to the day and time of the entry. Yelv. 27, 28. M. 44 & 45 Eliz. the Queen v. Fenton, Pecke, & al.—— Such exception was diſallowed. All. 49. Hill 23 Car. the King v. Simmons, & al.——If the *indictment* had *began with the day, time, and year,* then all which follows after ſhall be taken, and *intended to be at the ſame time,* per Williams J. and for this cited 5 E. 6. Dy. pl. 68. & 23 H. 7. Kelw. 98. and ſaid, that an indictment was reverſed the laſt term, for want of the word (*adtunc*) becauſe it might be *exiſtens liberum tenementum* 20 years before. But per Fleming, Ch. J. and Williams J. *the day, the time, and the place being all coupled together* in the principal caſe, then the words make all good; for thereby it appears, that it was his freehold, and the time being here laid when he entered, this indictment may be good enough without ſaying (adtunc) and ſo they both ſeem clearly to hold the indictment good, but did not overrule it, but gave time to ſearch for precedents. 1 Bulſ. 177. Tr. 9 Jac. Moor and Lankſoord's caſe.——Cro. J. 214. M. 6 Jac. B. R. S. P. Sir Nicholas Poynt's caſe.——639. Tr. 20 Jac. Bridges's caſe.——*But* upon a *conviction of forcible detainer,* by view of the juſtices of peace upon the ſtat. 15 *R.* 2. 2. the word adtunc is not material; becauſe *no reſtitution is to be awarded,* but the malefactors, being convicted by the view of the juſtices, are to be fined and impriſoned. 1 Vent. 23, Paſ. 21 Car. 2. the King v. Serjeant.——† 2 Roll. R. 65. Hill. 16 Jac. B. R. Ailing's caſe.

7. Indictment *by a parſon, for* a forcible entry *into the church,* ſaid, that the parſon was *ſeiſed pro termino vitæ,* and it was held good; for a parſon

a parſon may make a leaſe for life of the rectory, and by this the *church paſſes*, though the pariſhoners have the uſe, as in the caſe of an impropriation. Nota. 1 Sid. 102. Hill. 14 & 15 Car. 2. at the end of the caſe of the King v. March, &c.

8. An *inquiſition* of forcible entry was *quaſhed*, for that it did *not appear, what eſtate* the party on whom the entry was made, had; for if he were *tenant at ſufferance*, it would not lie. 12 Mod. 417. Mich. 12 W. 3. The King v. Dorney.

9. It was moved to quaſh an indictment of forcible entry, which ſet forth, that the defendant entered forcibly into the cloſe of J. S. and turned him out; whereas, before the time, J. S. *poſſeſſionatus fuiſſet de termino ult' elaps'*; his exception was, that the *eſtate of J. S. ſhould have been particularly ſet forth*; for he might have been tenant at ſufferance; and it has been often adjudged, that tenant at ſufferance is not within the ſtatute of forcible entries; likewiſe he ſaid, that by the word (fuiſſet) it does not appear, but that the eſtate of J. S. was determined before the entry, ergo quaſhed per Cur. Holt abſente. 11 Mod. 273. Hill. 8 Annæ, B. R. Queen v. Depuke.

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2 Keb. 495. 3 Bulſ. 71. 1 Vent. 23, 25. Salk. 260, 262. Het. 73. Latch. 109.

9. An indictment *on* 15 *Ric.* 2. needs only *ſhew, that ſome perſon was in poſſeſſion*; but an indictment *on* 8 *H.* 6. muſt ſhew, *that the party had a freehold*, and *on* 21 *Jac.* 1. *that he had a term for years*, &c. (ch. 64. ſ. 38.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer (H.) The book at large cites as in the margin.

2 Keb. 477, 499. 1 Keb. 191. Cro. E. 754 Noy. 131. 2 Roll. R. 65. Palm. 426. Sid. 102. Yelv. 28. Bulſ. 177. Vent. 306. 3 Le. 102. All. 49. Palm. 277. 2 Roll. Abr. 80. pl. 9. Cro. J. 633, 634. 2. Keb. 477. 2 Roll. Abr. 80. pl. 3. Yelv. 165. Mod. 73. 2 Keb. 709.

(R) Indictment. Good or not, in reſpect of the *Deſcription of the Place where*, &c. And Uncertainty.

1. INDICTMENT on 8 H. 6. was of *entering into a cloſe called Serjeant Hern's cloſe*. Exception was taken, that it was uncertain, ſo as there can be no reſtitution, but that it ſhould have ſaid a cloſe containing 20 acres of land, more or leſs, ſed non allocatur. Cro. E. 458. Paſch. 38 Eliz. B. R. Humphrey's caſe.

So exception was, becauſe the entry was laid to be into a rood of land, or into half a rood of land, which is uncertain, and this was held by the whole court, except Williams J. to be a good exception, and the indictment was quaſhed. 1 Bulſ. 201. Paſch. 10 Jac. Anon.

2. Indictment was ad ſeſſionem pacis tent. apud B. and ſhews not in *what county*, but the county was in the *margin*; nor was it ſhewn *before what juſtices* it was taken. Ruled ill. Cro. E. 738. Hill. 42 Eliz. B. R. Ludlow's caſe.

3. Juſtices of P. *certified* to the court, *that complaint was made to them, that R. and S. riotouſly made a forcible entry* in London, whereupon *they repaired to the place and found it true*, according to the complaint, *and they removed the force and fined the defendants* 20 *l.*

This

This certificate was challenged, becauſe they did *not ſhew the time when the complaint was made* to them. Haughton J. aſked, to what purpoſe ought it to be ſo alledged, ſince this certificate is not traverſable as an indictment of force is? and thereupon it was adjourned; but it was afterwards reverſed, becauſe it is in the nature of an indictment of force, which *ought to have certainty*. 2 Roll. R. 39. Trin. 16 Jac. B. R. Anon.

4. The *poſſeſſion*, wherein the force was committed, *muſt be certainly deſcribed*, and is not ſufficiently aſcertained by the word *tenement*, or *a disjunctive expreſſion of things of different natures*. (Ch. 64. ſ. 37) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer. (H.) The book at large cites Dalt. ch. 81. Dalt. 15. 2 Roll. R. 46. 2 Roll. Abr. 80. pl. 6. 3 Le. 102. Co. Lit. 6. 2 Roll. Abr. 80. pl. 4, 5. 1 Roll. R. 334. Cro. J. 633. Palm. 277. 2 Roll. Abr. 81. pl. 4. 1 Bulſ. 201. 2 Le. 186. 3 Le. 101. Br. Forcib. Ent. 23. 2 Roll. Abr. 8. pl. 7. Cro. E. 458. 2 Roll. Abr. 80. pl. 8.

A conviction was of a forcible detainer *of a chamber in a houſe in King Street in the pariſh of St. Margaret Weſtminſter, by force*, but did not alledge whoſe houſe it was, or where ſituate, nor whether forwards or backwards, or up how many pair of ſtairs, ſo that the ſheriff might not know of what to deliver poſſeſſion; but it was anſwered, that the court will not intend ſo, but that it ought to appear. 8 Mod. 65. Hill. 8 Geo. the King v. Watſon.

(S) Indictment. Good or not, by Reaſon of *Repugnancy*. [395]

1. INDICTMENT was, that *expulit vi & armis*, &c. *out of a houſe*, (and ſhewed all things requiſite to a certainty) *adtunc & adhuc* * *in quieta poſſeſſione of J. S.* and it was quaſhed for *repugnancy*. 2 Roll. R. 511. Paſch. 21 Jac. Anon.

* *So* where it was *adtunc & adhuc liberum tenementum ipſius J. S.*

it was held ill on exception to it, as repugnant; for it could not be his freehold after a diſſeiſin; becauſe then the diſſeiſor was ſeized, and no præcipe could be brought againſt the diſſeiſee. Show. 272. Tr. 3 W. & M. The King v. Hayes.——S. P. 2 Bulſ. 121. Trin. 11 Car. The King v. Skeit & al.——And after the adhuc exiſtens, there was the word *extratenet*, which alſo was repugnant. Ibid.

2. Indictment was, that *pacifice intraverunt, & eum adtunc, & ibidem vi & armis diſſeiſiverunt*, and upon exception it was quaſhed for the *repugnancy*. All. 49, 50. Hill. 23 Car. the King v. Simmons.

S. C. cited Show. 272. in the caſe of the King v. Hayes.

(T) Indictment. Good or not; In Reſpect of wrong or *improper Words*, &c.

1. A. was *leſſee for years, reverſion to B.* An indictment againſt J. S. was, that *expulit & diſſeiſivit B. & quendam A. tenentem expulit*. Exception was taken, that a perſon might be *diſſeiſed, though not in poſſeſſion*, as a reverſioner on a leaſe for years, *but*

Upon an exception taken to an inquiſition, viz. that by the ſtatute

8 H. 6. reſtitution is to be granted where the tenant of the freehold is put out of poſſeſſion, and that the ſtat. of 21 Jac. makes no alteration, but only grants reſtitution, where a termor for years, &c. is put out of poſſeſſion, and that in the preſent caſe it is not ſaid, that the tenant of the freehold was ouſted, but that the leſſee for years was ouſted, and compared it to the caſe above, [though it cites not the book] and re-cites the very word, viz. that it ſhould have ſaid, that the tenant of the freehold was diſſeiſed, and the leſſees for years expelled; and for this reaſon the indictment was held to be naught, per Dolben and Eyre, J. only in court. 4 Mod. 248. Mich. 5 W. & M. B. R. the King v. Waite.

but not expulſed; for privatio præſupponit habitum, and that two cannot be expulſed where only one was in poſſeſſion; and therefore it ſhould have ſaid, that the tenant of the freehold was diſſeiſed, and the termor expulſed; whereas, here the word expulit is applied to both. But Clench J. anſwered, as to the expelling the tenant of the freehold, out of the poſſeſſion of the freehold, that the *poſſeſſion of the termor, is the poſſeſſion of him in the reverſion.* Godb. 45, 46. Mich. 28 and 29 Eliz. B. R. pl. 56. Anon.

2. An indictment was *quare intravit in medietatem vi & armis*, and exception was taken to it, for that it cannot be, and that a man cannot enter, without entring into the whole, ſed non allocatur; for Jones ſaid, that if a man be *tenant in common with the king*, a ſtranger may enter into a moiety vi & armis, and gain a moiety. Palm. 419. Paſch. 1 Car. B. R. Anon.

For this is by the ſtatute of 21 Jac. 15. and becauſe the indictment had (diſſeiſivit) in it, it was quaſhed. Raym. 67. Hill. 14 & 15 Car. 2. the King v. Hardy.—And cited 4 Inſt. 176.——And per Holt. Ch. J. upon this ſtatute, it ſuffices to ſay, that the *entry was made on a copyholder or a leſſee for years, and that he was expelled.* Farr. 123. Hill. 1 Annæ, in the caſe of the Queen v. Taylor.——The indictment mentioned *cuſtomary tenants*, and exception was taken becauſe it did *not ſhew* the ſame to be *ſecundum conſuetudinem manerii*; and for that and other exceptions, the indictment was quaſhed. 2 Bulſ. 121. Tr. 11 Jac. the King v. Skeit and al.

3. Indictment of forcible entry, *into a copyhold* muſt not have the word *(diſſeiſivit)* in it, becauſe a copyholder has no freehold. Poph. 205. Mich. 2 Car. the King v. Ployden, & al.

4. The indictment was *expulſatus* where it ſhould have been *expulſus & fortiori modo*, where it ſhould have been *forti modo* [manu] and therefore the party was diſcharged. Noy. 155. Anon.

[396] (U) Indictment. Good or not, in Reſpect of *Words implied*.

S. P. 1 Hawk. Pl. C. ch. 64. ſ. 44.—— Noy. 120. contra. Anon. So of *illicite expulit*. 1 Hawk. Pl. C. ch. 64 ſ. 44.——So if it wanted *illicite* in an indictment on 8 H. 6. Noy 125. Watts's caſe.——Cites a precedent in Lambert's Juſtice of Peace, 155.

1. THE indictment was *eum diſſeiſivit*, but ſaid not, *(inde)* but the exception was not allowed; for it ſhall be *intended.* Cro. E. 186. Trin. 32 Eliz. Farr v. Eaſt.

2. *Diſſeiſivit* alone, omitting the word *(expulit)* is well enough; for diſſeiſin implies expulſion. Cro. J. 31, 32. Trin. 2 Jac. Andrews v. Ld. Cromwell.

3. Exception was taken to an indictment of forcible entry, becauſe it was not ſaid that he was diſſeiſed. But, per Cur. *expulit* implies it. Comb. 70. Mich. 3 Jac. 2. B. R. Anon.

(W) Indictment. Good or not, in Reſpect of *Omiſſion of Vi & Armis*, &c. and Want of Certainty.

1. AN indictment on 8 H. 6. wanted *vi & armis*; for it was *pacifice intravit, & ſine judicio diſſeiſivit, & a poſſeſſione expulit & amovit*; and exception being taken to it, it was ſaid, 1ſt, That the entry being *pacifice*, it was not the courſe to lay it, vi & armis. 2dly, That 37 *H.* 8. 8. ſupplied the defect of vi & armis in an indictment. But as to the latter, the court were of opinion, that the ſtatute *ſupplied only* the want of the words *gladiis, baculis & cultellis*, as are mentioned in the ſtatute. Vent. 265. M. 26 Car. 2. B. R. Anon.

2. Indictment not alleged to be *manu forti* is ill, although it was laid to be vi & armis. Cro. E. 461. 38 Eliz. B. R. Warner v. Collins.

3. Indictment ſaid, that he *entered and diſſeiſed* injuſte, *&c.* but does *not* ſay, whether he entered *pacifice* or *manu forti*, and exception was taken, for want of the word pacifice, which is uſually inſerted, where the indictment is *forcible detainer*; for that otherwiſe it might be, that the entry was alſo with force, which ought to be mentioned certainly, and every indictment ought to be certain in every point; and for that reaſon, Gawdy and Yelverton J. held the indictment inſufficient, but Popham and Fenner conceived it well enough. Cro. E. 915. Hill. 45 Eliz. Fitzwilliams's caſe.

———And the reaſon, why Popham and Fenner J. held it good enough, was, that the *indictment may be upon* 8 *H.* 6. *upon both branches* thereof, viz. for the *entering with force, and detaining with force*, or, *upon any of them by itſelf:* and that, when the indictment mentions that he entered generally, it ſhall *never be intended to be with force, unleſs it be ſhewn.* And an indictment, charging any with a tort, ought to be preciſe in the point of charging the offence or tort; but where the indictment is not to charge him for his entry, but *for forcible detainer* only, it is good enough; for no force ſhall be intended, unleſs ſpecially alleged. And though indictments uſe to mention that he entered peaceably, it ſhall not be intended, but that, without thoſe words, it may be good enough, when it is not to charge him with any forcible entry. Cro. J. 20. M. 1 Jac. S. C. Sir Wm. Fitzwilliams's caſe.

It was moved to quaſh a conviction of forcible entry becauſe there wanted *manu forti* intravit; upon reading the conviction *it was vi & armis* intravit, which the court ſaid was bad, for it might be vi & armis, and not manu forti, which are the *words of the ſtatute.* Ideo quaſhed. 11 Mod. 235. Trin. 8 Annæ, B. R. the Queen v. Baker, & al.

4. An indictment upon 8 H. 6. was quaſhed, becauſe it was *in quoddam meſſ. exiſtens lib. tenement. in, &c.* and did not ſay, *adhuc exiſtens*, and for † that fault the party was diſcharged. Noy 131. * Sir Nicholas Pogar's caſe.———cites it as ruled *accordingly.* P. 42 Eliz. B. R. Rot. 27. Stanſby v. Croxton.

†[397] Cro. J. 639. Trin. 20 Jac. B. R. Bridges's caſe.--*Cro. J. 214. Mich. 6 Jac. Sir N. Poynt's caſe.——*So* ſaying exiſtens liberum tenementum J. B. without ſaying *adtunc exiſtens*, was ill; for it may be, that at the time of the indictment it was the freehold

hold of J. B. but not at the time of the entry. Cro. J. 214. Mich. 6 Jac. B. R. Sir Nich. Poynt's caſe.

Whether if the word (ſtatute) was wrote at length, it ſhould be *ſtatuti* or *ſtatuterum*. See All. 49, 50. Hill. 23 Car. where this point was differently held by Roll. Ch. J. and Bacon J.

5. The concluſion of the indictment ſhould be *contra formam ſtatut.* See 3 Bulſ. 71. Tr. 13 Jac. Anon.

Exception was taken, that it was ſaid *quod adhuc detinet* (which is a tort) and yet ſays not *contra pacem* domini regis; but held well enough; for the *detainer* may be without force, and not againſt the peace. Cro. J. 31, 32. Trin. 2 Jac. Andrews v. Ld. Cromwell.

6. In the concluſion of the indictment *(manu forti)* and *(contra coronam & pacem regis)* were omitted, the indictment being *(fortitudine & potentia magna)* but no *manu forti* alſo; and becauſe the ſame was *taken before one J. of peace only*, and yet it did *not appear*, *upon which ſtatute* the indictment was taken, *there being two ſtatutes*, it was quaſhed, the whole court being clear of opinion that it was not good. Tr. 12 Jac. 2 Bulſ. 265. the King v. Cox.

But where the words (contra pacem) were in, and the words *(contra coronam)* omitted, it was held good. All. 40. Hill. 23 Car. the King v. Simmons, & al.——Though contra pacem be omitted, yet if the words *vi & armis, &c. and contra formam ſtatuti* are there, they *imply as much*. per Wray. Cro. E. 186. Trin. 32 Eliz. Farr v. Eaſt.——But if *contra formam ſtatuti* be omitted, the plaintiff cannot have reſtitution, per Haughton J. 2 Roll. R. 65. Hill. 16 Jac. B. R. Ailing's caſe.

7. *So*, becauſe it did *not conclude contra pacem.* 2 Bulſ. 258. ut ſup.

Palm. 277. S. C. and as to the third exception, ſays that ſeiſitus & diſſeiſivit implies franktenement, and *poſſeſſionatus* aggravates the fault of thoſe who enter; for it intimates that they ouſted him of *actual freehold veſted with a poſſeſſion*, whereas he might be diſſeiſed, though he had not the poſſeſſion. As if he makes leaſe for years, and the leſſee is ouſted. Emmot, Ellis, & al. caſe. —— 1 Hawk. Pl. C. 147. cap. 64. ſ. 36. S. C.——

8. Exceptions were taken. 1. That the inquiſition was *taken before A. and B. juſtices of the peace*, and doth not ſay, *nec non ad diverſas felonias, tranſgreſſiones, &c.* ſo that they have no power to inquire. Sed non allocatur, for, upon this ſtatute, juſtices of peace only, though not juſtices ad audiend. & terminand. &c. have authority to inquire. 2. Becauſe the entry is ſuppoſed, *in unum meſuagium ſive domum*, which was alleged to be uncertain, as a *meſſuage or tenement* hath been ruled to be ill. Sed non allocatur. For it was ſaid, true it is, that an entry into a meſſuage or tenement, is not good; becauſe tenementum is uncertain what it is; but meſuagium ſive domus, are all one and the ſame. 3. For that the indictment is, that he was * *ſeiſitus ſive poſſeſſionatus*, which is not certain, ſed non allocatur. For it is *of a meſuage ſive domum adhuc exiſtent. liberum tenementum*, which proves, that he was ſeiſed of ſuch an eſtate, whereof he might be diſſeiſed; wherefore the indictment was good, and Ellis ſubmitted himſelf to a fine, &c. Cro. J. 633. Hill. 19 Jac. B. R. Ellis's caſe.

* Indictment was quaſhed becauſe it alledged the party to be ſeiſed, or poſſeſſed, and ſo uncertain which. Vent. 108. Hill. 22 and 23 Car. 2. Anon.

It was held that a *ſchool-maſter* was a good addition in ſuch indictment. 2 Le. 186. Farnam's caſe.

9. Nota, that it was ſaid, that an indictment was avoided becauſe the perſons indicted were *without additions*. Lat. 109. Anon.

* S. P. But the court held, that

10. An indictment of forcible entry into a meſuage, &c. was *by way of recital*, with a *quod cum he was poſſeſſed*, &c. *Et ſic poſſeſſionatus*

ſeſſionatus, &c. and upon an exception taken to it, Twiſden J. held it well enough. But another exception being taken, that it ſaid, he was *poſſeſſed*, * *de quodam termino* † without ſaying *annorum*; Twiſden ſaid it was naught, and the indictment was quaſhed. Mod. 73. Tr. 22 Car. 2. B. R. the King v. Holmes.

if it had been pro termino annorum, *without ſaying for how many years*,

it had been well enough. 1 Vent. 306. Hill. 28 and 29 Car. 2. Anon.

11. Exception was taken to an inquiſition, for ſaying, *per ſacramentum duodecim, &c. jurat. & impanellat, &c.* without ſaying *adtunc & ibidem jurat*, &c. For that if the time and place are not ſufficiently aſcertained, the inquiſition cannot be good; becauſe the fact might be committed above a year paſt. But notwithſtanding this, and an authority cited out of Dy. 68. b. in a caſe of murder, it was held not material here to ſhew the place, &c. For the party could not be amoved, ſo as to make the defendant guilty of a forcible entry from another *place*, but from the land, per Dolben & Eyre J. cæteris abſentibus. 4 Mod. 248. Mich. 5 W. & M. B. R. the King v. Waite.

12. The *ouſter ſhall* be *intended* to have been *at the ſame time and place with the entry*, without adding *adtunc & ibidem*. (Ch. 64. f. 42.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer (H). The book at large cites as in the marg. Cro. J. 41. D. 68. pl. 28.

13. *Before the day of the indictment*, and *before the indictment*, in 31 El. 11. have the ſame meaning. (Ch. 64. f. 56.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer. (L)

(X) Indictment. Good or not. *Varying from the Statutes.*

1. INDICTMENT upon 8 H. 6. was *quod finem faciat domine reginæ*, &c. where the *ſtatute is finem faciat domino regi*. And it was held by Wray, Anderſon, Shute, Windham, and Fleetwood, to be vitious. And the party put out was reſtored. Sav. 68. pl. 141. 19 December, 27 Eliz. at Newgate Seſſions. Anon. So, where the indictment alledged, that the fine, mentioned in the ſtatute, was by the ſtatute given *dicto domino regi*; whereas the words in the ſtatute are domino regi without the word *(dicto)*; this was held per tot Cur. to be a good exception, and ſaid to have been ſo adjudged ſeveral times before. 1 Bulſ. 218. Trin. 10 Jac. The King v. Cole.

2. An indictment was upon the ſtatute 8 *H.* 6. 9. and the ſtatute was *recited to be made at Weſtminſter*, but *ſhewed not in what county*, and the indictment was diſcharged. Cro. E. 106. Trin. 30 Eliz. Eaſt v. Wilſon.

3. Indictment was for entering *in domum rectoriæ de P. ac in certas terras eidem domui pertin. jacen. in P.* And exception was taken, becauſe it *recited two parts of the ſtatute* (of 8 H. 6.) 1. *Expulſion* and diſſeiſin with force. 2. *Holding out*; and there *is no offence contained in it, as to* one of them, viz. *the holding out*; and though it was not neceſſary to *recite the ſtatute*, yet if the party meddles with it, and does *not apply it to the ſpecial matter*, it is

naught, and for this cites Pl. C. Strange v. Partridge. 2. The entry is ſuppoſed, *in domum & certas terras*, eidem domui pertinen. jacen. in P. which is uncertain, as to lands and naught for the houſe alſo. For it is not ſhewn in what town the houſe is. For this clauſe, *& certas terras* eidem domui pertin. jacen. in P. *is a diſtinct clauſe* of itſelf, *and refers only to the lands*, and does not extend to the houſe. The firſt exception was diſallowed; for it is not like Partridge's caſe. —— For there, the ſtatute is recited, which needed not; and therefore, being miſrecited, made the indictment inſufficient: but here the ſtatute is well recited, and therefore, as to the matter, the indictment is ſufficient. As to the 2d exception, the juſtices thought the indictment, in that reſpect, too general and uncertain. The 3d exception was not allowed; for the later words *(in Putney,)* refer to the whole, and *extend as well to the houſe as the lands*. But, as to the words, *lands to the ſaid houſe belonging*. See pl. C. 85. b. where it is good enough, becauſe the *number of acres* is *ſet in certain*. 1 Le. 186. Mich. 32 Eliz. B. R. Farnam's caſe.

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So where the word *(thereof)* after the words (feoffment and diſcontinuance), were *omitted*, it was, upon exception taken, held ill. For there is not any ſuch ſtatute, and the miſrecital of a ſtatute is cauſe to avoid it. Cro. E. 697. Mich. 41 Eliz. B. R. Eden's caſe.

4. In reciting the ſtatute, it ſaid *vel aliquod feoffamentum aut diſcontinuationem*; whereas the ſtatute is *poſt talem ingreſſum aliquod feoffamentum*, and upon exception taken, the indictment was held inſufficient for this miſrecital. Cro. E. 307. Mich. 35 and 36 Eliz. B. R. Hall v. Gaven & al.

Cro. E. 697. S. P. Mich. 41 Eliz. Eden's caſe.

5. Indictment *recited the ſtatute in the conjunctive*, where it is in the disjunctive, *ſi aliquis expulſus ſit vel diſſeiſitus*; yet Gaudy and Fenner J. held it not much material; for they are always expounded as copulative. And if he be not expulſus & diſſeiſitus, action lies not upon the ſtatute. Cro. E. 307. Mich. 35 and 36 Eliz. B. R. Hall v. Gaven, & al.

Manu forti and illicite *are not equipollent*, and the words of the ſtatute ought to be preciſely purſued, otherwiſe it is ill.

6. Exception was taken, that the indictment *did not ſay*, that the party entered *illicite & manu forti*, as the words of the ſtatute direct: and Roll. Ch. J. ſaid that there ought to be manu forti in the indictment according to the ſtatute, *to diſtinguiſh* this kind of entry *from an ordinary treſpaſs* by entering into another's land, which is not ſo violent, as a forcible entry is ſuppoſed to be. Sty. 135. M. 24 Car. B. R. Anon.

See 3 Bulſ. 71. Trin. 13 Jac. Anon.

2 Roll. Abr. 80. pl. 10. Palm. 195. &c. Cro. J. 19, 20, 32. Cro. E. 915.

7. An indictment *on* 15 *Ric.* 2. muſt ſhew, that *both the entry and detainer were forcible*; *but* an indictment on 8 *H.* 6. needs only ſhew that one of them was ſo. (Ch. 64. f. 40.) 1 Hawk. Pl. C. Ind. tit. Forcible Entry and Detainer (H). The book at large cites as in the Marg.

2 Roll. Abr. 80. pl. 11. Yelv. 99. Cro. J. 151. Sid. 97, 99, 414. 2 Keb. 505. B. 2. ch. 25. ſ. 2.

(Y) Indictment. *Certiorari.* And *how* it muſt be *obeyed.*

1. A. was indicted of a forcible entry, upon the 8 H. 6. and afterwards the ſame indictment being in force, he was *indicted a ſecond time upon the ſame ſtatute, upon the ſame day, and upon the ſame entry.* The *firſt indictment was removed* by certiorari into B. R. And *upon the ſecond* indictment, *the juſtices of peace awarded reſtitution*, but *before it was executed, a certiorari was delivered* to one of the J. of peace, who *refuſed to open it*, and granted no ſuperſedeas, by which *reſtitution was made.* Afterwards the indictment was removed into B. R. and *re-reſtitution* granted per tot. Cur. upon great deliberation. For the certiorari, coming to the hands of one of the J. of peace, is in itſelf a *prohibition to all*, and the not obeying the writ was a *miſdemeanor*, and he was much checked by the court. Yelv. 32. Hill. 45 Eliz. B. R. Fitzwilliams's caſe. Cro E. 915. S. C.

2. Juſtices of peace may ſend the indictment into B. R. by certiorari, or *deliver it per proprias manus*; but not by the hands of another. Palm. 277. Hill. 19 Jac. B. R. in Ellis's caſe.

3. No *writ of error* lies on a conviction of a forcible entry, on the view of the juſtice of peace; but it may be *examined by certiorari*, per Cur. Vent. 171. Mich. 23 Car. 2. B. R. Anon.

(Z) *Conviction* of Forcible Entry *quaſhed* in what Caſes, and How.

1. AN inquiſition of a forcible entry was denied to be *quaſhed*, though it had not the words *ad inquirendum pro corpore comitatus*, ſince it is a particular offence, and at the ſuit of the party by the ſtatute; and the reaſon, why in preſentments at the general quarter ſeſſions it is neceſſary to ſay ad inquirendum pro, &c. is, becauſe their commiſſion is ſuch, and the jury muſt inquire according to their commiſſion, but here their *commiſſion is by a ſtatute*; per Holt Ch. J. and the inquiſition was confirmed, per Cur. 6 Mod. 95. Hill. 2 Annæ, B. R. the Queen v. Watton. [400]

2. Upon a *conviction* of forcible entry, if a fine be ſet, the conviction cannot be *quaſhed upon motion*, but the defendant muſt bring a *writ of error*. Otherwiſe if no *fine be ſet*; for then it may be quaſhed upon motion. 2 Salk. 450. Paſch. 4 Annæ, B. R. The Queen v. Layton.

3. A conviction of a forcible detainer was quaſhed, becauſe the *adjudication was in the preterperfect tenſe*, inſtead of the preſent. 8 Mod. 65, 66. Hill. 8 Geo. 1. the King v. Watſon. ——— And ſays that in Trin. T. following, the like judgment was given for the ſame fault in the caſe of the King v. Morgan.

(A. a) Action, &c. In what Caſes. *By whom* in reſpect of *Eſtate.*

1. IF a man be *ouſted by force by him that has lawful entry*, in ſuch caſes *ceſty que uſe* ſhall not have action; for the force is only to the king as vi & armis & contra pacem, and of this he ſhall make *fine to the king*, *but the party ſhall not have action* where the entry of him who entered is lawful, per Bab. which was agreed. Br Forcible Entry, pl. 18. cites 9 H. 6. 19.

2. *Termor* ſhall have this action, per Priſot. Br. Action ſur le Statute, pl. 15. cites 37 H. 6. 31.——But per Needham * termor cannot have this action, but Brian contra, that at this day termor may have the action. Br. Action ſur le Statute, pl. 23. cites 5 E. 4. 34.

* Littleton accordingly, but per Jenney, the *ſtatute is that none ſhall make entry into lands or tenements, unleſs in caſes where entry is given by law, &c.* and lands or tenements in the hands of a termor [for years, are lands or tenements] as well as in the hands of the tenant of the franktenement. Br. Action ſur le Statute, pl. 25. cites L. 5. E. 4. 25.

3. Treſpaſs upon the ſtatute 5 R. 2. ubi ingreſſus non datur per legem lies *for termor*; but ſee elſewhere that *contra* it is *of action upon* the ſtatute of 8 *H.* 6. quod *expulit & diſſeiſivit*; becauſe *it is only for tenant of the franktenement*, quod mirum! for the ſtatute in the ancient book is *expulit vel diſſeiſivit.* Br. Action ſur le Statute, pl. 17. cites 38 H. 6. 4.

4. *And* the *baron* may have the action *alone on* 5 *R.* 2. *quære of* 8 *H.* 6. it ſeems he may; for he *recovers only damages* in the one, or in the other, *and no land*, and therefore all is one, as it ſeems. Br. Action ſur le Statute, pl. 17. cites 38 H. 6. 4.

5. *Tenant by ſtatute merchant*, by *elegit*, &c. may have ſuch actions, per Brian. Br. Action ſur le Statute, pl. 23. cites 5 E. 4. 34.

6. If a man has no eſtate but as *tenant by reaſon of an execution*, he cannot prefer an indictment upon the 8 H. 6. becauſe he has no freehold. Sav. 68. pl. 141. 19 Dec. 27 Eliz. at the ſeſſions at Newgate, Anon.

(B. a) Actions. *Writ* or *Declaration* good or not. And in What Caſes the Writ ſhall abate.

1. Forcible entry the writ was, that *illicite intravit*, and not ſaid *vi & armis* and therefore the writ was abated quod nota. Br. Forcible Entry, pl. 18. cites 9 H. 6. 19.

2. It is confeſſed, that *vi expulit & diſſeiſivit*, and ſo of *vi tenet*, after peaceable entry is within the caſe of the ſtatute 8 H. 6. but theſe words *adhuc extra tenet* are not in the ſtatute but are at common law; nevertheleſs note, that it is not uſual to make *reſtitution*

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to

to the party, unleſs theſe words are contained in the verdict, wherefore Ellerker pleaded to the writ, becauſe *extra tenet* is in the writ and not in the ſtatute. But Juyn ſaid, it is only a *ſurmiſe*, as, alia enormia, and ſuch like; therefore the writ was awarded good. Br. Forcible Entry, pl. 13. cites 14 H. 6. 16.

3. It was agreed, that if it be, quod *in tres acras* ingreſſus eſt, and *not ſaid ipſius querentis*, the writ is not good. Br. Action ſur le Statute, pl. 15. cites 37 H. 6. 31.

4. Forcible entry, the *defendant in another term demanded judgment of the count, becauſe the certainty of the land*, as 12 acres of land, 4 acres of meadow, &c. *is not alledged*; and therefore the writ was abated and cannot be amended; for it was counted of another term; and ſo ſee that for default in the count, *judgment ſhall not be that the count* ſhall abate, *but that the writ ſhall abate*. Br. Brief, pl. 247. cites 38 H. 6. 1.

Br. Count, pl. 54. cites S. C. —— Br. Forcible Entry, pl. 23. cites S. C. —Treſpaſs upon 5 R. 2. that the defendant *entered into divers lands and tenements of the plaintiff in D.* &c. and per Danby Ch. J. and Cateſby, this writ is not good, *into diverſe lands*, &c. for the *uncertainty*, though he *declares the certainty in the count*; Pigot, and Comberford, prothonatory ſaid, that there are ſeveral ſuch writs in chancery, and ſeveral ſuch precedents in C. B. And after the defendant paſſed over and pleaded in bar. Br. Brief, pl. 348. cites 4 E. 4. 18.

5. In forcible entry, becauſe the defendant *ouſted* the plaintiff of the land *with force, & diſſeiſivit & adhuc extra tenet*; and exception was taken to the writ, that the ſtatute is in the *disjunctive*, viz. where a man diſſeiſes another with force, or enters peaceably and holds with force; and yet the writ was awarded good; and it is ſaid there, that 20 H. 6. and 14 H. 6. agrees herewith. Br. Forcible Entry, pl. 15. cites 1 E. 4. 19.

6. Treſpaſs upon 5 R. 2. *by baron and feme*; Cateſby prayed judgment of the writ; for the baron has nothing but in *jure uxoris*, and the writ is, *that the baron and feme entred into the manor*, where it ſhould be the feme entered into the manor; & non allocatur, but the writ good. Br. Brief, pl. 345. cites 4 E. 4. 13.

7. Treſpaſs ubi ingreſſus non datur per legem *in the manor of P. in A. B. and C.* Littleton ſaid that *one acre parcel of the manor is in P. not named* in the writ, judgment of the writ; and no plea, by clear opinion of the court; for the plaintiff does not make his plaint but of entry into the 3 vills, and ſhall not recover damages but in thoſe 3, and not in the 4th, and if he *gives the manor in the* 3 that which is in the 4th does not paſs, and ſo of a fine of it in 3 vills. Br. Brief, pl. 330. cites 5 E. 4. 103.

Forcible entry *into the manor of D.* and did *not ſay in what vill*, and good; for it may be a vill, and ſo this is well known. Br. Brief, pl. 435. cites 19 H. 6. 49.

8. It is agreed, that if the plaintiff declares that, the defendant *with* 10 *perſons entered*; it is not good without ſaying with 10 perſons *ignotis*, quod nota. Br. Forcible Entry, pl. 24. cites 1 H. 7. 19.

S. P. Br. Pleadings, pl. 159. cites S. C. *unleſs he ſpecifies their names.*

9. Treſpaſs was brought for *entry* into, &c. ſuch a day and *detaining* the poſſeſſion, *to the time of exhibiting the bill without alledging any day when the bill was exhibited.* After verdict for the plaintiff, it was moved in arreſt of judgment, that the time of the detainer

tainer ſhould have appeared to the jury; for they ought to give damages, according to ſuch time, and his loſs thereby, and the appearing thereof of record, is not ſufficient, and of that opinion was Doderidge J. and Broome informed the court, that the courſe was to limit a day certain in the declaration. 2 Roll. R. 135. Mich. 17 Jac. Sliford v. Goodrick.

[402] (C. a) *Pleadings.* Good or not.

But if the number be expreſſed in the foundation, there it ought to be expreſſed, which was agreed. Br. Action ſur le Statute, pl. 9. cites 34 H. 6. 27.

1. TRESPASS upon 5 *R.* 2. the *defendant ſaid, that his predeceſſor, maſter of the hoſpital of D. was ſeiſed and died, and he entered as maſter* and gave *colour*, and held no plea, becauſe he did not *ſhew the foundation, and that he was elected and profeſſed maſter*, quod nota, by which he amended his plea, and ſaid, that he had the hoſpital of St. John, *incorporated of maſter, brothers and ſiſters time out of mind*, and that they *uſed after the death of every maſter, that the brothers and ſiſters ſhould chooſe another maſter, and that A. late maſter, was ſeiſed and died; and that this ſame defendant, before the entry, &c. was elected maſter by the brothers and ſiſters, and entered*, &c. as above, and well, *without expreſſing the number* of brothers and ſiſters; for the corporation was made before time of memory, and peradventure no expreſs number. Br. Action ſur le Statute, pl. 9. cites 34 H. 6. 27.

Contra, if he ſays, *of one moiety per my & per tout*; for otherwiſe it is no anſwer, when the plaintiff makes his plaint of entry into the whole, if the one moiety be ſevered. Br. Action ſur le Statute, pl. 43. cites 38 H. 6. 8.

2. Treſpaſs upon 5 *R.* 2. *feoffment of the moiety of the land where*, &c. and giving *colour* is no plea; for it may be of a moiety ſevered. Br. Action ſur le Statute, pl. 43. cites 38 H. 6. 8.

And the ſame was ſaid for law in the time of * H. 8. For the defendant ought to intitle himſelf to a lawful entry; for *diſſeiſor has franktenement*, and yet he entered where entry is not given by law. Ibid.——* Br. Action ſur le Statute, pl. 40. cites P. 23 H. 8. accordingly, per Sherwood and others.——S. P. and the reaſon ſeems to be, becauſe this plea *may be true by diſſeiſin*; and the action is to try the title of entry. Br. Action ſur le Statute, pl. 5. cites 27 H 8. 26.

3. Treſpaſs upon the ſtatute 5 *R.* 2. the *defendant ſaid, that the place is* 20 *acres*, which is *parcel of the manor of B. which is his franktenement*, and per Choke Juſtice, it is no plea in this action. Br. Action ſur le Statute, pl. 27. cites 2 E. 4. 6.

* S. P. in treſpaſs upon 5 R. 2. for entry into the manor of E. at E. but it does not appear whether he concluded to the writ or in bar. It ſeems that he *ought to conclude to the writ*; for after he pleaded to the writ, *becauſe two acres parcel of the manor extended into C. another vill*; and therefore it ſeems that the one plea and the other were to the writ. Br. Barre, pl. 40. cites 9 E. 4. 3.

4. In treſpaſs ubi ingreſſus non datur per legem, or in treſpaſs of forcible entry *in A. B. and C.* it is no plea to *ſay, that C. is a hamlet of B.* judgment of the writ; for nothing is to be recovered but damages in thoſe actions; but it was ſaid, per Jenny, that to ſay, that * *no ſuch vill, hamlet, nor place known*, &c. is a good plea in thoſe actions, *but* the firſt plea is a good plea *in an action in which a man ſhall recover the land*; for he ſhall not demand a thing twice; but in this action nothing is to be recovered but damages; and after the defendant was awarded to anſwer; quod nota. Br. Brief, pl. 329. cites 5 E. 4. 88.

5. In

5. In an action upon the ſtatute 5 R. 2. 7. the *defendant ſaid, that he was ſeiſed, till by B. diſſeiſed, who enfeoffed the plaintiff, upon whom he entered peaceably*, the *plaintiff ſaid that B. did not diſſeiſe him.* priſt, &c. per Fairfax and Cateſby, the *plaintiff has not made title to himſelf*, therefore ill. But per Pigot and Jenny, the *defendant has given title to the plaintiff in his bar, and therefore it is ſufficient for the plaintiff to maintain it.* Br. Treſpaſs, pl. 188. cites 9 E. 4. 49.

But where the defendant pleads bar, and gives colour, there the plaintiff *ought to make title.* Br. Treſpaſs, pl. 188. cites 9 E. 4. 49.

6. Treſpaſs upon 5 *R.* 2. *of entering into* 20 *acres in D.* the *defendant ſaid, that A. was ſeiſed of* 20 *acres in S. and infeoffed him, by which he entered*, and gave *colour*, &c. *Abſque hoc, that he entered into the* 20 *acres of land in D.* and a good plea to make the vill parcel of the iſſue, for inveigling of the jury, and a good *replication, which was acknowledged by the one, and by the other*, which was agreed by the juſtices. Br. Action ſur le Statute, pl. 32. cites 11 E. 4. 9.

Br. Barre, pl. 81. (bis) cites S. C.

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7. *Treſpaſs upon the* 5 *R.* 2. the defendant *ſaid, that the plaintiff had another writ pending of the ſame entry upon the ſtatute* 8 *H.* 6. and averred, that all was of one and the ſame entry; and no plea per Cur. becauſe, *nothing is to be recovered but damages* and no land, as in *precipe quod reddat*, and diverſe entries may be made in one and the ſame day. Br. Brief, pl. 317. cites 5 H. 7. 15.

5 Rep. 61. b. in SPARRIE's caſe, ſays, the reaſon in this caſe (which as it ſeems the reporter miſtook) was utterly denied by the court, where it is ſaid, that becauſe diverſe treſpaſſes may be done in one and the ſame day, therefore it is no plea (as it is there ſaid) in treſpaſs that other action is pending, &c. for the ſame treſpaſs; for by the ſame reaſon, after the plaintiff has recovered in treſpaſs, and brings action for the ſame treſpaſs again; the defendant cannot aver, that all is for one and the ſame treſpaſs.

8. In an action upon the ſtatute 5 *R.* 2. the defendant *ſhall not plead by a name*; for there the *certainty of acres is compriſed in the writ*; contrary in treſpaſs, per Bryan and Choke Juſtices, quod Cateſby conceſſit, *but* by him, *where the plaintiff gives name* in his count, the *defendant may vary* from it, and ſo note a diverſity. Br. Treſpaſs, pl. 360. cites 21 E. 4. 80.

So action upon the ſtatute of 8 H. 6. of *entry into a houſe and* 20 *acres* of land with the ſervices, the *defendant pleaded in bar, and gave the acres a name, and was not ſuffered* to give name no more than in aſſiſe or precipe quod reddat, *becauſe the plaintiff has given certainty in his declaration*, and ſo the defendant ſhall plead to it at his peril; as in writ of entry in nature of aſſiſe he ſhall not give name. Br. Pleadings, pl. 134. cites 5 H. 7. 28.—Br. Action ſur le Stat. pl. 21. cites S. C. ——Br. Treſpaſs, pl. 277. cites S. C.

9. In forcible entry, the defendant pleaded a deed of * *feoffment with warranty of the anceſtor of the plaintiff whoſe heir he is*, &c. and the plea good, per Townſend, but Brian e contra. Br. Forcible Entry, pl. 31. cites 11 H. 7. 15.

* In treſpaſs upon 5 *R.* 2. it was held no plea, notwithſtanding that it be pleaded *by deed*, quod nota. Br. Action ſur le Statute, pl. 20. cites 1 H. 7. 12.

10. In action upon the ſtatute of 8 H. 6. of forcible entry, *or* in treſpaſs upon 5 *R.* 2. ubi ingreſſus non datur per legem, *non ingreſſus eſt contra formam ſtatuti*, is a good plea. Br. Action ſur le Statute, pl. 40. cites P. 23 H. 8. per Sherwood and others.

S. P. And it is a good replication, that the plaintiff was ſeiſed till the defendant entered contra formam ſtatuti, abſque hoc, that he diſſeiſed him; nota. Br. Action ſur le Statute, pl. 1. cites 26 H. 8. 47.

11. In an action upon the ſtatute 5 *R.* 2. in treſpaſs, it is a good plea, that the defendant was *ſeiſed till by the plaintiff diſſeiſed, upon whom he entered*; for the defendant ſhall not be compelled to make title to himſelf unleſs he will, per Fitzh. Arg. Br. Treſpaſs, pl. 1. cites 26 H. 8. 4.—but cites 27 H. 6. 3. contra. But 21 E. 4. fol. 74. is accordingly, if he *ſays, that it is the ſame treſpaſs, &c. of which the plaintiff brought his action*, and herewith agrees 5 H. 7. fol. 11. and 9 H. 6. fol. 32. and 27 H. 6. fol. 1. and in 15 H. 7. fol. 11. it is a good plea for the defendant, *that J. infeoffed him, by which he was ſeiſed till by the plaintiff diſſeiſed upon whom he entered*, but there he made title; contra ſupra. Br. Treſpaſs, pl. 1. cites 26 H. 8. 4.

12. It ſuffices upon the *ſtatute* 21 *Jac.* 1. 15. that entry was made on a *copyholder* or *leſſee for years*, and that he *was expelled*; but upon the ſtatute 8 *H.* 6. 9. you muſt always alledge a freehold and ſeiſin in ſome body; and if it be an entry upon a leſſee for years, you muſt ſay, that the entry was made *on the freehold of A. in the poſſeſſion of B.* and that ſo he *diſſeiſed A.* and of neceſſity there muſt be a diſſeiſin of the freehold laid, and upon reſtitution the poſſeſſion is reſtored to the leſſee, and the freehold to the other, and on this ſtatute, diſſeiſin is a term of art not to be ſupplied by any other word, per Holt; and rule abſolute, per tot. Cur. Farr. 123. Hill. 1 Annæ, B. R. Queen v. Taylor.——Poph. 205. Anon. was a caſe upon the ſtat. 21 Jac. 1. 15. per Holt ibid.

[404] * See (Q) pl. 1.

(D. a) Pleadings. * *Not Guilty*, &c. In what Caſes it is a good Plea.

1. NOTE, on an indictment of forcible entry found before juſtices of peace and removed hither on the ſtatutes 5 Eliz. and 15 R. 2. the party pleads, as to the entry with force, not guilty, and he was forced to anſwer to the entry, wherefore he juſtified the entry. Hale's Notes on F. N. B. 248 (H) cites 7 H. 6. 13.

S. P. F. N. B. 249. (D)

2. In action for a forcible entry, *not guilty* is a good plea. Br. Forcible Entry, pl. 13. cites 14 H. 6. 16.

3. Treſpaſs upon forcible entry againſt E. D. who *ſaid that J. N. was ſeiſed in fee, and leaſed to the defendant for life*, and by this he was ſeiſed; *and the plaintiff, by colour of a deed, &c. made by J. N. where nothing paſſed, &c. entered upon him, and he re-ouſted peaceably, abſque hoc*, that the defendant ouſted him *with force, or detained with force*, and ſhewed that he in reverſion was in ward of the king, *and prayed aid of the king*; and by the beſt opinion, becauſe he is *tenant for life*, and has franktenement, he *ſhall not have aid in treſpaſs* of the king, nor of a common perſon; by which the defendant pleaded *not guilty*, and it was admitted a good iſſue; for it was argued, whether he ſhall have it or not, and at laſt it was admitted for

for plea and well; for it is ſaid elſewhere, that in *aſſiſe and treſpaſs the defendant may waive the pleading and plead the general iſſue.* Br. Forcible Entry, pl. 6. cites 22 H. 6. 17.

4. Treſpaſs of forcible entry by G. againſt K. prioreſs of B. and *counted, that he diſſeiſed her with force, and yet detains with force*; the defendant pleaded, that the plaintiff was *ſeiſed of the ſame land the day of the writ purchaſed*, judgment of the writ, & non allocatur; for per Moyle, *in replevin, and counted quod adhuc detinet, it is no plea, that the plaintiff is ſeiſed* of the beaſts, *and was the day of the writ purchaſed.* Per Newton, the plea *does amount only to quod non detinet with force, which is no plea by itſelf, nor to ſay, that he did not diſſeiſe him with force.* Br. Forcible Entry, pl. 8. cites 22 H. 6. 37.

6. And in treſpaſs of graſs ſpoiled, it is no plea, that non depaſcit herbas, &c. but ſhall ſay, not guilty, by which he was ruled to anſwer, wherefore he *ſaid that D. his predeceſſor was ſeiſed in fee in right of the church, till by J. S. diſſeiſed, who enfeoffed M. whoſe eſtate the plaintiff has, and the predeceſſor died, and his ſucceſſor entered peaceably, abſque hoc*, that he entered with force, or detained with force; the plaintiff, *proteſtando, that he did not confeſs any thing by the defendant alledged, pro placito* [ſaid] *that M. his mother was ſeiſed and died ſeiſed, and the land deſcended to the plaintiff who was ſeiſed, till* by the defendant, with ſtrong hand, ouſted the defendant proteſtando [that] he did not confeſs ſuch * deſcent, pro placito [ſaid] that the *defendant made continual claim, in which time M. died*, by which the proteſtation was ouſted as being repugnant; for he confeſſes and avoids the deſcent by the continual claim. Br. Forcible Entry, pl. 8. cites 22 H. 6. 37.

* The word in larger edition of Brooke is (detent) and in both the other edition is (deſcens) but the year book is (diſcent.)

6. In treſpaſs upon 5 *R.* 2. it was admitted, that *colour* ſhall be given in this action, as in treſpaſs, and the defendant may plead, *not guilty*, and ſo to iſſue, and admitted there. But it is ſaid at this day, that it is no plea, but *ſhall ſay*, that *non ingreſſus eſt contra formam ſtatuti.* Br. Action ſur le Statute, pl. 29. cites 3 E. 4. 1.

7. Treſpaſs upon the ſtatute of 5 *R.* 2. *againſt A. B. and C.* which *B. came and pleaded not guilty*; and ſo ſee that not guilty is a good iſſue; and *A. and C.* came and *ſaid, that one B. was ſeiſed, and, a long time before that the plaintiff any thing had, infeoffed the ſaid A. and C.* and gave *colour* to the plaintiff; and the *plaintiff ſaid, that this B. is the ſame B. which is one of the defendants, and they make title of their own poſſeſſion*, and yet good; for two may make title by the third as well as by a ſtranger, and it is well; for there [405] is no reaſon, that the name of the feoffor, put in the writ by the plaintiff, ſhall ouſt the defendants of their bar. Br. Action ſur le Statute, pl. 36. cites 1 E. 5. 4.

• See (F. a) pl. 3.

(E. a) Pleadings. * *Juſtification.* In what Caſes it is a good Plea.

S. P. in treſpaſs upon the ſtatute 5 R. 2. the defendant ſaid, that the place where, &c. is the *franktenement of J. N. and he, by his command, entered*, and Littleton and Danby Juſtices held it no plea; for the action is given by the ſtatute, and therefore *ought to have a ſpecial anſwer, and not as in general writ of treſpaſs.* Br. Action ſur le Statute, pl. 15. cites 37 H. 6. 31.

1. IN action upon the ſtatute 8 H. 6. the defendant pleaded that the *franktenement, at the time of the entry ſuppoſed, was in J. N. and that he as ſervant to J. N. and by his commandment, entered peaceably, abſque hoc, that he entered with force*; but this was held no plea per Cur. and he ſhall *make title*, becauſe the word *diſſeiſivit ſuppoſes franktenement at the time*, &c. in the plaintiff. Br. Forcible Entry, pl. 13. cites 14 H. 6. 16.

Treſpaſs upon 5 R. 2. by A. The *defendant ſaid, that R. and W. were ſeiſed, till by the plaintiff diſſeiſed, upon whom, the defendant, as ſervant to them, and by their command, entered*; the *plaintiff ſaid, that T. was ſeiſed, till by the ſaid R. and W. diſſeiſed, which R. and W. were ſeiſed, till by the plaintiff diſſeiſed, upon whom T. re-entered and infeoffed the plaintiff, by which he was ſeiſed till the defendant did the treſpaſs*; and by this the bar is *confeſſed and avoided*. Br. Confeſs and Avoid, pl. 48. cites 11 E. 4. 5.

2. *Whereupon* the defendant pleaded, *that J. N. was ſeiſed in fee, till by the plaintiff diſſeiſed*, by which the defendant, *as ſervant* of J. N. and by his command, entered peaceably, *abſque hoc, that he entered with force, or diſſeiſed him with force*; and per Juyn, if he had ſaid *abſque hoc, that he diſſeiſed him with force*, it had been a good plea. Br. Forcible Entry, pl. 13. cites 14 H. 6. 16.

Action upon the ſtatute 5 R. 2. ubi ingreſſus non datur per legem, the *defendant ſhewed how replevin was ſued, and returned that the beaſts were eſſoigned and withernam was awarded, and he as ſervant and officer of the court, entered and ſued the withernam, abſque hoc, that he ſued as the writ ſuppoſes*, and by the opinion of the juſtices, this is a good plea. Br. Action ſur le Statute, pl. 23. cites 5 E. 4. 34.

3. In treſpaſs upon 5 *R.* 2. the *defendant ſaid, that the plaintiff in the court of A. was* * *attached for taking beaſts, and diſtreſs awarded, and the bailiff prayed the defendant to aid him to aſſiſt the bailiff to diſtrain the plaintiff in the place where the entry is ſuppoſed, who did ſo*, which is the *ſame* entry, &c. and per Aſhton and Needham Juſtices, this is no plea; for by ſuch entry he claims no intereſt in the ſoil, and therefore he does not confeſs and avoid, nor traverſe; by which he ſaid *abſque hoc, that he entered in any other manner*, and then a good plea, per Choke, for the inſtruction of the lay jury if general iſſue ſhall be joined, but Aſhton and Needham contra; for per Needham, it ſhall be *abſque hoc, that he entered as the writ ſuppoſes*; contra Aſhton, therefore quære. Br. Action ſur le Statute, pl. 30. cites 4 E. 4. 13.

4. Treſpaſs upon 5 *R.* 2. the *defendant juſtified for a way*; and per Brian and Needham, this is no juſtification; becauſe he *claims nothing in the ſoil of intereſt*, as leaſe for years, &c. nor any manurance, but Cateſby contra, quære. Br. Action ſur le Statute, pl. 31. cites 8 E. 4. 8.

5. In treſpaſs upon 5 R. 2. ubi ingreſſus non datur per legem *by* 3. Defendant pleaded a *recovery of the* 3d. *part of the moiety againſt*

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one of the plaintiffs, and execution had; and it is a good bar. Br. Barre, pl. 83. cites 18 E. 4. 28.

6. The *defendant juſtified* his entry *by common appendant, abſque hoc, that he diſſeiſed the plaintiff.* Per Fiſher, this is no plea; for claim of common *is no property in the land*, but per Keble contra; for common *is intereſt* in the land; *contra*, if he enters *to ſee waſt, or* to *diſtrain, or* if he enters *as ſheriff to ſerve a writ*, but to enter to have common of eſtovers or of turbary is a good plea, and ſo was the opinion of the court. Br. Barre, pl. 109. cites 10 H. 7. 9. [406]

7. *Confirmation with warranty* is no plea in an action upon the ſtatute of 5 R. 2. For the *action is in the perſonalty*, but he is * put to writ of covenant; and where it is pleaded by way of covenant, † he cannot vouch by it; for the warranty is perſonal. Br. Barre, pl. 55. cites 21 H. 7. 32. per Fineux and Brudnell.

* *Orig.* (bate.)

† All the editions of Frooke have the word [car] or [for]

8. The king grants *cuſtodiam caſtri to A.* and after grants *caſtrum to B.* and his heirs; B. ſends his ſervants to prepare his lodgings, &c. A. ſhuts the door. The ſervants of B. break it open and enter. The poſſeſſion of A. was held the poſſeſſion of B. and this can only be treſpaſs to B. their maſter; and the commandment of B. is a good plea to an indictment by A. Mo. 787. Mich. 4 Jac. in the Starr Chamber. Lady Ruſſel v. Earl of Nottingham.

(F. a) Pleadings. *Traverſe* in what Caſes.

1. IF the defendant doth *plead matter in bar*, yet *he ought*, in the end of his plea in bar, *to traverſe* the entry with force which is alledged, as to ſay *abſque hoc, that he did enter with force*, &c. but yet the demandant or *plaintiff ought to anſwer to the ſpecial matter alledged in the bar*, without anſwering to the traverſe with force, &c. F. N. B. 249. (D).

2. Forcible entry, *ſuppoſing* him to be *diſſeiſed with force*; the *defendant conveyed himſelf in by diſcent*, by which he entered peaceably, *abſque hoc, that he entered with force, or detained with force*, and no plea; for the plaintiff alledged diſſeiſin with force and not entry with force, and alſo the plaintiff did not alledge detainer with force, and the *defendant cannot traverſe that which is not alledged* by the plaintiff; by which he ſaid, that he did not diſſeiſe with force, nor detain with force. Per Newton, this is not good; for it is two matters; by which he ſaid, not diſſeiſed with force, priſt; and the others e contra. Br. Forcible Entry, pl. 12. cites 14 H. 6. 1.

See (E. a) pl. 3.

3. The defendant ſaid, that *J. and S. were ſeiſed, and* thereof *infeoffed T. and P.* in fee, and he *as ſervant*, &c. entered peaceably, and gave colour to the plaintiff, *abſque hoc quod intravit manu forti & ipſum expulit & extra tenuit modo & forma prout, &c. and did not traverſe the diſſeiſin*, and yet well, becauſe diſſeiſin cannot be but by expulſion, and therefore this word expulit anſwers to it. Br. Forcible Entry, pl. 24. cites 1 H. 7. 19.

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4. In forcible entry, if an *abatement* be alledged, *and gift in tail* by the abator, and that the donee died ſeiſed; the dying ſeiſed is *traverſable* and not the abatement; for the dying ſeiſed takes away the entry. Br. Forcible Entry, pl. 26. cites 3 H. 7. 8.

5. The court held, that though the conviction was only of forcible detainer upon view, yet it was *traverſable* upon the 8 H. 6. 9. *by him that had been three years in quiet poſſeſſion, as well as upon a finding by inquiſition*; and that, becauſe the party is to be impriſoned. 1 Salk. 353. Paſch. 4 Annæ, B. R. Queen v. Layton.

(G. a) Pleadings. *Monſtrans* or Profert *of Deeds.* In what Caſes.

1. *TRESPASS* upon the ſtatute of 8 H. 6. the defendant pleaded a *gift in tail by an abbot and covent to A. B.* the *remainder in tail to J. S.* and after *A. B. died without iſſue*, and J. S. entered and died, and one N. entered as heir in tail to the ſaid J. S. whoſe eſtate he hath, which N. is yet alive, and gives *colour* to the [407] plaintiff; and per Littleton, Choke and Brian J. the defendant who pleaded ought to ſhew the deed of gift; for an abbot and covent cannot give but by deed; and the defendant ought to ſhew the deed. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

(H. a) *Iſſue.* Of what the Iſſue ſhall be.

1. THE *iſſue* in forcible entry of entring with force, and detaining with force, *ſhall be always upon the title, and not upon the force*; and yet both ſpeak of the force; but if the title be found againſt the defendant, he is eo facto convicted of the force; and if the title be found for the defendant, he is excuſed of the force, quod nota; for ſo it is put in Ure. Br. Forcible Entry, pl. 5. cites 21 H. 6. 32.

(I. a) Verdict. How the the Jury may find. Supported or intended by it, what; or what is a ſufficient finding.

1. IN forcible entry *againſt two*, who pleaded not guilty, it was *found that the one entered with force, and the other held with force*; and the plaintiff recovered againſt both in ſuch a writ in B. R. per Greenfield, which was not denied. Br. Forcible Entry, pl. 15. cites 1 E. 4. 19.

2. Treſpaſs

2. Treſpaſs upon 5 *R.* 2. the *defendant ſaid*, that *non ingreſſus eſt contra formam ſtatuti*; and *it was found, that in 2 parts divided from the third part non ingreſſus eſt prout*, &c. the *defendant alledged in arreſt of judgment, that it ſhall be intended, that the plaintiff and defendant, by this verdict, are tenants in common*; and then this action does not lie by one tenant in common againſt another; and upon good argument it was *agreed, that it ſhall not be ſo intended*; by which the plaintiff recovered; quod nota. Br. Action ſur le Statute, pl. 34. cites 21 E. 4. 10.

But if he had *lawful entry into any part*, he might enter into the whole; but it ſeems that this is intended *before partition*. Br. Action ſur le Statute, pl. 34. cites 21 E. 4. 10.

3. Forcible entry upon 8 H. 6. the defendant pleaded not guilty, and it is *found* that the defendant *diſſeiſed the plaintiff peaceably, and detained with force*; and the plaintiff recovered, per Cur. For the ſtatute is in the diſjunctive; and if the one point or other be found the plaintiff ſhall recover. Br. Forcible Entry, pl. 14. cites 6 H. 7. 12.

4. Indictment on 8 H. 6. that he *entered with force, and diſſeiſed H. with force, and held him out with force.* The bill was *found quoad the detainment with force*, and thereupon reſtitution was awarded. Upon removing the indictment, exception was taken, that the indictment was ill; for it is *not found that he entered peaceably*, as it ought, according to the words of the ſtatute. And of that opinion was the whole court. Cro. J. 151. Hill. 4 Jac. B. R. Ford's caſe. ——Yelv. 99. S. C.

The jury on a like indictment, *found peaceable entry and forcible detainer*; and therefore it was moved, that no reſtitution ſhall be, part of the indictment being found to be falſe. But the court held clearly, that inaſmuch as the jury had given their *verdict as to both*, though the detainer be found peaceable, yet the indictment is good. *Otherwiſe if* they had given *no verdict as to the detainer*, but had omitted it; for there it ſhould be ill, and no reſtitution ſhould be, according to Ford's caſe. 1 Sid. 99. Hill. 14 & 15 Car. 2. B. R. The King v. Sadler.——1 Keb. 427. S. C.

5. Indictment laid, that they, *manu forti, entered upon the poſſeſſion of J. S. the farmer of A. B. and diſſeiſed A. B. and him ſo diſſeiſed extra tenuit till the day of the inquiſition.* Upon exception taken, it was agreed per totam Cur. that the indictment was inſufficient, becauſe they have *not found that J. S. the farmer was amoved and expulſed*, which is the force of all the matter; for the poſſeſſion of the farmer or termor, is the poſſeſſion * of the reverſioner, *and without ouſting the leſſee, there can be no diſſeiſin to him that has the franktenement*; and the indictment was diſcharged. Yelv. 165. Mich. 7 Jac. B. R. † Freiſton v. Shellito.

The concluſion of an indictment, where a leſſee for years is outſted with force, ſhall be *(and diſſeiſed him in reverſion)* otherwiſe the indictment is not good, and the *reſtitution ſhall be made to him in reverſion; and if he will not have reſtitution, the leſſee is without remedy*, and ſo it was ruled. D. 142. a. per Sanders Ch. J. and in Marg. pl. 48. cites Trin. 38 Eliz. B. R. Matthew v. Comber.——† See D. 141. in Marg. pl. 48. cites Paſch. 38 Eliz. contra. The King v. Locester.

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6. *But if the indictment had not expreſſed J. S. to be farmer, but generally* that the *cottage, &c. were in his occupation*; then, per Williams J. the indictment, which found the diſſeiſin only, had been good; becauſe no title is found in any other but in him only, who is found to be diſſeiſed; but finding J. S. to be farmer is an eſtate known and certain, and ſuch farmer muſt be ejected, otherwiſe he, who has franktenement, cannot be diſſeiſed. Quod nota. Per tot. Cur. Yelv. 165. Freiſton v. Shellito.

7. In

7. In an indictment againſt two for a forcible detainer upon the 8 H. 6. it was found *quod intraverunt & manu forti extratenuerunt*; it was objected, that the finding quod intraverunt was not ſufficient *without ſhewing how*, whether *peaceable or with force*. But per Lea Ch. J. and Houghton and Chamberlaine J reſtitution muſt be awarded, for there is no mean between a peaceable and forcible entry, and both go before the forcible detainer found here; and Lea Ch. J. ſaid, that the word (peaceable) in the ſtatute, is to ſupply what was not remedied by 5 R. 2. and he thought the entry ſhould be intended vi & armis. But Doderidge doubted if by the tenor of the ſtatute it be good; for there cannot be a detainer without a tortious entry, and this entry might be either with force or without, and by the indictment it does not appear what the entry was. But upon the opinion of the 3 other judges, reſtitution was awarded. Palm. 194. Trin. 19 Jac. B. R. Ld. Saliſbury v. Sir Anthony Aſhley.

The indictment was quaſhed, and reſtitution awarded. 1 Sid. 414. S. C.

8. An indictment of forcible entry and detainer was preferred againſt S. and the *jury found as to the detainer* with force, *billa vera*, but *as to the entry, ignoramus*. This upon exception was held not good; for they ought to have found all or none. 1 Vent. 25. Paſch. 21 Car. 2. The King v. Serjeant.

——Yelv. 99. Hill. 4 Jac. B. R. The King v. Ford, &c. S. P. See pl. 4. ſup.

(K. a) Puniſhment thereof, and what ſhall be recovered.

In treſpaſs upon this ſtatute, the plaintiff

1. 5 *Ric.* 2. *cap.* 7. enacts that *none ſhall enter into lands or tenements, but where entry is given by law, and in a peaceable manner, upon pain of* impriſonment, and ranſomed *at the king's will.*

ſhall *not* recover *damages for the iſſues and profits, but only for the entry*, quod nota. Br. Action ſur le Statute, pl. 28. cites 2 E. 4. 23.——Br. Damages, pl. 120. cites S. C. for the action is, that he entered where his entry is not given by law.

But becauſe that ſtatute provided *no ſpeedy remedy* in this point, *nor extended to holding with force*, nor left any ſpecial power therein to the juſtices of peace in the country. Whereas the experience of that unquiet time, required a more ready hand to the ſuppreſſion of ſuch diſorder, and juſtices of peace were (by 13 Rich. 2. ſtat. 1. 7.) then newly conſtituted. Lamb. Eiren. 128. ſays that therefore

2. 15 *Ric.* 2. *cap.* 2. enacted, that *when a forcible entry is made into lands, benefices, or offices of the church, one or more juſtices of the peace taking ſufficient power, and going to the place ſo kept by force, and finding any that hold ſuch place forcibly, may* commit *the offender to the next gaol, there to remain convict by the record of the juſtice till he hath made* fine and ranſom *to the king; and all people in the county ſhall be aſſiſting to the juſtice to arreſt ſuch offender upon pain of fine and impriſonment.*

* *But* yet again foraſmuch as this laſt ſtatute did *not extend to thoſe that entered peaceably, and then held with force, nor* yet *reached* to the offenders, if they were *removed* before the coming of the juſtices, *nor made reſtitution* of the poſſeſſion ſo forcibly gotten; nor gave any pain againſt the ſheriff that did not obey the precepts of the juſtices in this behalf. Lamb. Eiren. 129. ſays that therefore.

3. 8 *H.* 6. *cap.* 9. § 2. enacted that *upon complaint made to the juſtices of peace, or one of them, of a forcible entry or detainer by the party grieved, they or one of them ſhall cauſe the ſtatute of* 15 *Ric.* 2. 2. *to be duly executed at the coſts of the party grieved.*

If, upon diſtreſs of rent by jointenant ſurvivor, for rent due in the tenements of his companion deceaſed, reſcous be made, and *not vi & armis*, the plaintiff ſhall recover but *ſingle damages* and if it was vi & armis, then *treble damages* by this ſtatute. Br. Aſſiſe, pl. 7. cites 33 H. 6. 20.

§ 6. *And if any perſon be put out or diſſeiſed of any lands or tenements in forcible manner, or put out peaceably, and afterwards holden out with force, or after ſuch entry any feoffment or diſcontinuance thereof be made to defraud the right of the poſſeſſor; the party grieved ſhall have* aſſiſe of novel diſſeiſin, or *a writ of* treſpaſs *againſt ſuch diſſeiſor; and if the party grieved recover, and if it be found by verdict* * *or in other manner, that the defendant entered with force, or after his entry did hold with force; the plaintiff ſhall recover* treble damages, *and make fine and ranſom to the king.*

In treſpaſs on this ſtatute of *oſtaining with force, and holding out with force*, per Needham & Moyle, he ſhall not have any *damages*, for the ſtatute is in the *diſjunctive*, where he is ouſted by force, or if he be ouſted peaceably and held out with force; to which Danby and Choke agreed. Br. Forcible Entry, pl. 17. cites 10 E. 4. 11.

* *In treſpaſs or aſſiſe* upon this ſtatute, the defendant is condemned by *non ſum informatus*: he ſhall pay *treble damages and treble coſts*; ſo adjudged and affirmed, in error. The words of the ſtatute gives them, where the recovery is by *verdict, or otherwiſe, in due manner*; and this judgment is in due manner, though not by verdict. Jenk. 197. pl. 8.

4. Where the writ is, that *vi diſſeiſivit & vi tenuit*, and this is found, the plaintiff ſhall recover *treble damages for the diſſeiſin* with force, *and alſo* treble damages *for the detainer* with force, per Paſton; but Cot. e contra. Br. Forcible Entry, pl. 13. cites 14 H. 6. 16.

5. For entry to the damage of, &c. *found* for the plaintiff *to the damage of* 20*l.* and the court awarded that the plaintiff recover the 20*l.* taxed by the jury, and 40*l.* over by the ſtatute, viz. 60*l.* in the whole for *treble damages*; and that the defendant capiatur, quod nota, and therefore he ſhall be fined. Br. Forcible Entry, pl. 3. cites 19 H. 6. 6.

Br. Damages, pl. 70. cites S. C.

6. In forcible entry, the *defendant* pleaded not guilty, and *was found guilty to the damage of* 100*l.* *viz.* 80*l.* *for the tort, and* 20*l.* *for the coſts*, and with great deliberation, the plaintiff *recovered* 300*l.* notwithſtanding that treble damages are given by the ſtatute; and ſo he recovered *treble damages and treble coſts*, quod nota. Br. Forcible Entry, pl. 9. cites 22 H. 6. 57.

7. Forcible entry againſt ſeveral, and the plaintiff counted according to the ſtatute, and upon this they were at *general iſſue* and *found that ſome entered with force and held peaceably, and ſome entered peaceably and held with force*, and taxed the damages *ſeverally*; by which he had *ſeveral judgments of treble damages* againſt the one, and the like alſo againſt the other; *and* that he recover the *coſts* of his ſuit, and yet contrary in waſte, for there are no coſts; and in this caſe the plaintiff was amerced, Br. Forcible Entry, pl. 4. cites 19 H. 6. 32.

Br. Damages, pl. 71. cites S. C. & P. as to the damages.

8. If a man enters with force into lands or tenements, into which he *hath title and right of entry*, and puts the tenant of the freehold

freehold out of thoſe lands or tenements; in this action of forcible entry, the plaintiff ſhall recover *treble damages*, as well *for the occupying the lands*, *as for* the firſt *entry* therein. F. N. B. 248. (H).

9. If a man enters and diſſeiſeth another by force, and afterwards the *diſſeiſee re-entreth* again; *yet* the *diſſeiſee may bring his action* of forcible entry, *and recover his treble damages*, although he be ſeiſed of the land at the time of the action brought. F. N. B. 249 (C).

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10. If a man *enters* with force, *and detains with force* any lands or tenements, the party may have his action upon the *ſtatute of Northampton*, made an. 2 *E.* 3. *c.* 3. F. N. B. 249 (E).

11. Per Cur. not only the *coſts aſſeſſed by the jury*, but alſo thoſe which were adjudged *de incremento*, ſhall be *trebled*, and the party ſo convicted of the force at the ſuit of the party ſhould be *fined*, *though fined before* on indictment for the ſame force. Paſch. 28 Eliz. C. B. Le. 282. Rollſton v. Chambers.

12. Termor paid his rent unto B. for 15 years, and at the end of the term, he kept it againſt him to whom he had ſo long payed his rent; this was adjudged a forcible detainment; and for this offence he was fined in the Star Chamber 500*l.* Cro. J. 199. Mich. 5 Jac. in the Star Chamber. Snigg v. Shirton.

17 H. 7. 17. a. b. 21 H. 6. 39. b. F. N. B. 249. (D) Bro. Force, 5, 11. 29.

13. In an *action* of forcible entry grounded on thoſe laws, if the *defendant make himſelf a title which is found for him*, he ſhall be diſmiſſed without any inquiry concerning the force; for howſoever he may be *puniſhable at the king's ſuit* for doing what is prohibited by ſtatute, as a contemner of the laws and diſturber of the peace; yet he ſhall *not* be *liable to pay any damages* for it *to the plaintiff*, whoſe injuſtice gave him the provocation in that manner to right himſelf. 1 Hawk. pl. C. 141. cap. 64. § 3. cites the books in the margin.

Foreign.

(A) Foreign Courts. Decrees, Judgments, &c. there, How far binding or Regarded here.

Vid. 2 Ch. Caſes, 238. Mich. 29 Car. 2.

1. THE ſhip being unladen at *Barcelona*, where the freight was payable by the charter party, the factor refuſing to pay the freight, the maſter of the ſhip litigated there in the admiralty for it; and the cauſe was heard, and judgment there given, that the maſter ſhould have his freight, but that the damages the goods had ſuſtained in the voyage, by reaſon of the deviation, ſhould be deducted, and the *account transferred to the deliquidators*, (who are in

in the nature of our maſters in chancery) to take the account, and the money ordered to be brought into court; but the factor had appealed to a higher court there. Ld. Chancellor declared, that he would not ſlight their proceedings beyond ſea; and if in this caſe the damages had been there aſcertained, or a *peremptory ſentence given*, the ſame ſhould have been concluſive to all parties: but it appearing, the *factor was a native* of that place, and therefore, in all probability, might againſt juſtice prevail, and defendant being willing to deſiſt his ſuit there, his lordſhip directed a trial here by jury, to aſcertain the damages ſuſtained by the deviation. Mich. 1681. Vern. 21. Newland v. Horſeman.

(B) Foreign Lands. Judgments, &c. of Things done there. [411]

1. A. was ſued in the admiralty upon an *obligation* ſuppoſed to be *made and delivered in France*, and now he prayed a prohibition; per Cur. ſuch a bond may be ſued here in B. R. but being begun in the admiralty, we cannot prohibit them, becauſe perhaps the witneſſes of the plaintiff are beyond ſea, which may be examined there but not here. 3 Le. 232. Mich. 31 Eliz. B. R. Delabrock v. Barney.

(C) Foreign Laws and Cuſtoms how far regarded here.

1. ON *marriage* of two French people in *France* the *contract was that the huſband, ſurviving the wife, ſhould have two thirds* of her fortune for life, (whereas *by the cuſtom of Paris*, where they married, *the huſband ſurviving, is to have but a moiety*) and 300 livres in the firſt place by way of preſent, *and that the reſt ſhould go according to the cuſtom of Paris*. Afterwards they fled hither from the perſecution, and ſeveral years after the wife died. Her relations brought a bill for an account of the eſtate, and to have the benefit of the contract. It was objected, that they could not bring over the French law hither, but muſt now be governed *by the laws of England*; *the huſband ſurviving is intitled to all the wife's perſonalty*, or that at leaſt there was no colour to carry it further than the ſum ſtipulated in the contract, and not to that which was left to go according to the cuſtom of Paris, which is only a local law, and ſo could have no benefit of it here. It was anſwered, that marriage contracts are to be ſupported in all countries, without regard to the place where made, and that this contract extended to the whole fortune of the wife, and not only to the particulars mentioned, and the ſaying that the reſt ſhould go according to the cuſtom of Paris, is as much as if the cuſtom had been recited at large, and that the fortune ſhould go ſo. Ld. Keeper decreed relief only as to the ſum

S. C. cited in a caſe of marriage articles made *in Holland*, and that by the law of Holland, *marriage articles take place of any other debts*, and it was inſiſted, that therefore they ſhould be conſtrued here, according to the law of Holland, where they appeared to have been made. But it was anſwered, and

ſum ſtipulated; but on appeal to the lords they had relief for the whole. Chan. Prec. 207. Mich. 1702. Feaubert v. Turſt.

ſo ruled, that it ought *to have been proved* in this caſe, *what is the law of Holland*, as in the caſe of Foubert and Turst, it was proved, what was the law of France, *without which proofs, our courts cannot take notice of foreign laws*, Wms's Rep. 431. Paſch. 1718. Freemoult v. Dedire.

(D) Foreign Money.

1. WHEN one demands foreign coin in ſpecie, the writ ought to be in the *detinet* only; but when the value of it in Engliſh ſilver is demanded, it may be in the *debet & detinet*. per counſel, to which Holt and Eyre, J. ſeemed to agree, and by Eyre, J. *guineas* are as foreign coin. Lutw. 488. Mich. 5 W. & M. in caſe of Pope v. St. Leger.——Jo. 69. Paſch. 1 Car. B. R. Ward v. Kedgrove al. Kedgerow.

It ought to be in the detinet only, and they may *count of the value.* per Holt, Ch. J. Skin. 573. in caſe of St. Leger v. Pope.

———Per Holt. Ch. J. They muſt *demand Engliſh money*, and not foreign money, and they are to value it according to the value it bears here in England; but if a man will bring an *action* for foreign money, it muſt be *detinet*. 12 Mod. 541. Trin. 13 W. 3. B. R. Brown v. Gullock.

[412] (E) Foreign Plantations. Barbadoes, &c.

1. A *Writ of error* lies here upon any of their ultimate judgments in Barbadoes, viz. in any dominions belonging to England. Vaugh. 402. in caſe of proceſs into Wales.

S. C. cited Parl. Caſes 33. and cites alſo 21 H. 7. 3. that it doth ſo to all ſubordinate dominions, though the diſtance of the place prevents the common uſe of ſuch writ, yet by Vaughan's opinion it clearly lies. Parl. Caſes, 33. in caſe of Dutton v. Witham.

2. In Barbadoes they *have laws different from ours*, as that a deed ſhall bind a feme covert, &c. 2 Mod. 46. Trin. 37 Car. 2. C. B. Arg. in caſe of Dawes v. Pindar.

3. An *appeal* lies from thoſe lands to the king in council here, but that is by conſtitutions of their own. Arg. 2 Mod. 46. in caſe of Daws v. Pindar.

4. The king *conſtituted a governor and council of ſtate of Barbadoes*. In action of falſe impriſonment brought againſt the governor for impriſoning the plaintiff by order of the council judgment was given for the plaintiff in B. R. Hill. 3 Jac 2. 3 Mod. 159. Witham v. Dutton.

But in writ of error in the houſe of lords, it was argued, that though it did not appear, that the king gave any authority to the governor and council to commit, yet it is *incident* to their authority, *as being a council of ſtate*; the council here in England commit no otherwiſe. And where the commitment is not authorized by law, the king's patent gives no power for it. But the government muſt be very weak, where the council of ſtate cannot commit a delinquent, ſo as to be forth coming to another court that can puniſh his delinquency. And therefore prayed that the judgment ſhould be reverſed, and the ſame was accordingly reverſed. Parl. Caſes 34. Dutton v. Witham, Howell & al.

5. Theſe plantations are *parcel of the realm*, as county palatines are; their rights and intereſt are every day determined in *Chancery* here, only that, for neceſſity and incouragement of trade, they

§ make

make *plantation lands as aſſets* in certain caſes to pay debts; in all other things they make rules for them, according to the common courſe of Engliſh equity. Arg. Parl. Caſes 33. in caſe of Dutton v. Howell, Witham & al.

6. It was inſiſted by council, that by the cuſtom of the iſland of Barbadoes, a plantation there, though it be a *fee ſimple* eſtate, is in the firſt place *liable to the payment of debts*, ſo that the owner cannot, by his will, ſo deviſe his plantation, but that will be liable to the payment of his debts; but theſe debts muſt be either debts *contracted on the place*, or elſewhere, for matters *relating to the plantation*, &c. Paſch. 1687. Vern. R. 453. Noel v. Robinſon.

To make a plantation in Barbadoes, liable to a debt contracted here, it is ſaid, the method is by procuration from hence under the *ſeal of the mayor of London*, and getting that recorded there; or an acknowledgment of the debt by the owner of the plantation upon the place will do it. Trin. 1687. Vern. 460. Noel v. Robinſon

7. A. recovered a debt contracted here againſt an executor of an owner of a plantation in Barbadoes, and brought an action of *trover*, and had judgment for the *fourth part of a negro*. Arg. Paſch. 1687. Vern. 453. cited as Serj. Maynard's caſe.

8. A plantation in Barbadoes is not a *teſtamentary eſtate* by the laws now in force. per Cur. Trin. 1687. Vern. 469. Noel v. Robinſon.

9. In Barbadoes, all *freeholds* are ſubject to debts, and are eſteemed *as chattels till the creditors are ſatisfied*, and then the lands deſcend to the heir. 4 Mod. 226. 5 W. & M. B. R. in caſe of Blankard v. Guldy.

(F) Foreign Plantations. Jamaica and others. [413]

1. A Plaintiff may *ſue in* the admiral *court*, if he will ſuppoſe the contract in Virginia. But if he *ſuppoſes the contract in England*, he may ſue here. But if part of the contract be here, and part over the ſea in Virginia, or upon the ſea, the common law only ſhall have juriſdiction, and thoſe are the true differences. Per Jones J. 2. Roll. R. 492. Hill. 22 Jac. B. R. Capp's caſe.

2. The reaſon why an *ejectment will not lie* of lands in Jamaica, or any of the king's foreign territories is becauſe the courts here cannot command them to do execution there; for they have no ſheriffs. Per Twiſden J. Vent. 59. Hill. 21 and 22 Car. 2. B. R. Criſp v. the Mayor, &c. of Barwick.

3. The court cannot judge of the *uſualneſs of covenants* of lands lying in Jamaica, but but they muſt be tried by jury. 2 Mod. 240. Trin. 29 Car. 2. C. B. Goffe v. Elkin.

4. Lands lying in Jamaica paſs by grant, and no *livery and ſeiſin* is neceſſary. 2 Mod. 240. Trin. 29 Car. 2. C. B. in caſe of Goffe v. Elkin.

5. *Treaſon* done in Carolina, in raiſing a rebellion there, may be tried in *Middleſex*, by 25 *H.* 8. 2. 3 Salk. 358. Mich. 1 W. & M. The King v. Speke.

6. If a man *lives in New York, and would paſs land in England,*

it is uſual to *join a nominal perſon* with him in the deed, who acknowledges it here, and it binds. 1 Salk. 389. Mich. 8 W. 3. B. R. Tailor v. Jones.

7. Laws of England do not extend to *Virginia*, being a conquered country; their *law* is what the king pleaſes. per Holt. Ch. J. 2 Salk. 666. Smith v. Brown and Cooper.

(G) Foreign Plantations. Actions for Matters there. In what Caſes may be brought here.

6 Mod. 194. Wey v. Yally.

1. LESSOR brought debt againſt leſſee for rent, upon a demiſe of lands in Jamaica, and laid his *action in London*; defendant pleaded that the lands were in Jamaica, and that there are courts there, &c. that if entry and ouſter were pleaded, it could not be tried here, and that the right of plaintiff and defendant depending on foreign laws, cannot be given in evidence here. And per Cur. Where an action is local, it muſt be laid accordingly. Therefore if the leſſor declares on the *privity of eſtate*, and that lies in Ireland, &c. the action muſt be brought there; for the eſtate is *local*, therefore ſuch leſſor cannot maintain *debt* here againſt an aſſignee of a term in Ireland; for the action is founded on a privity of eſtate, otherwiſe where it is founded on a *privity of contract*, which is tranſitory, as debt for rent by leſſor againſt leſſee, for that may be maintained where the land lies not; and if *a foreign iſſue*, which is local, ſhould happen, it may be tried where the action is laid; for that purpoſe there may be a ſuggeſtion entered on the roll, that ſuch a place in ſuch a county is next adjacent, and it may be tried here by a jury from that place, according to the laws of that country, and on *nil debet* pleaded, you may give the laws of that country in evidence. 2 Salk. 651. Trin. 3 Annæ, B. R. Way v. Yally.

[414] (H) Foreign Plantations. Governed by what Laws.

1. IF there be a *new uninhabited country found out by Engliſh ſubjects*, as the law is the birth-right of every ſubject, ſo whereever they go they carry their laws with them, and therefore ſuch newfound country *is to be governed by the laws of England*. 2 Wms's Rep. 75. ſays it was ſaid by the Maſter of the Rolls, 9 Auguſt, 1722, to have been ſo determined by the lords of the privy council upon appeal.

2. *But* after ſuch country is inhabited by the Engliſh, *acts* of parliament, *made in England, will not bind them without naming* the foreign plantations. Ibid.

3. *Therefore* it has been determined, that the ſtatute *of frauds* and perjuries, which *requires three witneſſes to a will*, and that theſe ſhould

ſhould ſubſcribe in the teſtator's preſence, in caſe *of a deviſe of land*, does not bind Barbadoes. Ibid.

(I) * Foreign States.

* See (A) (B)—See Admiralty.

1. A. *By authority of the king of Denmark*, ſeiſed and *condemned goods* in ſome of the dominions of the king of Denmark, according to the law of that country, and coming into England was *proſecuted here for the ſame*. The court thought this was a matter of ſtate, and concerned the juſtice of another king in amity with the king of England, and that what was done *was according to their law*, and that it was not properly triable here, whether the King of Denmark had power to make ſuch a grant, and decreed a perpetual injunction. Mich. 26 Car. 2. Fin. R. 186. Badtolph v. Bamfield & al.

2. If a man obtains a judgment or *ſentence in France*, yet here the debt muſt be conſidered as a debt by ſimple contract. He can maintain no action here, but an indeb. aſſ. or an inſimul computaſſet, &c. though both parties were *foreigners*, that will not help the plaintiff. per Lord Keeper. Hill. 1705. 2 Vern. R. 541. Duplein v. De-Roven.

3. Where a *foreign court has juriſdiction* of a cauſe, *and the perſons are within it*, the ſentence muſt bind without regard to what law is here; and the ſentence appearing, is not to be controlled by evidence, that the law is not ſo there. Sel. Ch. Ca. in Ld. King's time. 69. Mich. 1726. Burrowes v. Jemineau.

Foreigners.

(A) Suits by them.

1. THE plaintiffs, being creditors of Colley, preferred their bill againſt the defendant, being all foreigners, but the goods were paſſed over into England, into merchants hands by Colley, and this court taking notice, in reſpect of the *different computation of the realm*, firſt, *to be paid at the feaſt of the three kings heads*, ſecondly, becauſe the *bill was not ſealed*, thirdly, becauſe the *debts grew in France*, and he came over hither to keep his body from arreſts, the court decreed the debts, and cauſed a *decree* to be drawn up *pro confeſſo becauſe the defendant would not anſwer*, and ſequeſtered monies in other men's hands, to pay the debts, although they were paſſed over to others, to the uſe of an infant. Toth. 131, 132. cites 8 Jac. Sere & Eland v. Colley.

2. The plaintiff being a Dutch woman brought 4000 *l.* portion to her *husband*, who *agreed* with her *before marriage, to leave a compleat maintenance for herself and her children*, but *not expressing what*; the marriage took effect, but he declining in estate, her friends called on him; and he thereupon assigned certain bonds, wherein M. was bound to him, and a letter of attorney was made after to S. to receive the money upon the bonds, who received the money of him. The bill was to have the money from M. and S.——M. by plea sets forth the payment to S. and that he had no notice of the assignment of the bonds. And this was allowed a good plea for M. But S. pleaded a letter of attorney, and payment to him on good consideration, but did not deny notice, and therefore his plea disallowed, and the *agreement and assignment of the debt in Holland*, where such agreement between husband and wife, and such assignment of bonds are good, they are to be *allowed* here; by the lord keeper. Chan. Cases. 232. Trin. 26 Car. 2. Ashcomb's case.

Foreign Plea.

(A) In Civil Cases. What; and how granted, and received.

1. 6 *R.* 2. 2. *IF in writ of* debt account, and the like, *it shall be declared, that the* contract thereof was made in another county *than is contained in the original writ, such writ shall be abated.*

But at the common law, one that had a *particular jurisdiction* to hold plea of debt, contract, detinue, covenant or trespass within his manor, &c. could not hold plea of a debt, contract, &c. *alledged to be made out of* the manor, &c. because albeit it was transitory, yet (being so alledged) it was not within his power or jurisdiction, which he had by prescription or grant. For all pleas holden there, must be *infra jurisdictionem Curiæ*. 2 Inst. 231.

As if a lord had *probate of testament*, made within the precinct of his manor, he cannot prove a testament, made out of the precinct of it. 2 Inst. 231.

So of the court of *piepowders of contracts*, &c. made out of the fair or market, &c. 2 Inst. 231.

But before this statute, writ of *debt, and account against a receiver*, and such like actions might be brought in any county, where the party might be best brought in to answer, and the plaintiff might have counted of a contract or receipt, &c. in any other county; because *debitum & contractus, &c. sunt nullius loci*, 7 Rep. 3. Mich. 26 and 27 Eliz. in BULWER's case cites 2 E. 3. 44. 6 E. 3. 266. and 275. 8 E. 3. 380. 10 E. 3. 7. 19 E. 3. Jurisd. 29. 29 E. 3. 26. 33 E. 3. Jurisd. 57. 40 E. 3. 7. 3 H. 6. 30. 5 E. 4. 19. 21 E. 4. 88.

In debt *upon bond*, the defendant *pleaded*, that it was *made in another county* than is alledged in the declaration, and prayed, that the attorney might be examined thereupon, by force of this statute. The plaintiff demurred, as if it had been a plea in bar to the action, and defendant joined and concluded, *quod ab actione precludatur*. But it was resolved, that the plea was ill, and not warranted by the statute, which *provides only, that the original shall not be laid in one county and the declaration upon a bond made in another*, and if so, that the writ shall abate; and this course of pleading had been disallowed. cites 3 H. 6. 35. And secondly, because the *demurrer was joined as to the action*, judgment was given, quod recuperet, &c. Allen. 17. Hill. 22 Car. 2. Shalmer v. Slingsby.

2. Debt

2. Debt upon a *bond* in Banco, and counted that it was *made in London*; Paſton prayed judgment of the writ, for that he has a *plaint* upon the ſame bond yet *pending in N. by which he ſuppoſes the bond to be made at N.* judgment of the writ, & non allocatur; for it is out of the caſe of the ſtatute of 6 *R.* 2. *c.* 2. that if a man brings action in one county, and declares in another, his writ ſhall abate, but *here he declares in the ſame county.* Br. Brief, pl. 8. cites 3 H. 6. 15.

3. *Debt in the county of N.* and *declared at H.* where *it extended into the county of N. and of L.* and the *defendant ſaid, that* the bond upon which he declares *was made in the county of L.* Judgment of the writ, by reaſon of the ſtatute of 6 *R.* 2. *c.* 2. and per Martin, this is a good plea; by which Rolf paſſed over, quod mirum; for [416] the ſtatute is no other, but where a man brings action in one county, and declares in another, that the writ ſhall abate, but *here he declares in the ſame county.* Br. Brief, pl. 10. cites 3 H. 6. 35.

4. If defendant in a corporation court pleads a foreign plea, which is *collateral, as in debt upon bond*, if he pleads *releaſe* made in a place *out of the juriſdiction* of the court, it need not be received without oath. Litt. R. 236. Mich. 4 Car. C. B. Corporation Court.

5. *But* if *in covenant or debt for money, to be paid at another place; he pleads payment accordingly*, or the covenants performed in the place limited, which was out of their juriſdiction, it ought to be received *without oath.* Agreed by all the juſtices. Quod Nota. Ibid.

6. If defendant plead a foreign plea, which is *tranſitory*, the plaintiff may *demur* to it. But if it be *not tranſitory*, it muſt be *upon oath*, otherwiſe it will not be received. Sid. 234. Mich. 16 Car. B. R. Collins v. Sutton.

If the action be tranſitory, and defendant carries it into another county, the plea is naught, except in *ſpecial caſes*; *but if the action be local*, the removing it into another county, than where the plaintiff has laid it, it is properly a foreign plea, which is not done in the principal caſe; for there the action is laid in Cheſhire, and the defendant does not in his plea remove it thence. quod Curia conceſſit, and ſo judgment ſet aſide. 12 Mod. 123. Paſch. 9 W. 3. Cholmley v. Bloom.

7. If it *appears by the declaration, that the money was to be paid out of the juriſdiction* of the court, the judgment is not good; and it is not neceſſary to *ſwear* the plea, if it appears *on the* * *obligation*, that the money was to be paid out of the juriſdiction of the court, and he *pleads payment according* to the condition. But if one *will not ſwear* a foreign plea, where he ought to do it, the plaintiff may enter judgment on a *nihil dicit*, for ſuch a foreign plea, not ſworn, is no plea upon the matter. Sti. 225. Trin. 1650. Dudeny v. Collier.

* S. P. and ſays, that many inſtances may be given of foreign pleas, which, if *not collateral to the action*, muſt be received without oath. 5 Mod. 335. Cholmondley v. Broom.

8. A prohibition was prayed to the court of the compter, to an action of *debt* there commenced; for that the defendant had *pleaded before imparlance*, that *the cauſe of action did ariſe at a place out of their juriſdiction*, and offered to have ſworn his plea, and they refuſed to accept this plea; and a prohibition was granted; for inferior courts have not cognizance of *tranſitory things*, which ariſe out of their juriſdiction, as F. N. B. 45. is: but then it is not ſufficient to ſurmiſe

miſe ſuch matter for a prohibition, but a *plea* to that effect *muſt be tendered in the inferior court*, and that *before any imparlance* taken, (whereby the juriſdiction would be admitted) and it muſt be *upon oath*; and then if refuſed, a prohibition ſhall be granted; or upon ſuch refuſal, a bill of exceptions may be made, and error aſſigned. Vent. 180. Hill. 23 and 24 Car. 2. B. R. St. Aubin v. Cox.

12 Mod. 123. S. C. but vid. Mod. 81.

9. A foreign plea *is*, where the action is carried out of the county where it is laid, and is to be *ſworn*, which a plea to the juriſdiction is not. Carth. 402. Paſch. 9 W. 3. B. R. Cholmly v. Broom.

10. *Debt* was brought *in B. R. on a bond* made *at Cheſter*; the defendant did not imparle, but *pleaded* by attorney, *that he is, and at the time of the action* brought, *was an inhabitant, and notoriouſly converſant at Nantwich, within the county palatine of Cheſter*, and ſo prayed judgment if the court of B. R. ought to hold plea of this matter. But the plaintiff taking this to be a foreign plea ſigned judgment, becauſe it was not ſworn to. And to ſet aſide this judgment, it was inſiſted, that though this is a plea to the juriſdiction, yet it is not a foreign plea, and therefore need not be ſworn to, And accordingly the judgment was ſet aſide. Vid. Carth. 402. [417] Paſch. 9 W. 3. B. R. Chumley v. Broom. and 5 Mod. 335. Cholmondley v. Broom. S. C.———and 12 Mod. 123. Cholmeley v. Bloom. S. C.

12 Mod. 123. S. C. and P.

11. *Ancient demeſne*, and all *pleas of privilege*, are pleas to the juriſdiction, and not foreign pleas, and therefore not to be ſworn to, but may be received without an oath. Arg. and judgment accordingly. 5 Mod. 335. Cholmondley v. Broom.

12. *Debt* was brought *in London*. A *prohibition* was moved for, and granted *niſi*, upon ſuggeſtion that the defendant had tendered for plea below, that the cauſe did ariſe out of their juriſdiction, and offered to make oath of the truth of it. Now it was *ſhewed, that he tendered the plea after the court was up*, whereas it *ſhould be, in propria perſona, and in court*. And though an affidavit was offered in B. R. of the truth of the plea, and * TURNER's caſe, 4 Jac. 2. was cited out of Lutwich, where a prohibition had been granted *upon affidavit in B. R. without oath below*, yet by three juſtices abſente Holt, the rule was diſcharged. For in all pleas that ouſt a court of juriſdiction, whether inferior or ſuperior, there *muſt be oath, in that very court, of the truth of plea.* 6 Mod. 146. Paſch. 3 Annæ. B. R. Sparks v. Wood.

* Lutw. 1023. Turner v. Weſton.

(B) When and how Granted.

1. IN debt, if the *defendant pleads foreign plea in another county in perſon*, he ſhall not be examined, but if it be by attorney, the attorney ſhall be examined. But in this caſe they uſe to examine the party at this day without oath. Br. Examination, pl. 23. cites 20 E. 4. 10.

2. If one be ſued *in an inferior court*, for a matter out of the juriſdiction,

diction, the defendant may either have a *prohibition from one of the common law courts, or may*, if it happen *in the vacation*, and it happens then, when the chancery only is open, *move the court of chancery for a prohibition*, but then it muſt appear *upon oath* made, *that the matter aroſe out of the juriſdiction, and that the defendant tendered a foreign plea, which was refuſed.* Wms's Rep. 476. Trin. 1718. Anon.

3. *But if* a prohibition has been *granted improvide*, and without theſe circumſtances, the *court will grant a ſuperſedeas* thereto. Ibid.

4. *But if* it ſhall *appear on the face of the declaration*, that the matter is *out of the juriſdiction* of the court, *then* a prohibition will be granted *without oath* of having tendered a foreign plea. And in theſe caſes equity imitates the common law. Ibid. 477.

5. *And* in a late caſe, which was moved the laſt ſeal after Trinity term, where the court had granted a prohibition to an action in the courts of London, upon an affidavit, that the matter aroſe out of the juriſdiction, it appearing at another day, that the *defendant had imparled generally*, (which admitted the juriſdiction) and ſo could not afterwards be allowed to plead a foreign plea, the court granted a *ſuperſedeas* to the writ of prohibition. Ibid 477.

(C) Foreign Plea. In Criminal Caſes.

1. 4 *H.* 8. 2. *Where a murderer or felon, (to delay his arraignment) pleads that he was taken out of a privileged place, in a foreign county, and it is alledged by the king's attorney, (or ſome other in the king's behalf) that he was taken in the county where he is ſo to be arraigned, they ſhall be tried by the inqueſt who are to try the murder or felony, and before the ſame juſtice, and if it be found that he was taken in the ſame county, ſuch foreign plea ſhall do him no advantage or benefit.*

Foreſt. [418]

(A) Foreſt, Park, Chaſe, &c.

[1. THE *parker may receive beaſts* into the park, *to paſture for money.* 46 E. 3. 12. b.]

[2. *But* the parker *cannot give power* to another *to cut the branches of the trees*, without the aſſent of his maſter. 46 E. 3. 12 b.]

(B) Parke,

(B) Parke, Chaſe. By whom it may be made.

Nor a warren or chaſe; and if he does it of his own head in a *quo warranto*, they ſhall be ſeiſed into the king's hands. 11 Rep. 86. in the caſe of monopolies.——87. b. ibid.——2 Inſt. 199.

[1. NONE can make a park *without licence of the king*, becauſe it is to appropriate things which are feræ naturæ & nullius in bonis to himſelf. 11 Rep. 87. b. Monopolies, 18 H. 6. 21.]

* Trin. 44. Eliz. 3.

[2. *So* none can make a chaſe without licence of the king. 11 Rep. 87. b. * Monopolies.]

(C) Law of the Foreſt.

1. JUSTICES *of foreſt ſhall have determination of hart proclaimed killed*, and *not the King's Bench*; and therefore the defendant may plead to the juriſdiction. Per Fineux Ch. J. Br. Juriſdiction, pl. 55. cites 21 H. 7. 30.

2. The foreſt law *is not the common law of the land*, and we are not bound to take notice of it, but it ought to be pleaded. Trin. 29 Eliz. C. B. 2 Le. 209. Ruſſel v. Broker.

3. The Earl of Lancaſter, who was *lord of a foreſt*, *granted* to one H. *to make a park within the foreſt*; it was adjudged, that if the grantee incloſed it ſo ſlightly that the deer of the foreſt might get in, it was a forfeiture of the grant, and that the lord might enter and take the deer. Bridgm. 27. Arg. cited in the caſe of the King v. Sir John Byron.

(D) What is a Foreſt, and the Antiquity, and Extents thereof.

1. 1 *E.* 3. *ſtat.* 2. *cap.* 1. *aſcertains the bounds of foreſts.*

2. Beſides other prerogatives of the *Saxon kings*, they had alſo a franchiſe for wild beaſts of chaſe, which we commonly call foreſts, being *a precinct of ground, neither parcel of the county, nor the dioceſs, nor of the kingdom, but rather appendant thereunto.* Bac. of Government, 82.

[419] 3. Foreſts *will appear by* matter of record as by *eires* of juſtices of foreſts, *ſwanimotes*, officers of foreſts, as regardors, agiſtors, verderors, &c. but the *appellation* of it by the name of a foreſt, *in grants, offices and conveyances*, is not any proof that it is a foreſt in law. 12 Rep. 22. Paſch. 5 Jac. in Leiceſter Foreſt's caſe.

4. A foreſt may well be *in the hands of a ſubject*, and ſhall be uſed as a foreſt if the king gives authority by expreſs words for the adminiſtration of juſtice there, and for his juſtices to come there; and if ſuch

ſuch grantee might have commiſſion in ſuch caſes to uſe and have officers of a foreſt, then it ſhall continue a foreſt in the hands of a ſubject. Otherwiſe, without ſuch liberties, it is but a chace, being in the hands of a common perſon; per all the juſtices and barons. Cro. J. 155. in the caſe of Leiceſter foreſt.———And Popham ſaid, that he had ſeen ſuch liberties of a foreſt granted in that manner. Cro. J. 155. Paſch. 5 Jac. B. R. ut ſup.

5. 16 *Car.* 1. *cap.* 16. § 4. enacts that, *the meets and bounds of foreſts ſhall extend no further than the ſame were commonly known or taken in the twentieth year of King James, and all preſentments, ſince the ſaid twentieth year, and all other preſentments, perambulations and other acts, by which the meets or bounds of the foreſts are further extended, ſhall be void.*

6. There are 3 manner of foreſts; 1ſt, *ancient foreſts de temps d'ont, &c.* before charta de foreſta, called *charta parva*, in reſpect to magna charta which paſſed in the ſame year. 2*dly*, There are *new foreſts* made in the reigns of King Henry 2. Richard 1. King John, &c. A third ſort of foreſts, are ſuch as were *partly ancient and partly new*; in regard the ancient bounds of the foreſts were enlarged, and ground taken in to the foreſt that did not anciently belong to it. And that is the reaſon of the ſaving in 9 H. 3. *in charta de foreſta*; *ſaving all commons accuſtomed*, though the lands of the owners were diſafforeſted by the act; becauſe they had been afforeſted in the reign of King *Hen.* 2. or *King John*, &c. to the prejudice of the owners of the land who had common there; and were not rightfully within the foreſt, and therefore it was but reaſon that, upon the diſafforeſtation of thoſe lands, the owners ſhould enjoy their cuſtoms; and this is the true ground of that ſaving in the act. But afterwards in the 12 *H.* 3. and 10 *Ed.* 1. there were *other perambulations*, whereby *many foreſts were enlarged* to the prejudice of the ſubjects. And thereupon, afterwards, in 21 *Ed.* 1. there was *another perambulation* made, by which the king conceived himſelf much prejudiced in abridging the bounds of the foreſt, and exempting the lands out of the foreſt, which in truth were part of it. Upon theſe grievances on both ſides, both to the king and ſubject, occaſioned by theſe perambulations made *after* 9 *H.* 3. *the king and his ſubjects concerned therein came to an accord* and agreement; and thereupon *anno* 33 & 34 *Ed.* 1. *ordinatio foreſtæ was made*; whereby it is declared, by aſſent of both parties, that the de-afforeſtations made upon thoſe perambulations (be they right or wrong) ſhould be quite diſcharged of the foreſt; but then the owners of the ground were not to have common there. But ſuch, who were content to continue their lands within the foreſt, were to have common as they uſed formerly to have it. Per Hale Ch. B. Hard. 438. Hill. 18 & 19 Car. 2. in the Exchequer, in caſe of the King v. Inhabitants of Rodley in Glouceſterſhire.

(E) What

(E) What may be claimed by a subject in forests.

1. 9 *H.* 3. *stat.* 2. *cap.* 4. enacts, that *freeholders, who have their woods in forests, shall have them as at the coronation of king H.* 2. *and those that make purpresture, &c. in them without licence shall answer for it.*

2. 9 *H.* 3. *stat.* 2. *cap.* 9. *allows agistment and pawnage to the owners of woods.*

[420] Where lands were *not duly* and of right *afforested at first, and that they had common by prescription in the forest*, it was not the intent of the ordinatio forestæ to toll such a common; but if they were well afforested at first, and afterwards disafforested unduly by some perambulation, then the common is lost, if the owner will have the land remain disafforested; and this is the true meaning and interpretation, and intent of this act of ordinatio forestæ. Hard. 438. Hill. 18 and 19 Car. 2. in the Exchequer, in case of the King v. Inhabitants of Rodley in Gloucestershire.

3. 33 *E.* 1. *stat.* 5. enacts, that *those, to whom the king hath granted purliew, (whereby their woods are disafforested) shall be quit of the charge of the forest, but then they are to have no common there: howbeit such as are willing to return their woods into the forest, shall enjoy common and other easements there as they did before.*

This act of ordinatio forestæ *makes but a temporary suspension of the common law*, viz. so long as the owners of the lands would be out of the forests, et non ultra. Hard. 439. in case of the King v. Inhabitants of Rodley in Gloucestershire.

4. 34 *E.* 1. *stat.* 5. *cap.* 6. enacts, that *they, who had common of pasture, and were restrained of it by the perambulation, shall have their common as before.*

5. A man may *cut wood in his own soil in a free chase*, without view of the forester. Br. Forest, pl. 6. cites the time of E. 1. and Fitzh. Trespass 239.

6. One claimed before the justices in eyre, to be quit of pannage in the king's forest; and also claimed in the same forest, *pannage for* the *hogs of his tenants* agisted; but they would not meddle with it, because this belonged to the justices of the forest. Keilw. 150. b. in Itin. E. 3.

A. being seised of Hatfield chace *granted and sold to B. and his heirs all the wood growing, and to grow* upon a part thereof, and *excepted the soil*; *and* further, *that he might inclose every year* 16 *acres* thereof, and to hold it in severalty, for the preservation of the spring, *according to the statutes of the realm*; and this grant was *confirmed by a private act of parliament*, and that the grantee might hold it in several, without suit of the king's officers, with a *saving of the right of all strangers*; and a *commoner put in his beasts*, to take his common in one parcel of that which was inclosed, against whom the grantee brought an action of trespass, and in this the only question was, if the grantee of the trees, which had not any interest in the soil might inclose against a commoner by this statute. It was agreed by Coke Ch. J. and Foster, that this statute *was repealed by* the statute of 35 H. 8. for this *is in the negative*, and therefore is a repeal of a former statute, but if the last had been in the affirmative, otherwise it should be; and it was also agreed, that this was not within the statute of 35 *H.* 8. for that *appoints of what age the wood shall be inclosed, and by this recompence is given to the commoner*; but here it is not averred by pleading, of what age this wood was which was inclosed; and

7. 22 *E.* 4. 7. enacts, that *if any, having woods in his own ground, without any forest, chase, or purliew, shall cut, or cause the same (or any part thereof) to be cut by the king's licence (where such forest, chase, or purliew are his) or without licence (where they belong to others) he may keep them several, and inclosed during 7 years next after their felling.*

therefore

therefore it was adjudged that the action is not maintainable againſt the commoner. 2 Brownl. 289, 290. Chalk v. Peter.——8 Rep. 136. b. Sir Francis Barrington's caſe S. C.——Godb. 167. S. C.——2 Brownl. 328. per Coke Ch. J. acc.

This ſtatute doth *not extend to any woods* in foreſt, *in which an other hath common*, for it doth *but* extend *only to ſuch woods which a common perſon hath in the King's foreſt*, or common perſon's, and that it might be incloſed for the ſpace of three years after the cutting of the wood therein before the making of this ſtatute, and this was no wood in which a ſtranger had common, as it appears by the preamble of the ſaid ſtatute; and then after in the ſaid ſtatute it is ſaid, ſuch woods may be incloſed, per Coke Ch. J. 2 Brownl. 327. Paſch. 8 Jac. Chalk v. Peter.

8. Preſcription may be for *warrens* in foreſts, though they were in the king's hands, but without a ſpecial preſcription it cannot be; and in ſuch caſe of *preſcription* for warren, if it was by *grant*, or he can prove it by preſcription, a *non uſer* is no cauſe of forfeiture thereof. Cro. J. 155. Paſch. 5 Jac. B. R. Leiceſter Foreſt's caſe.——Jenk. 316. pl. 6.

9. If the king grant a *foreſt*, the grantee ſhall have but a chace, unleſs *power* be granted to hold a *ſwanimote court*, *juſtice ſeat*, *court of attachment*, &c. But if this be granted a ſubject may have a foreſt and this has been twice adjudged; per Coke. Roll. R. 195. Paſch. 13 Jac. B. R. the King v. Briggs. 2 Roll. R. 190. Trin. 18 Jac. B. R. S. C.—2 Bulſ. 295. S. C.—Subject cannot have a foreſt; but what is foreſt in the hands of the king when granted to a ſubject is a chaſe. Palm. 93. Bridges's caſe——Roll. R. 112. S. C.——By *ſpecial words* of grant, as to have foreſt, to conſtitute juſtices and verderors, a ſubject may have foreſt, but not by general words, and ſo Popham ſays, it was adjudged. Palm. 94. 37 Eliz. B. R. Jennings v. Rock.——Roll. R. 194.——12 Rep. 22. per Popham Ch. J. that the ſubject may have a foreſt. But this is intended, if he hath power to have ſwanimotes and juſtices in eyre, and *foreſters appendant to* his foreſts. Paſch. 5 Jac. B. R. Anon.

10. A *ſubject may have* a foreſt, but cannot have a juſtice ſeat, but he may have a ſwanmark court and the other courts, and a commiſſion to execute them. Mich. 3 Car. C. B. Het. 60. Comins's caſe. [421] Kelw. 15. &c.—Cro. J. 155. Leiceſter foreſt's caſe.—Jenk. 316. pl. 6.

11. An *allowance in eyre bindeth the king*, the ſubject being in poſſeſſion, *'till removed by another judgment*; but B. R. hath no juriſdiction in foreſt cauſes; and therefore an allowance there of liberties within the foreſt, will not put the king out of poſſeſſion. 8 Car. Jo. 267. Caſe of the Hundred of Wargrave

12. A purchaſor of a manor in a foreſt, liable to *repair a bridge* there, may be compelled to repair the ſame, and he muſt ſeek his remedy at law for *contribution* from the others, who have any part of the lands; and the court (of eyre) is not to let the bridge lie in decay, 'till it be determined between the parties, whether they ought to contribute or no. 8 Car. Jo. 273. Caſe of Lodden Bridge.

13. A. ſeiſed of the manor of W. claimed *to hunt foxes*, *hares and wild cats* therein, *under a charter* granted by R. 1. to the abbot of Waltham Holy Croſs, and ſhewed the diſſolution of the abbey, and a new grant of the ſaid manor to one N. with the words of tot, tanta, talia, &c. libertates, &c. quot, &c. and ſo deduced the title down to himſelf, by ſeveral meſne conveyances. It was held by Noy, and ſo adjudged, that the words of *tot*, *tanta*, *talia*, &c. are no warrant for him; for the abbot had 20 manors, and yet there was but one hunter; but

but if theſe grants be allowed, hunters will be multiplied, and ſo the foreſt ſpoiled; and ſo this point was adjudged in the foreſt of Waltham againſt Sir THOMAS FANSHAW, who claimed the like privilege within his manor of B. which was the abbeſs of Barking's, who had the like charter, and Sir Thomas the like words as here. 8 Car. Jo. 286. in Sir Edmund Sawyer's caſe.

14. A. claimed in like manner as aforeſaid, *to be free from the repair of bridges*, but it was not allowed; for thoſe bridges, which by law he ought to repair, no grant can diſcharge; for the *ſubject hath an intereſt* therein; and for thoſe bridges, which are not known by whom they ought to be amended, the ſtatute of 22 H. 8. 5. hath made all men chargeable. Ibid.

15. He made alſo a like claim *to be quit from carriages*, & a navigio & domorum regalium edificatione, &c. but they are all of the nature of purveyance, and were *reſumed by* 27 *H.* 8. 25. *and* ſo *not revived by grant* of tot, tanta & talia, &c. Ibid.

2 Brownl. 326. per Coke Ch. J. in caſe of Chalke v. Peter.

16. So he likewiſe claimed *to incloſe his woods of W. with as great ditches and hedges as he pleaſe*; but it was not allowed, becauſe this was but matter of election, which the abbot might chuſe, or not; and *matters of election are not revived*, as aforeſaid; and if the abbot himſelf were living, he could not incloſe it by virtue of that licence, which is 400 years ſince; becauſe it cannot be known whether that power was not once executed, and if it was, and after thrown out again, it cannot be incloſed again; for then one power ſhould be executed divers times. Ibid.

17. A preſcription *to be out of the foreſt* is not good, without ſhewing an allowance in eyre; by Noy, and ſo adjudged. Ibid. 290. caſe of the Tenants of the Manor of Bray.

18. So, no *liberty* within a foreſt, *in deſtruction of the vert or game*, is good by preſcription, without an allowance in eyre, except only in caſe of *common*; by Noy. Ibid. 291.

19. Common of *paſture for ſheep*, is good only in two caſes within a foreſt, the firſt is, when an officer of the foreſt hath land belonging to his office, and claims common for ſheep belonging to that land; and this was allowed in one BLANCHARD's caſe, in the time of R. 2. and adjudged for him in eyre, and in chancery, and after in parliament; and ſuch another was for Claringdon foreſt in Wiltſhire. The other caſe is for paſture of ſheep, which a man may preſcribe for in his own open waſte grounds, but not in his coverts; by Noy. Ibid. 292.

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20. One claimed all *windfalls and profits* whatſoever *within his bailywick*; but held by Noy, that it was not good; for he cannot have the profits of every man's land within that bailywick. 8 Car. Jo. 294. Sir Charles Howard's caſe.

Jo. 281. in Reſton's caſe.

21. So the *claim of office of keeper*, or bailiff *of ſeveral walks*, *una cum vadiis & feodis*, &c. is not good, by Mr. Noy; becauſe *no fee certain is claimed*; and theſe words una cum vadiis & feodis, &c. debit. & conſuet. & tot, tanta, &c. quot, quanta, &c. aliquis, &c. will not help it without an averment what they were. Ibid.

22. So a claim of *as much firewood as he ſhould think fit to be burned in New Lodge* is void, by Noy; becauſe otherwiſe he might take as much

much wood as he thought fit, and ſell it when done. But if the claim had been of as much as he ſhould burn in New Lodge, it had been good. Ibid.

23. The *inhabitants* of Haley *claimed common of paſture* in the foreſt; it is not good, by Noy; for inhabitants cannot claim any profit apprendre, as GATEWARD's caſe, Co. 6. but an eaſement they may, as a way to church. Ibid. 297.

24. A claim for *common for cattle, without ſaying levant and couchant upon land in certain*, is not allowable. Ibid. 298.

25. In *ejectment*, a ſpecial verdict was found, upon which the queſtion was, whether or no a *preſcription for common or paſture for all cattle and ſwine*, in a foreſt *at all times of the year*, were a good preſcription, or not. It was argued pro quer. that the preſcription was naught, which was agreed by the court, and the counſel of the other ſide; but for *not finding expreſsly that it was a foreſt*, judgment was given pro defendente. Hard. 87. Mich. 1656. in the Exchequer. Woolridge v. Dovey.

26. In *replevin* of a heifer, the defendant avowed damage feaſant; the plaintiff, in bar, *preſcribed for common omni anno omni tempore anni*; iſſue upon the preſcription, and verdict found the iſſue for the plaintiff; but further found, that the land, and place where, is *infra regardum foreſtæ de Whittlewood in com' Northamton*; upon which judgment was given for the plaintiff that the preſcription is good, notwithſtanding that the place where is a foreſt, and that in the preſcription *fence-month* is not excepted, according to TRIG and TURNER's caſe. 3 Lev. 127. Trin. 35 Car. 2. C. B. Brabrooke v. Carter.

27. A man may *preſcribe for common for ſheep* in a foreſt, but not for *goats*. See Lutw. 81 Grammer v. Watſon———and ſuch preſcription may be for common for ſheep in the *fence-month*. Lutw. 81. Paſch. 1 Jac. 2. C. B.——Adjudged 3 Lev. 98. Paſch. 35 Car. 2. C. B. Trigg v. Turner.———2 Show. 9. S. C.

Within a *free chaſe, in the hands of the king*, the owner of the ſoil, by *preſcription*, may have common for his *ſheep and warren for conies by grant or preſcription*. But he cannot *ſurcharge* with more than has been uſed time out of mind, unleſs, &c. nor *make burroughs* in other places than *hath been uſed time out of mind*, unleſs he has warren *by grant*, and then he may uſe it according to his grant. But he cannot *erect a new warren* without charter. 12 Rep. 22. *and* he that has ſuch a warren may lawfully *build* upon his inheritance, within his warren, *a convenient lodge* for preſervation of his game. 12 Rep. 22. Paſch. 5 Jac. B. R. per all the juſtices and barons in Leiceſter foreſt's caſe.——4 Inſt. 298.——Cro. J. 155.

Common for ſheep cannot be in a foreſt, per Dodderidge J. to which Coke Ch. J. agreed, unleſs it be by preſcription. 3 Bulſ. 213. Trin. 14 Jac. in Webb's caſe ——And Coke ſaid that charta de foreſta is but in affirmance of the common law. ibid.———Roll. R. 411. S. C.

28. If there be park or foreſt where the lord has the game, another man may *preſcribe to have the herbage*; for the lord has conſiderable profits of the ground by his deer, which is ſo conſiderable, that if the *franchiſe comes to be determined*, it has been held, that ſuch a preſcription for herbage being but ſurpluſage after the feeding of the deer, and ſubordinate to it, ſhall rather be *loſt*, than carry the whole profit of the feeding and exclude the owner. And it has been the caſe of many parkes, that have been *diſparked by the king, after the herbage granted away*, per Sir Francis North, Arg. Vent. 391. in caſe of Potter v. North.

(F) What

(F) What may be done by a ſubject therein.

2 Inſt. 309. ſays, that after the blowing the horn, it ſhould be *propriis ſuis canibus aut arcu ſuo proprio.*

1. BY 9 *H.* 3. *ſtat.* 2. *cap.* 11. *a nobleman paſſing by the foreſt, is allowed to kill a deer or two*, by view of, or a horn, being blown for the foreſter.

2. 9 *H.* 3. *ſtat.* 2. *cap.* 12. enacts, that *every freeman ſhall make in his own wood, land, or water, within the foreſt, mills, ſprings, pools, marſhes, dikes or arable ground, without the cover, ſo as not to annoy his neighbour.*

3. 9 *H.* 3. *ſtat.* 2. *cap.* 13. *allows ayries for hawks, &c.*

4. 1 *E.* 3. *ſtat.* 2. *cap.* 2. enacts, that *every man, that hath wood within the foreſt, may take houſebote and heybote in his wood.*

The owner of land in the foreſt cannot build a houſe there *without licence* of the king or the juſtice in eyre. Jenk. 230. pl. 100.

5. *Building a new houſe* in the ſeveral ſoil or waſte of any man in a foreſt is a purpreſture, and an annoyance to the foreſt and game, and *finable or arrentable* for the tolerating or permitting it to ſtand, at the diſcretion of the juſtice in eyre, or he may demoliſh it at pleaſure. D. 240. b. Trin. 7 Eliz. pl. 45.

6. *Erection of a beacon* upon a man's own land in a foreſt, is a purpreſture. D. 240. b. Marg. 45. cites Atkins's reading upon the ſtatute of foreſt, Auguſt 1632, in Lincoln's Inn.

7. *So*, where a man deviſed a ſum of money for erecting *of a cauſey* in Waltham foreſt, and the ſame was done accordingly; he was fined for purpreſture. D. 240. b. Marg. ut ſup.

8. A man cannot *cut down wood* in his own land in a foreſt, without view of the foreſter. Co. Litt. 115. a. (o) cites ſtatute 34. E. 1. But he ſays, that, inaſmuch as this act is *in affirmance of the common law*, a man *may preſcribe* to cut down his woods there without ſuch view, and ſays that it was ſo adjudged, 16 Eliz. in the Exchequer. as Popham Ch. J. reported to him.

S. P. 12. Rep. 22. And if they are not foreſts in law, but *free chaſes only*, the freeholders there, though the chaſes are *in the hands of the king*, may cut the wood and timber growing on their lands, without view or licence. But if the owner leaves not ſufficient covert to maintain the king's game, he ſhall be puniſhed at the ſuit of the king. P. 5 Jac.

9. In ſuch foreſts or chaſes *being in the hands of a common perſon*, thoſe, that are *owners of woods, may cut* them down at their pleaſure without licence or view of the foreſters; but yet ſo, as to leave ſufficient *vert* for the deer there. Cro. J. 155. Paſch. 5 Jac. B. R. Leiceſter Foreſt's caſe——So though it be in the hands of the king. Ibid——Jenk. 316. pl. 6.

Jenk. 316. pl. 6.

10. *Parks laid open to foreſts* for 40 years, may yet be incloſed again, and they may kill deer that come therein. Cro. J. 156. Paſch. 5 Jac. B. R. Leiceſter Foreſt's caſe.

Jenk. 316. pl. 6.

11. *Incloſures* cannot be in foreſts or chaſes, unleſs with *low hedges*, which may not diſturb the game; and though incloſures have been continued for 40 *years* together, if they were no ancienter, they may well

well be deſtroyed and laid open. Cro. J. 156. Paſch. 5. Jac. B. R. Leiceſter Foreſt's caſe.

12. If the *king grants* away *part of his demeſne lands, cum omnibus boſcis there growing*, for a valuable conſideration; the king's intent was not to diſaforeſt this, but only to paſs the intereſt in the timber, as well as the ſoil; but the timber cannot be felled by virtue of this grant. And if the patentee will fell any of it, he muſt take the ſame way as others do in like caſes. Jo. 268. 8 Car. in Itin. Windſor. Whitlock's caſe.

(G) Grant of a Foreſt to a Subject. Good. And how conſidered. [424]

1. THE king grants the foreſt of W. and S. in the county of S. to *A. for* 60 *years*; A. covenants with the king *to maintain* 100 *deer there, during the ſaid term, and* at the end thereof, *to leave the foreſt ſo ſtocked* to the king; the *king grants the fee* of the foreſt *to B.*——*B. during the term cannot kill, nor give a warrant for any deer there*; by all the judges of England. For the foreſt was granted for 60 years, and the game paſſed by the grant of the foreſt, and the ſaid covenant does not controul the grant. And if B. might have ſuch liberty, he might diſable A. from performing his ſaid covenant. Jenk. 218. pl. 63.

D. 169. b. pl. 1. Mich. 1 & 2 Eliz. Ld. North v. Cromwell.

2. The honour of Pickering has a foreſt appendant to it. A patent granted by the king, of the *honour cum pertinentiis*, paſſes the foreſt; and the grant of the foreſt paſſes the game. Jenk. 218. pl. 63.

3. A common perſon may have foreſt *by ſpecial words of grant*. As to have foreſt, and to conſtitute juſtices and verderors; but not by general grant of foreſts, per Popham J. and he ſaid it had been ſo adjudged. Palm. 94. 37 Eliz. B. R. in caſe of Jennings v. Rock.

(H) Of the Officers of the Foreſt.

1. 9 *H.* 3. *ſtat.* 2. *cap.* 5. enacts, that *rangers of the foreſts ſhall exerciſe their offices, as uſed at the coronation of H.* 2. *and not otherwiſe.*

2. 9 *H.* 3. *ſtat.* 2. *cap.* 7. *prohibits extortion by officers of the foreſt.*

3. 34 *E.* 1. *ſtat.* 5. *cap.* 2. enacts, that *on the death or abſence of any foreſter, &c. another ſhall be put in his place.*

4. 34 *E.* 1 *ſtat.* 5. *cap.* 3. enacts, that *no foreſter, &c. ſhall be put upon any aſſiſe, jury or inqueſt, taken out of the foreſt.*

5. 34 *E.* 1. *ſtat.* 5. *cap.* 4. enacts, that *if officers of the foreſt ſurcharge the foreſt, they ſhall be impriſoned.*

6. 25 *E.* 3. *ſtat.* 5. *cap.* 7. enacts, that *no foreſter, &c. ſhall gather victuals*

victuals or other thing by colour of his office, but that which is due of old right.

7. 32 *H.* 2. 35. *impowers juſtices of the king's foreſts, by writing under the ſeal of their office, to make deputies.*

8. If *one of the officers* of the foreſt *put one ſeal to the rolls by aſſent* of all the verderors, regardors, &c. it is *good.* 8 Car. Jo. 268. Ld. Lovelace's caſe.

9. If *officers* of the foreſt *break their truſt*, it is *a forfeiture* of their places. per Noy. 8 Car. Jo. 272. in Ld. Lovelace's caſe.

10. Office of *agiſtors*, is *only to preſent treſpaſſes done by cattle*; and any other preſentment by them, not belonging to their office, is void; and *ſo* it is *of other officers*, &c. per Noy. Ibid. 280.

11. If a man claim the office of *keeper*, &c. and *no fee* for the execution thereof; this is but a burthen, and therefore he is *removeable at pleaſure:* by Noy. Ibid. 292.

12. By *acceptance of the office of verderor, all other offices*, as keeper and bailiff of ſeveral walks, and of the game, and riding foreſter, *are determined, becauſe ſubordinate* thereto; and the objection, that a verderor was by election, which might be againſt a man's will, and therefore ſhould not determine other offices by letters patents, was diſallowed, becauſe of the acceptance of what he might have waved. 8 Car. 1. Jo. 295. in Sir Cha. Howard's caſe.

[425] 13. Though men may cut their *woods* for neceſſary boots, by view of foreſters or verderors, yet at the next court of attachment, the officers ought to preſent what was *felled*, and that it was *by view*, ſo as it may appear on record. Per Noy. Ibid 295.

(H. 2) How far the Beaſts are priviledged when * out of the Foreſt, Park, or Chaſe.

* See (K) pl. 2, 3. (L) See Hunting (B).

1. IF a man has *land adjoining to a chaſe*, and ſavages enter into his land, he may chaſe then out with *ſmall dogs*, but *not with* * *greyhounds.* Br. Foreſt, pl. 1. cites 43 E. 3. 8.

* Orig. (Leveretz.

2. *And* by ſome, if the *dogs follow them into the chaſe*, and the *owner recall them*, and yet they kill the ſavages, treſpaſs does not lie. Quære. Br. Foreſt, pl. 1. cites 43 E. 3. 8.

S. P. by Dodderidge J. Poph. 162.

3. Foreſter alledged cuſtom, that when the ſavages went out of the foreſt, that he might *enter into the* [*land*] *of another and rechaſe them*; but per Newton, it is not a lawful cuſtom; for they are feræ naturæ, and when they are out of the foreſt, none has property in them. Br. Cuſtoms, pl. 64. cites 7 H. 6. 36.

S. P. by Brian, Kelw. 30. b.

(I) Diſafforeſted, and the Effects thereof.

1. 9 *H.* 3. *ſtat.* 2. *cap.* 1. enacts, that *all foreſts, taken out of the ſubject's lands, ſhall be diſafforeſted, ſaving common of herbage, and other things within the foreſt, to ſuch as were accuſtomed to enjoy them.*

2. 33 *Ed.*

2. 33 *Ed.* 1. *ſtat.* 5. *they, whoſe woods are diſafforeſted, ſhall not have common within the foreſt.* Exception was taken, that this was not a ſtatute, but *an ordinance only*; but all the juſtices over-ruled it. For Popham ſaid that he was a counſel in a like caſe, 9 Eliz. between Sir CHRIST. HATTON and Sir J. ST. LEGER in the exchequer, which continued till 19 Eliz. and by good advice adjudged a ſtatute. Palm. 93. Jennings v. Rocke.

They, which will return their woods into the foreſt, ſhall have common as they had before.

3. If one has *common in a foreſt*, and by letters patents of the king, this land is diſafforeſted, yet he ſhall have common, per Popham Ch. J. quod fuit conceſſum by all the juſtices. Palm. 94. 37 Eliz. B. R. Jennings v. Rock.

4. 16 *Car.* 1. *cap.* 16. § 8. enacts, that *all grounds de-afforeſted ſince the twentieth year of king James ſhall be left out of the meets and bounds of the foreſt, which are to be enquired of, and ſhall be de-afforeſted.*

§ 9. *Provided that the owners and occupiers of tenements left out of the bounds of the foreſts to be returned and certified by virtue of commiſſions granted to enquire of the meets and bounds and foreſts, may enjoy ſuch common and other profits within the foreſts as anciently.*

5. Upon a bill in equity concerning *common*, claimed by the inhabitants *in the foreſt* of Sherwood *in certain lands there lately encloſed* by the king and his patentees, it being a *common by preſcription*, and the lands of the inhabitants there, being now diſafforeſted, whether this common be deſtroyed by the de-afforeſtation upon the ſtatutes of charta de foreſta, ordinatio foreſtæ, & 34 Ed. 1. was the queſtion? And by the opinion of baron Raynesford, and Turner, the common is gone by the expreſs words of the ſtatute of ordinatio foreſtæ, and of 34 Ed. 1. and in an iter, 8 Ed. 3. a judgment was cited in point in a like caſe, in this very foreſt, of a common by preſcription. But the Ch. Baron doubted: for if the lands were not duly afforeſted at firſt, *and that they had common by preſcription in the foreſt* it was not the intent of the ordinatio foreſtæ [426] to toll ſuch a common. But if they were well afforeſted at firſt, and afterwards diſafforeſted unduly by ſome perambulation, then the common is loſt, if the owner will have the land remain diſafforeſted; and this is the true meaning, and interpretation, and intent of this act of ordinatio foreſtæ, and this being matter of fact; and it not appearing of what nature theſe lands are, that are now diſafforeſted, nor whether there be a common by preſcription in the caſe; this caſe is not yet ripe for a decree, which muſt be made one way or other, as the matter of fact ſhall guide them; and this was the firſt ground of his doubt. 2d. This act of ordinatio foreſtæ *makes but a temporary ſuſpenſion of the common law*, viz. ſo long as the owners of the lands would be out of the foreſt, & non ultra: ſo that there cannot be, in ſuch a caſe, an abſolute decree, or a perpetual injunction. His 3d reaſon was, becauſe now by the ſtatute 17 Car. 1. 16. the lands cannot *be afforeſted again*; and therefore it would be hard to take away common, where it is due of right. For theſe reaſons he would not deliver any poſitive opinion in the caſe, which he ſaid was a caſe of great

importance; and deserved another kind of argument than upon an ordinary demurrer in law; which, yet, the court never refuseth to hear upon the least difficulty, (though the consequence be many times of small concernment,) that this cause deserved more consideration than to be determined upon a sudden opinion upon the hearing. But because the Chancellor of the Exchequer, and the other barons were against him, the decree passed pro rege. Hard. 437, 438, 439. Hill. 18 & 19 Car. 2. in Scacc. the King v. Inhabitants of Rodly in Glouceſterſhire.

6. A *manor* may be *within the metes and bounds of a forest*, and yet *not within the regards*. As if the manor were *disafforested* by charta foreſtæ, becauſe it was a ſubject's manor, and not the king's; yet it remains within the metes and bounds of the ſaid foreſt, but not within the regards; for now by the diſafforeſting, it is made *purlieu*, and not ſubject to the regards and laws of the foreſt, as to the owner of the manor. See Charta Foreſta 1. and yet, notwithſtanding this ſtatute, if the *king had granted* this manor *to be free of the regards*, it is ſtill within the metes and bounds of the ſaid foreſt. Arg. Bridgm. 25. in caſe of the King v. Biron.

See (K. 2.) (K) Offences in Foreſts, other than killing and hunting Deer. How puniſhed.

1. A. was *amerced at a juſtice-ſeat* in the foreſt for *putting in his ſheeep to depaſture* there, and being queſtioned for it, he juſtified; for which contempt he was *fined* 20 *marks*, and for *refuſing to pay it, he was committed to priſon*, and being brought up by *hab. corp.* the court refuſed to bail him, and thought he ought to be puniſhed for the juſtifying. 3 Bulſ. 213. Trin. 14 Jac. Webb's caſe.

2. If a man be preſented for any offence in a foreſt, as *waſte*, &c. and puts in claim to be quit of waſte, &c. he ſhall be fined for the preſent; and when the *claim is allowed*, that *diſchargeth the fine*. 8 Car. Jo. 267. caſe of the hundred of Wargrave.

3. A man may *fell by the view* of the foreſters or verderors *for firewood* and other neceſſary boots, *but not* any thing *to ſell* but by writ of ad quod damnum, per Noy. 8 Car. Jo. 268. Whitlock's caſe.

4. If a man make an aſſart, either by his *ſtubbing up wood and plowing* it, or *plowing up meadow or paſture*, the party ſhall be fined, and the value of the corn ſown ſhall be anſwered to the king. 8 Car. Jo. 269. Whitlock's caſe.

[427] 5. It was very ſtrongly held (contrary to Ld Coke's opinion in Litt. 115. a. b.) that *no preſcription* can be *to fell and ſell wood without view* of the foreſters, except with the help of an allowance; per Ld. Richardſon and Noy. 8 Car. Jo. 270 & 271. Ld Lovelace's caſe.

It was argued by Noy, that a preſcription to fell wood, per viſum is not good, but it muſt be *per viſum & allocationem*; for if it be per viſum only, then if the foreſter, being required, refuſe to come, it may be cut without view; for which he cited a caſe in the dutchy, of one Leicester. But in Sir Thomas Palmer's caſe, 5 Rep. 25. a.

it is held, there is no diverſity between per viſum, and per viſum & allocationem; for in both caſes, *upon requeſt* made, *and refuſal*, the *party may take wood without view or delivery*, 8 Car. Jo. 275, 276. caſe of the inhabitants of Egham.——A caſe was alſo cited by Noy as reſolved 6 Jac. that *in a chaſe* one may preſcribe to fell, &c. becauſe *not within the ſtatute* of charta de foreſtæ; from whence he ſtrongly inferred, that it could not be preſcribed for in a foreſt. Ibid.

It was agreed by Noy, that a preſcription to cut down wood *in a chaſe* without view, is good. Jo. 389. in caſe of the tenants of the manor of Bray.

6. One B. was fined 4 *l.* for *making a ferry* where there was none before; for by this means the foreſt may be abuſed by ſtealing deer, and carrying them over the water. 8 Car. Jo. 274. Blagrave's caſe.

7. One was indicted for *threatning words to hinder a complaint* to be made againſt him *for cutting wood*, and fined 100 *l.* and committed till he found ſureties for his good behaviour. 8 Car. Jo. 274. Street's caſe. Ibid. Sir Ch. Howard's caſe. S. P.

8. Divers were fined for *concealing the killing deer*, Ibid 275.

9. One was fined 50 *s.* for *carrying a gun with intent to kill deer*. Ibid.

10. It was ſaid by Mr. Noy, that in H. the 2d's time, *the inhabitants* in the foreſt were *fined* 100 *marks for burning heath*. 8 Car. Jo. 276. in caſe of the inhabitants of Egham.

11. It was preſented that one had *erected a brick wall, and thereby ſtraitned the highway*. Mr. Noy ſaid it could *not be arrented without an inquiry*, per miniſtros foreſtæ, ſi ſit competens paſſagium. 8 Car. Jo. 277. Brown's caſe.

12. The foreſters may not take any thing for their view, per Noy. 8 Car. 1. Jo. 277. in Brown's caſe.

13. If the *four men and reeve* of any town *make default upon the firſt ſitting of the juſtice ſeat*, the whole vill ſhall be amerced; but after appearance, they only who make default. Per Noy. Ibid. 279.

14. One, for *drawing* the *preſentments* of the agiſtors, *whereby* he made them *preſent what did not belong to their charge*, was fined 10 *l.* Ibid 280.

15. If there be *a warrant to cut wood*, yet they *muſt cut fair*, and ſo, that the remainder may not thereby come to deſtruction, per Noy. Ibid. 280.

16. Thoſe who claim *common* of paſture in the foreſt, if they uſe ſtaff-herding, i. e. to have one *follow their cattle*, &c. their common may be ſeiſed till they pay a fine for the abuſe. per Noy. Ibid. 282.

17. Upon a diſallowance of a *claim of fee-trees*, the ſpoils are to be anſwered to the king; and the *horſes and carts* which carried them away, are to be enquired of; for they are all *forfeited*; by Ld. Richardſon. Jo. 282. In Reſton's caſe.

18. For *erecting a windmill on his own ground* within the foreſt a man was fined 5 *l.* becauſe it frighted the deer, and drew company to the diſquiet of the game. 8 Car. Jo. 293. Sir Sampſon Darrel's caſe.

19. Where *treſpaſſers* in a foreſt, chaſe, park, warren or incloſed ground, wherein deer are kept, *will not render themſelves* to the keepers *upon an hue and cry* to ſtand to the king's peace; but fly S. P. C. 13, b.—Crom. 30. b.—D. 326. pl. 3.

fly or defend themselves, in such cases, *they may be* lawfully *slain*. Hawk. Pl. C. cap. 28. s. 15. cites as in the marg.

* Register 77. b.—4 Inst. 314.—† Register 80. b.—F. N. B. 67. (D)—Pl. C. 124. a.

20. As to *imprisonments for offences* in the forest, which are *not within the benefit of a* * *replevin*, they must be for offences in forests strictly such, and not in † parks or chases, but it is not material whether the forest be the king's, ‡ or a subject's. 2 Hawk. Pl. C. Abr. cap. 15. s. 20. the book at large, s. 38. cites as in the marg.

——‡ 1 Inst. 2. a. 233. a.

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4 Inst. 290.—Register 80. b.—F. N. B. 67. (A) (B). (C)——45 E. 3. 37. pl. 8.

21. *Persons* indicted or *taken with the manner*, being imprisoned, have their *election*, either to pursue the *remedy* given by the statute 1 E. 3. stat. 1. cap. 8. or to be bailed by the judges of Westminster Hall on a habeas corpus. *But* if a person be *imprisoned* for an offence relating to the forest *without having been indicted* for it, or taken with the manner, he may have an action of *false imprisonment*, &c. 2 Hawk. Pl. C. Abr. cap. 15. s. 22. the book at large. s. 39. cites as in the marg.

See (K.)

(K. 2) Offences in hunting and in killing Deer. Punished how; and Pleadings.

D. 238. Ld. Shandois v. Wye & al.

1. The court of B. R. were of opinion, that upon a conviction of hunting on the stat. *W.* 1. 20. The *fine and imprisonment is for the king and not the party*; and the defendant shall not be discharged out of prison, but by the king's warrant directed to the same justices. Trin. 13 H. 7. Keilw. 39. pl. 5.

2. Indictment of *killing of a hart proclaimed*, found *before justices of peace*; there it is said, that *the place ought to be shewn where it was proclaimed, and where it was killed*; for if it was killed out of the forest, it is lawful for every one to kill him, quod non negatur. And per Fineux Ch. J. he may plead this matter to the jurisdiction of the court; for the *justices of the forest ought to determine it*. Br. Indictments, pl. 8. cites 21 H. 7. 31.

3. A man having a *chace within a forest*, is yet *finable for hunting* or killing any *beast of the forest*; *so* if one have a chace *adjoining* to the forest, and *denies the keepers of the forest to fetch back any stag*, &c. he is finable. 8 Car. Jo. 278. the case of the manor of Windlesham.

Carth. 77. S. C. it is there said, that the warrant being directed to a messenger, when no officer of the forest is known by that name was the

4. Several were committed on the warrant of the chief justice in eyre of the forest, directed to a messenger; and on their removal by hab. corp. cum causa into B. R. it was argued, that *by charta de foresta & 1 E. 3. c. 8. & 7 R. 2. c. 4. none shall be imprisoned before presentment* at the swanimote, and the *C. J. in eyre is within those statutes*, and so restrained, and the Register de B. 80. and F. N. B. 67. (C.) was cited to the same purpose. Holt Ch. J. said the statutes do not by express words exclude the Ch. J. in eyre from committing, till presentment made; but yet he is within the general words of them; and by Eyres J. the C. J. in eyre *cannot commit, but only where*

where the party is taken in the manner, viz. with bloody hands, or with veniſon in the foreſt, or in the act of cutting down trees, &c. But timber found in a yard, which was cut in the foreſt, is not in the manner; to which Dolben J. and the reſt agreed. Pemberton Serjeant ſaid, although one be taken in the manner, yet the C. J. in eyre cannot commit; for he can ground his warrant on nothing but a preſentment; but Holt thought he might, on oath made that the party was taken in the manner. Per tot. Cur. the warrant was illegal, and the priſoners diſcharged. Mich. 1 W. & M. B. R. Comb. 159. Lord Lovelace's caſe.

eſpecial reaſon the commitment was held illegal. And that it was agreed by three of the judges that *taking in the manner is*, when a man was taken in the very fact, or ready to do it, or with his bow bent, or ready to ſlip his dogs, or hands bloody; but that finding timber of the foreſt in a man's poſſeſſion, viz. in his yard, was not a taking in the manner within the ſtatute, though of this the Ch. J. doubted; but all agreed, that the taking upon a freſh purſuit, was a taking in the manner.

(L) Pleadings and Proceedings. [429]

1. 9 *H.* 3. *ſtat.* 2. *cap.* 2. enacts that *men that dwell out of the foreſt, ſhall not come before juſtices of the foreſt by common ſummons, unleſs they be impleaded there, or be ſureties for others that are attached for the foreſt.*

2. 9 *H.* 3. *ſtat.* 2. *cap.* 8. *directs when ſwainmotes ſhall be kept, and who ſhall repair to them.*

3. 9 *H.* 3. *ſtat.* 2. *cap.* 16. *directs how pleas of the foreſt ſhall be holden.*

4. 34 *E.* 1. *ſtat.* 5. *cap.* 1. *directs how offences done in foreſts ſhall be preſented.*

5. 34 *E.* 1. *ſtat.* 5. *cap.* 6. *The juſtice of the foreſt or his lieutenant, in the preſence or by aſſent of the treaſurer, ſhall take fines and amercements of thoſe indicted for treſpaſſes in foreſts, and ſhall not tarry for the eyre.*

6. 7 *R.* 2, 3. enacts that *a jury, for the trial of a treſpaſs within a foreſt, ſhall give their verdict where they received their charge.*

7. 7 *R.* 2. 4. enacts that *none ſhall be taken or impriſoned by any officer of the foreſt, without indictment, or being taken with the mainour, or treſpaſſing in the foreſt.*

8. Treſpaſs *of a cloſe broken*, the *defendant ſaid that the place where*, &c. *lies adjoining to the foreſt of W. of which he is foreſter of fee*; and he and his anceſtors time out of mind, have *uſed in the ſame place where to chaſe the ſavages of the foreſt with his dogs, and to re-chace them to the foreſt*; and that 4 deer came out of the foreſt there, wherefore he re-chaced them, &c. to the foreſt, &c. and a good preſcription, per Mordant, Frowicke, Vaviſor & Brian; for it may have a lawful commencement. Br. Preſcription, pl. 107. cites 13 H. 7. 16.

9. *Indictment* for *killing of a hart proclaimed*, found *before the juſtices of the peace*, the indictment was challenged, becauſe *it was not ſhewn* in the indictment, *in what place the proclaiming was made*, *nor* in what place *the hart was killed*; for if it was killed out of the bounds

S. C. cited 8 Car. Jo. 267. in the caſe of the hundred of Wargrave.

bounds of the foreſt, it was lawful for him to kill it. Per Fineux J. he may plead to the juriſdiction of the court, becauſe the juſtices of the foreſt ought to determine this matter, &c. Br. Foreſt, pl. 9. cites 21 H. 7. 30.

10. In *ejectment* a ſpecial verdict was found, upon which the queſtion was, whether or no a *preſcription for common of paſture for all cattle and ſwine* in a foreſt at all times *of the year*, were a good preſcription, or not? it was objected, that it does not appear that it is a foreſt; for it does appear to have been diſafforeſted; and a few words in a ſpecial verdict found afterwards, ſhall not by inference and conſtruction make it a foreſt again. And it muſt have been a foreſt temps d'ont, &c. or the preſcription cannot come here in queſtion. It was argued pro quer', that the preſcription was naught, which was agreed to by the court and the counſel of the other ſide; but for *not finding expreſsly that it was a foreſt*; judgment was given pro defendente. Hard. 87. Mich. 1656, in the exchequer. Woolridge v. Dovey.

11. The *proceſs* in eyre is *de hora in horam*; and the party may plead preſently: and the preſentment of all the officers is ſufficient *evidence*. 8 Car. Jo. 268. Whitlock's caſe.

An *under-keeper*, on a preſentment *for cutting unlawful*

12. *Warrant* from the king *to fell for repairs*, was held to be not legal; for the *decay ought firſt to have been viewed, and an eſtimate* thereof *made*, and then thereupon the warrant to have gone. 8 Car. Jo. 269. Sir Cha. Howard's caſe.

browſe wood, ſaid he did it *by the king's command to buy hay* for the deer in hard times, but he was fined 10 *s.* for not having it firſt viewed. Ibid. 279. Rapley's caſe.——S. P. where although the verderors affirmed that it was employed in repairs, yet the party was fined 5 *s.* for the undue way of taking. Ibid. Clifton's caſe.

[430] 13. One being preſented for *felling trees* in 3 acres of his woods ſhewed the *general pardon*; Mr. Noy, on reading it, ſaid that *treſpaſſes* were there pardoned, but not *waſta*, and therefore he was fined 40 *s.* Jo. 279. Sir W. Tichborn's caſe.

14. Per Cur. *Certiorari* may be granted out of this court *to the juſtices in eyre*; but they would not grant it in this caſe, which was to remove a record before them, concerning Pickering foreſt, *for cutting wood there*, becauſe the matter is *only a preſcription* of a thing, *and enquirable and puniſhable by the regarderors* there; for by their law, whoſoever is owner there, cannot cut his wood without *leave of the king*. And to the intent that ſuch offences againſt foreſt law ſhould not go unpuniſhed, they reſolved that *they would not grant a certiorari upon preſentment till conviction there*; but they further declared for law, that *no preſentment nor conviction* upon it *before juſtices in eyre*, concerning matters of the foreſt, *ſhall conclude the right of the party*; but that he may, notwithſtanding this, have his action at common law for the *treſpaſs*, or for the recovery of his right. Sid. 296. Trin. 18 Car. 2. B. R. Duke of Norfolk v. Duke of Newcaſtle.

Foreſtallers, &c.

(A) What was a Foreſtalling, Puniſhable at Common Law.

1. A Lombard was indicted *for attempting by words, to enhance the prices* of commodities; and it was objected, that this did not found in foreſtalment, ſed non allocatur. 43 Aſſ. 38. Fitzh. Aſſ. 354. S. C. Br. Indictment, pl. 40. S. C. omits the words (non allocatur.)——Lord Coke cites S. C. and ſays, that hereby it appears, that an attempt by words, to enhance the price of merchandizes, was puniſhable by law, and did found in foreſtalment. 3 Inſt. 196.

2. *All endeavours whatſoever to enhance the common price* of any merchandize, and *all kinds of practices* which have apparent tendency thereto, whether by *ſpreading* * *falſe rumours*, or by † *buying* things *in a market before the accuſtomed hour*, or by buying and ſelling again the ſame thing in the ſame ‡ market, or by any other ſuch like devices, are highly criminal at common law, and all ſuch offences anciently came under the general notion of foreſtalling, which included all kinds of offences of this nature. 1 Hawk. Pl. C. 234. cap. 80. ſ. 1. cites as in the marg. *43 Aſſ. 38. 3 Inſt. 195, 196. Br. Indictment, 40. Preſentment, 12. † Crom. 80. b. ‡ Crom. 80. b.

3. *But* any *merchant* may lawfully *bring victuals*, or any other merchandize, *into the realm in groſs, and ſell them in groſs*; *but* no one can lawfully buy *within the realm*, any merchandize in groſs, and ſell it in groſs again. 1 Hawk. Pl. C. Abr. 269. cap. 80. ſ. 1. cites as in the marg. 3 Inſt. 196. H. P. C. 152.

4. *Alſo* it is an offence at common law, for a man *to ingroſs* a whole commodity, *with an intent to ſell it again at an unreaſonable price*, whether he ſell any part of it or not; and even the buying *corn in the ſheaf*, is an offence at common law. 1 Hawk. Pl. C. 4. cites 3 Inſt. 197. H. P. C. 152.

(B) What is Foreſtalling; And who a Foreſtaller, &c. by Statute. [431]

1. 5 & 6 Ed. 6. 14. ſ. 1. ENACTS, that *if any perſon ſhall buy, or cauſe to be bought, any merchandize, * victual, or other thing, coming by land or water towards any market or fair, to be ſold in the ſame; or coming towards any city or port from beyond ſea to be ſold, or make any bargain, contract, or promiſe, for the having or buying of the ſame, before it ſhall be in the market, fair, city, or port, ready to be ſold, or ſhall make any motion by word, letter, meſſage, or otherwiſe, to any perſon for enhancing the price, or dearer ſelling any of the things aboveſaid,* *Buying of corn to make into meal, and ſelling it afterwards,* was held by Popham and Fenner, *not* to be ingroſſing, within this ſtat.

aboveſaid, or diſſwade, or move any perſon coming to any fair or market, to forbear bringing the things abovementioned to any market, fair, city or port; he ſhall be adjudged a foreſtaller.

S. 2. *Directs who ſhall be deemed a* regrator.

S. 3. *And whoſoever ſhall ingroſs or get into his hands by buying, contracting, or promiſe-taking, other than by grant or leaſe of land, or tythes, any corn growing, or any other corn, or grain, butter, cheeſe, fiſh, or other dead victuals, to the intent to ſell the ſame again, ſhall be deemed an* ingroſſer.

S. 7. *Provided that the buying of any barley, big, or oats, as any perſon ſhall buy to convert into malt or oatmeal in his own houſe; or the buying by any fiſhmonger, butcher, or poulterer, ſuch things as concern their trade, otherwiſe than by foreſtalling, who ſhall ſell the ſame again at reaſonable prices by retail, or the taking of any cattle, corn, grain, butter, cheeſe, or other things aboveſaid, reſerved upon any leaſe for life or years; or the buying of any wine or other dead victual, by any innholder or victualler, to ſell by retail in his houſe, or to his neighbours for reaſonable prices; or the buying any † dried or ſalted fiſh; or of any corn, fiſh, butter, or cheeſe, by any badger, lader, kidder, or carrier, as ſhall be allowed to that office, by three juſtices of peace of the county, who ſhall ſell or deliver in open fair or market, or to any other victualler, or to any other perſon, for the proviſion of his houſe, within one month after he ſhall ſo buy the ſame, without foreſtalling; or any common proviſion made without fraud by any perſon of the things aboveſaid, for any city or town corporate; or for proviſion for victualling of any ſhip, caſtle, or fort, without foreſtalling, ſhall not be deemed or taken to be any offence againſt this act.*

S. 12. *Corn may be tranſported from one port to another.*

S. 13. *Provided, that it ſhall be lawful for any perſon inhabiting within one mile of the main ſea, to buy all manner of fiſh freſh or ſalted, not foreſtalling the ſame, and ſell them again at reaſonable prices.*

Paſch. 35 Eliz. Mo. 595. pl. 810. Anon. ——*But* if a *miller buys corn, and grinds it, and ſells it* within his houſe, this is within the ſtatute. Cited Ow. 135. by Coke Ch. J. as Paſch. 42 Eliz. Reynolds v. Gerret. ——*But* it was adjudged, that where a man buys *meal, and makes the ſame into ſtarch*, and ſells it, he *may juſtify the ſelling*, and it is out of the ſtat. becauſe it is *not the ſame thing*. Mich. 5 Jac. 1. Le. 241. pl. 392.—* *Hops* were adjudged not to be victuals within this ſtatute. Cro. C. 231. Mich. 7 Car. 1. B. R. the K. v. Maynard.——S. P. per Roll. Ch. J. Sty. 190.——*And* Paſch. 15 Jac. Rot. 36. it was adjudged, that buying *apples* to ſell again, was not within this ſtatute. Cro. Car. 231.——For the law *intends only thoſe things* that are *uſually ſold in markets in great quantities*, as corn, cattle, butter, cheeſe, &c. to be within the ſtatute. Ibid.——† *So much of this ſtatute as concerns ſea fiſh unſalted, or mud fiſh, is repealed by the ſtat. of* 5 *Eliz.* 5.

2. By 13 *Eliz. cap.* 25. *ſ.* 21. *the aboveſaid act of* 5 *&* 6 *Ed.* 6. 14. *is made perpetual; and it is provided, that the ſaid act againſt foreſtallers, regrators, and ingroſſers, ſhall not extend to any wines, oils, ſugars, ſpices, currants, or other foreign victuals imported from beyond ſea, (fiſh and ſalt only excepted.)*

3. In information for buying *ſeed corn*, having ſufficient of his own, and *not bringing ſo much of his own unto the market*, it was ſaid by the judges to be law, that a *contract in the market, for corn not in the market*, or which was not there that day, is not within the breach of the ſtatute. *But* if corn or grain be in the market, although the *contract* be *made out of the market, and delivered to the buyer out of the market*, yet it is within the ſtatute; and that the market ſhall be ſaid, the place in the town where it hath been uſu-

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ally

ally kept, and not elſewhere. Hill. 29 Eliz. in C. B. Godb. 131. pl. 148. Anon.

4. One bought *barley*, and becauſe it was of ſuch quantity that he could not make malt of it in his own houſe, he made it in another man's, by his own ſervants; and it was reſolved; firſt, that the converſion of corn *into malt* in his own houſe, *to ſell again*, was within the ſtatute, unleſs there be a ſaving for it; ſecondly, becauſe it was in another's houſe, he is out of the proviſo, and ſo within the penalty of the ſtatute. Cited Ow. 135. by Coke, Ch. J. as Mich. 39 & 40 Eliz. B. R. Framlington's caſe.

5. Information on the ſtatute 5 E. 6. 14. for buying *wheat-meal, and converting it into* * *ſtarch*; reſolved, by 3 of the judges, that this is not within the ſtatute: but they agreed, that if one *buys corn, and makes it into meal or oatmeal, and ſells it*, it is within the ſtat. for there is *no alteration* in this caſe, but it remains the ſame corn; *but ſtarch is altered* by a trade, and ſo is not the ſame thing. But Coke, Ch. J. contra. Ow. 135. Trin. 9 Jac. C. B. the King v. Weſt.

* S. P. Bridgm. 5. Daviſon v. Culier.—S. P. held, by 3 of the judges, to be within the ſtatute, but Coke contra.

Mich. 9 Jac. C. B. 2 Brownl. 108, 115. Croſs v. Weſtwood.

6. One was indicted and convicted by the name of Davies fiſhmonger, for ingroſſing and buying ſeveral *ſalmons*, quas tenuit & vendidit; it was objected, that every fiſhmonger, by the ſtatute, might buy and ſell at pleaſure; but the contrary was adjudged, if at *unreaſonable prices*; and the book ſays, that ingroſſing fiſh *going to market* is puniſhable. Paſch. 12 Jac. in B. R. Roll R. 11. The King v. Davies.

7. Information on the ſtatute 5 E. 6. 14. for ingroſſing 100 *buſhels of ſalt* to ſell again, and upon demurrer thereto it was objected, firſt, that foreſtalling and regrating, are not in themſelves offences puniſhable before the ſtatute; ſecondly, that ſalt is not any victual within the ſtatute, but only a condimentum, and for preſervation of victuals, though if any one ſhall *engroſs ſalt to ſell it at unreaſonable prices*, he may be indicted at common law, ſed adjournatur. Mich. 7 Car. 1. B. R. Cro. C. 231. the King v. Maynard.

S. P. per Roll. Ch. J. Sty. 190.

8. And a record of Paſch. 18 Eliz. was cited, where * *buying barley, and converting it into malt*, and ſelling it, had been adjudged no offence, puniſhable in a mayor, nor made him a victualler, (the mayor being prohibited to ſell victuals) Ibid.

* By Coke, Ch. J. malt-ſters if they buy and ſell again, at unreaſonable rates, ſhall be within the ſtatutes of ingroſſers. Trin. 12 Jac. 2 Bulſt. 249. in caſe of Suckerman and Coates v. Sir Henry Warner.——So likewiſe in 1 Roll. R. 12. the King v. Davies.

9. Indictment for ingroſſing *divers kinds of fiſh*, viz. *ſmelts, whitings, &c.* to ſell again, contra formam ſtat. Upon not guilty pleaded it was found againſt him, and being removed by certiorari into B. R. it was moved in arreſt of judgment; for that by expreſs words of the ſtatute, 5 & 6 E. 6. 14. *fiſhmongers and butchers*, &c. are not ingroſſers within the ſtat. if they buy only things belonging to their trades; but held, per tot. Cur. that if they *regrate and ſell at unreaſonable*

Jo. 320. S. C. the King v. Salmon.——By Coke, Ch. J. fiſhmongers may well juſtify the buying of

fiſh, if they ſell it again at reaſonable rates, otherwiſe they ſhall be within the ſtat. Trin. 12 Jac. 2 Bulſt. 249. in caſe of Suckerman and Coates v. Sir Henry Warner.

reaſonable prices, they are within it. Trin. 9 Car. 1. B. R. Cro. C. 314. Penn's caſe.

A coſtermonger, who bought pippins to ſell again, was adjudged in error brought in the exchequer chamber, not to be within the ſtatute. Cited by Coke, Ch. J. Ow. 135.

10. On an indictment at the aſſizes in Kent, upon the ſtatute made againſt ingroſſers of victuals, for ingroſſing *apples, pears, and cherries*, it was inſiſted againſt the defendant, that apples, pears, and cherries, are victuals within the ſtat. and ſo expounded by ſtat. 2 E. 6. where *fruiterers* are called ſellers of victuals; but Roll. Ch. J. ſaid, that 4 Jac. apples were adjudged no victuals; and after, upon writ of error, that judgment was affirmed in the Exchequer Chamber. Jerman, Juſtice, differed, * and Nicholas, Juſtice, held, that apples are victual within the ſtat. becauſe better than fiſh. Ak, Juſtice, held, that apples are victual, but not within the ſtat. for a ſtat. cannot alter by reaſon of time, but the common law may. Adjournatur. Hill. 1649. B. R. Sty. 190. Anon.

——as the caſe of Baron v. Briſe.——The barons of the exchequer held clearly, that apples were not within the ſtat. and adjudged accordingly; which afterwards, on a writ of error brought in the Exchequer Chamber, was affirmed. Although the 2 *E.* 6. 15. *mentions butchers, brewers, bakers, cooks, coſtermongers, and fruiterers, as victuallers*, yet apples are not dead victuals within the ſtat. 5 E. 6. and no information before this time hath been exhibited for them, no more than for plumbs or other fruit, which ſerve more for delicacy than neceſſary food. But the ſtat. 5 *E.* 6. is to be *intended of things neceſſary, and of common uſe for the ſuſtenance of man*. But the ſtat. 2 *E.* 6. 15. made *againſt conſpiracies to enhance the prices, extend to things more of pleaſure than profit*. Mich. 6 Jac. in the Exchequer. 13 Rep. 18. Baron v. Boys.——S. P. adjudged in error in the Exchequer Chamber. Mich. 6 Jac. Cro. J. 214. Braddon v. Brown; and per Coke, Ch. J. there is *not any thing prohibited* within the ſtat. *but it has a proviſo, how, in ſome kind, it may be bought*; but *there not being any* proviſo *for apples, therefore* they are *not within the intent* of the ſtatute.

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11. In debt upon the ſtat. 5 E. 6. 14. for ingroſſing 2000 quarters of *oats*; after nil debet pleaded, it appeared in evidence, that they were *foreign oats*, and *exempted by* 13 *Eliz. cap.* 23. and alſo, that the defendant was a *licenſed badger*, and by that too, exempted; to all which the court agreed. Trin. 14 Car. 2. in Scacc. Hard. 231. Hammond v. Taylor.

12. A poor woman that cried fiſh was indicted for foreſtalling, by *buying of fiſh at Billingſgate*; Holt, Ch. J. on the trial at niſi prius held, that ſhe was not guilty; for Billingſgate was a *market time out of mind*, and ſo the party was acquitted; and he ſaid, that were it otherwiſe, all fiſhmongers would be liable to proſecutions. 1 Show. 292. Mich. 3 W. & M. the King v. . . . . .

(C) Puniſhed or reſtrained. How.

And by ſerjeant, Hawkins, 1 Hawk, Pl. C. Abr. 270. cap. 80. ſ. 2. At this day all ſuch offenders are liable to *fine and impriſonment*, on an indictment at common law.

1. 31 Ed. 1. 1. ENACTS that *no foreſtaller ſhall be ſuffered to dwell in any town, and if any be convicted of that offence, for the firſt time he ſhall be amerced, and loſe the thing ſo bought; for the ſecond, ſhall have judgment of the pillory; for the third ſhall be impriſoned and make fine; and for the fourth ſhall abjure the town; and like judgment alſo ſhall be given his acceſſaries.*

2. 5 &

2. 5 & 6 *Ed.* 6. 14. *ſ.* 4, 5, 6. enacts, that *every perſon who ſhall offend in any of the things contained in this act, ſhall, for the* firſt offence, *ſuffer* two months impriſonment, *without bail or mainprize, and* forfeit the value of the goods, cattle, *and victual ſo by him bought or had; and for the* ſecond offence, *one half years impriſonment, and forfeit double the value of the goods, &c. and for the* third offence, *ſhall be ſet in the* pillory, *in the city, town, or place where he dwells, and* forfeit all his goods and chattels, *and be impriſoned during the king's pleaſure.* 3 Inſt. 195.

S. 8. *And if any perſon, having ſufficient corn of his own, do buy any corn in any fair or market, for change of ſeed, and do not bring to the ſame fair or market, the ſame day, ſo much corn as he ſhall buy for ſeed, and ſell the ſame if he can, he ſhall forfeit double the value of the corn ſo bought.*

S. 9. *And if any perſon ſhall buy any oxen, ſheep, or other live cattle, and ſell the ſame again alive, unleſs he keep and feed them by the ſpace of five weeks before he ſell them again, he ſhall forfeit double the value of the cattle ſo bought and ſold again, one moiety of all which forfeitures, to go to the king, the other to him that will ſue for the ſame in any court of record by action of debt, bill, plaint, or information.*

S. 11. *None ſhall be* puniſhed twice *for the ſame offence.*

3. Information againſt ſeveral for ingroſſing 1000 quarters of corn; upon not guilty pleaded, the jury *found one* of the defendants *guilty* for 700, *and the others not* guilty at all. After much debate, judgment was given againſt him found guilty. Trin. 7 Jac. in Scacc. Lane 59. Vaux v. Auſtin & al. [434]

4. Information againſt a foreſtaller, who *pleaded guilty, and prayed* the court *to mitigate the forfeiture*; Coke, on hearing the ſtat. 5 E. 6. 14. read, ſeemed to think they might mitigate the forfeiture becauſe it was only of the value. Paſch. 13 Jac. B. R. 1 Roll. R. 194. the King v. Wray.

(D) Pleadings.

1. ON an information on the ſtat. of 23 Eliz. 25. for ingroſſing barley, and converting it into malt, the queſtion was, whether the defendant might plead *not guilty*, and give the *ſpecial matter in evidence?* and held that he might. Mich. 29 Eliz. B. R. Godb. 144. pl. 180. Anon.

2. Information upon the ſtatute 5 E. 6, 7. for buying *wools*; the defendant *pleaded to all, except* 50 *ſtone* of wool, *not guilty*; and *as to that, he pleaded an information depending* againſt him *in C. B. at the ſuit of B. G. and averred, it was for the ſame offence*, unde petit judicium, &c. Upon demurrer it was objected, that the plea was not good, becauſe it was *not ſet forth, that any proceſs iſſued upon the information*; and if no proceſs, then the information was not depending; but adjudged, that as ſoon as the information is filed, it is depending; and therefore the plea is good. Mich. 33 & 34 Eliz. Cro. E. 261. the Queen v. Harris.

(E) Indictment

(E) Indictment and Information. How laid; And where.

1. 5 & 6 *E.* 6. 14. *ſ.* 10. ENACTS, that *the juſtices of peace in every county, at their quarter ſeſſions, are impowered to hear and determine the offences, by inquiſition, preſentment, bill, or information before them, and award proceſs thereupon.*

S. 10. *Proſecutions for this offence muſt be within two years after the offence committed.*

S. P. Hawk. Pl. C. 238. ſ. 20. and ſays, that in every ſuch information, the words of the ſtatute muſt be ſtrictly purſued.

2. Upon the ſtatute of 5 E. 6. of ingroſſers, if the information be, that the defendant *hath bought corn*, &c. it is not ſufficient; for the words of the ſtatute are, *get into his hands*. Arg. 2 Le. 39. Trin. 30 Eliz. in the exchequer, in Martin Van Henbeck's caſe.

3. By 31 *Eliz.* 5. *ſ.* 5. *it is provided, that nothing in this act ſhall extend to any information, &c. for any offence in any ſtatute againſt ingroſſing, regrating, or foreſtalling, where the penalty ſhall appear to be to the value of* 20 *l. but that every ſuch offence may be laid in any county.*

2 Show. 302. TRAHEERE v. PEARCE; it was holden, that the ſtat. 5 E. 6. 14. was revived, though the day of making thereof miſtaken in the 13 Eliz. 25.——Skin. 110. Trin. 35 Car. 2. S. P. and ſeems to be S. C.

4. Exception was taken by Foſter Juſtice to an information for ingroſſing that it concluded, *contra formam ſtatuti*, whereas it ought to have been, contra formam *ſtatutorum*; for this ſtat. of 5 E. 6. 14. was determined by the 8 Eliz. and revived by the 13 Eliz. and ſo there were two ſtatutes; but Warburton contra; for the information did intend only, 5 E. 6. 14. the words whereof it recited. Trin. 9 Jac. Ow. 135. in caſe of the King v. Weſt.

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1 Roll. R. 134. the King v. Gouldſborough. S. C.

5. An information on 2 E. 6. for ingroſſing *diverſos cumulos grani* was adjudged ill for the *uncertainty* of the word cumulos; for the ſame might be a heap *threſhed, or in ſhocks*; alſo a detinue lieth not, nor is an indictment good, de uno cumulo tritici, pretii; and this information being on a *penal law*, the *certain quantity* of corn engroſſed *ought to appear*. 2 Bulſ. 317. Hill. 12 Jac. Gouldeſborow v. Whider.

S. P. Hawk. Pl. C. 237. cap. 80. ſ. 13.

6. One was indicted on the ſtat. 5 E. 6. as a foreſtaller, and the indictment was, *that he met with J. S. at D.* near Briſtol, *and* bought ſo much lead of him, *which was to have been ſold at Briſtol market*; it was objected, that the indictment was ill, becauſe it did *not ſet forth that J. S. was coming towards the market with the lead*; for the ſtatute is, that a foreſtaller is he, who buys any thing of one coming to market with it, and the averment ought to be, that it was coming to the market *at that time*. Mich. 14 Jac. B. R. 1 Roll. R. 421. the King v. Hook.

7. Infor-

7. Information in the exchequer for ingroſſing *butter and cheeſe*; upon not guilty pleaded, it was found againſt the defendant, and a writ of error being brought in the exchequer chamber, the exceptions, amongſt others, were, for that the forfeiture was prayed, *legalis monetæ Angl. (with a blank) ad valorem prædict. butyr. & caſ.* but held well enough, *without mentioning any particular ſum*, that being to be ſettled by the jury, ſo that it was *not alledged* in the information, *that the defendant had it not by demiſe, grant*, &c. but this was alſo held good, it being a matter for the defendant himſelf to give in evidence; laſtly, for that the plaintiff *demanded his own moiety, and took no notice of the moiety belonging to the king*; but this was diſallowed, for all the precedents agree therewith, and accordingly the judgment was affirmed. Mich. 20 Jac. B. R. Jo. 156. Bedoe v. Alpe.

8. Several were indicted, for that they ingroſſed *magnam quantitatem ſtraminis & feni*, at C. with an intent to ſell and make it dearer; it was objected, that the indictment was ill, becauſe it did *not ſay, quilibet eorum ingroſſed*, ſed non allocatur; then it was objected, that it was ill, for that the indictment did *not mention how many loads of* hay and ſtraw they ingroſſed; and for that cauſe the indictment was quaſhed. Mich. 10 Car. Cro. C. 380. Anon.

9. Indictment for engroſſing upon 5 E. 6. exception was taken, that the indictment was *laid in London, and the ſale in Surry*; ruled, that it was well enough, (on a ſpecial verdict) Comb. 3. Mich. 1 Jac. 2. B. R. the King v. Copeland.

(F) Cogniſable; In what Court.

1. JUDGMENT was given in a court of *piepowders*, upon an information on the ſtatute of *buying leather*; the defendant was in execution, and being brought up by habeas corpus, it was objected, that the judgment was coram non judice; for though the court of piepowders is the king's court, yet they have not authority to hold pleas upon penal ſtatutes; and ſo it was adjudged; but having power to hold pleas in debt, and ſo having colour to hold plea in this action, the judgment is not void, but voidable by writ of error. Mich. 38 Eliz. C. B. Cro. E. 530. Wilkinſon v. Netherſal.

2. Information *by the Attorney General in B. R.* on the 5 E. 6. 14. *for ſelling live cattle within five weeks after they were bought*; upon not guilty pleaded, there was a verdict againſt the defendant, and it was moved in arreſt of judgment, that *no information would lie in this court*; becauſe by 21 Jac. 1. 4. *all informations by the Attorney General, upon any penal ſtatute in any of the courts at Weſtminſter, ſhall be void*; and the court was of opinion, that ſince it was clear, the defendant might have been indicted at the ſeſſions, on the 5 E. 6 therefore this caſe was within the reſtraint of the 21 Jac.

1 Salk. 372. S. C. the K. v. Gaul.— An action brought in the ſheriff's court, in London, for buying and ſelling live cattle, on the ſtat. 3 & 4 E. 6.

was, upon removal into B. R. held ill, becauſe it ought to have been brought in the ſeſſions of the peace, according to 21 Jac. 4. though there it was held, that B. R. was not reſtrained. Latch. 192. Anon.

Jac. and *the information was quaſhed* accordingly. Mich. 10 W. 3. Carth. 465. the King v. Galle.

(G) Licences; And Pleading thereof.

1. 5 & 6 *E.* 6. 14. *ſ.* 16. ENACTS, that *it ſhall be lawful for any common drover, licenſed by three juſtices of the peace, quorum un. to buy cattle in ſuch ſhire where drovers were uſed to buy cattle, and ſell the ſame in common fairs and market, forty miles diſtant, ſo that ſuch cattle be bought without foreſtalling.*

S. 17. *Provided, that no ſuch licence ſhall continue in force above one year, unleſs the ſame be renewed.*

2. Information for ingroſſing *cattle*, the defendant *juſtified as to a certain number under two ſeveral licences, without ſhewing how many by one, and how many by the other*, and on demurrer it was adjudged for the plaintiff. Mo. 879. Dawkes v. Hill.

3. It was ſaid by Hubbard, Ch. J. and Winch, but Warburton contra, that a man, having a licence of foreſtalling on 5 E. 6. *need only*, in pleading, *recite the ſtatute of* 5 *E.* 6. without pleading; for the licence is grounded only on the 5 E. 6. and the 13 Eliz. only qualifies the perſon. Noy. 27. Anon.

4. Information on 5 E. 6. for ingroſſing *corn*, the defendant *juſtified as to part, by licence* from three juſtices of peace, *but did not aver his ſelling it again within one month* after. It was held not good without ſuch averment, it being parcel of the ſtatute, and not in nature of a condition ſubſequent, which is to be alledged by him that will take advantage thereof. Trin. 16 Jac. in B. R. 2 Roll. R. 33. the King and Smith v. Carter.

5. It was doubted, whether a defendant, on an information brought againſt him *on the* 2 *E.* 6. for ingroſſing, might plead *non culp. and give a licence* from juſtices of peace *in evidence*, or plead it in juſtification; or whether the general plea of not guilty is good, without ſaying, *contra formam ſtatuti.* Quære. Trin. 17 Jac. B. R. 2 Roll. R. 92. Anon.

Forfeiture.

(A) Forfeiture. In Caſes of Treaſon. In what Caſes.

1. 34 *E.* 3. 12. ENACTS, that *there ſhall be no forfeitures of land for treaſon of* dead perſons not attainted *in their lives.* This act ſaves nothing to the king, but what was in eſſe, and pertaining to him at the making it. 3 Inſt. 12. and cites a judgment in parliament. 29 H. 6. cap. 1. JACK CADE's caſe: that he being ſlain in open rebellion, could no way be puniſhed, or forfeit any thing, and therefore was attainted by that act of high treaſon.

2. If a man be *adherent to the enemies of the king, in France or elſewhere*, it is a forfeiture of his land. Br. Forfeiture de terres, pl. 94. cites 5 R. 2.

3. 11 *H.* 7. *cap.* 1. enacts, that *none ſhall forfeit any thing for ſerving the king for the time being in the wars within the realm or without.* [437]

4. At this day, though a man be aiding and aſſiſting the king's enemy, or be *killed in open rebellion* againſt the king, he ſhall not forfeit his land or his goods; but if the *Ch. J. of England*, (who is ſovereign coroner of all England) in perſon *upon view of the body* of him killed in open rebellion *makes record of it, and returns it into B. R.* he ſhall forfeit his land and goods, as was done and reſolved in time of H. 7. per Fineux. Ch. J. 4 Rep. 57. b. in a nota of the reporters, in the caſe of the Commonalty of Sadlers.

5. 33 *H.* 8. *cap.* 20. *ſ.* 1. enacts, that *if any perſon commit high treaſon when he is of perfect memory, and after accuſation, examination, and confeſſion thereof before any of the king's council, ſhall fall into lunacy, he ſhall be enquired of in any county, where the king by his commiſſion ſhall aſſign; and if he be there indicted, he ſhall there be arraigned without his perſonal preſence, and if he be found guilty, he ſhall ſuffer death, and forfeit as if he had been of perfect memory*; but this is altered by 1 & 2 P. & M. cap. 10. ſ. 8.

S. 3. *If any perſon be attainted of high treaſon, by the common laws or ſtatutes of this realm, ſuch attainder by the common law, ſhall be of as good force, as if it had been done by parliament, and the king ſhall have as much benefit thereby, viz. of lands, &c. of ſuch offender, and ſhall be as well adjudged in actual and real poſſeſſion of all ſuch things of the offender which the king ought or might lawfully have, or which the offender ought or might lawfully loſe or forfeit, or as if he had been attainted by the parliament, without any office or inquiſition to be found of the ſame.*

S. 4. *The rights, &c. of all others, (except the offenders, &c.) is ſaved.*

6. 5 & 6 *E.* 6. *cap.* 11. *ſ.* 9. enacts, that *the offender in treaſon being lawfully convicted thereof, ſhall forfeit to the king all ſuch lands, tenements and hereditaments, as he ſhall have of an eſtate of inheritance in his own right, in uſe or poſſeſſion of the king's dominions, at the time of the treaſon committed, or at any time after.*

7. 7 *Ann. cap.* 21. *ſ.* 10. *after the deceaſe of the perſon who pretended to be prince of Wales, during the life of the late king James, &c. no attainder for treaſon ſhall extend to the diſinheriting of any heir, nor to the prejudice of any perſon, other than the offender, during his life.*

8. Though the *act of K. W.* 3. ſaves corruption of blood in caſes of treaſon by *coining*, yet, notwithſtanding, the real eſtate is forfeited; for there are *other acts which give the forfeiture to the crown in all treaſons*; and when two acts ſeem to croſs one another, ſuch conſtruction ſhall be made, that both ſhall ſtand together; beſides, it is not like the caſe of felony; for there it is the corruption of blood only, that prevents the deſcent, and occaſions the eſcheat. MS. Rep. ſaid to be Lord Harcourt's, tit. Forfeiture. 21 Jan. 1710. Horton v. Hinton.

* See Copyhold.

(B) In Caſes of Treaſon; What Things or * Eſtate ſhall be ſaid to be forfeited.

S. P. reſolved, but a *difference* taken, between a *naked right of action*, and an *eſtate of inheritance, which is forfeitable, coupled with an antient right, for which the forfeiture of the poſſeſſion is barred, by the* 26 *H.* 8. 13. Mich. 4 Jac. 1. 12 Rep. 6 Anon.

1. *RIGHT of action* is not forfeited by the words in the ſtatute 33 *H.* 8. 20. 3 Rep. 2. b. Trin. 25 Eliz. Marq. of Wincheſter's caſe.

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2. By the general words in attainder of *all hereditaments*, neither a *condition*, nor an *uſe* was given to the king, for they were not forfeitable at the common law; but there is a *difference* in this caſe, *becauſe inheritances and chattels.* 3 Rep. 2. b. 3. Trin. 25 Eliz. Marqueſs of Wincheſter's caſe.

Tenant in tail diſcontinues, and commits treaſon, and is attainted, this right of action is not forfeited. Jenk. 286. pl. 21.——*But if the diſcontinuee enfeoffs the tenant in tail*, the right of the tail is forfeited; for the inheritance is involved in the poſſeſſion. Jenk. 286. pl. 21.——*But* if the diſcontinuee had *made a leaſe for life to* the *tenant in tail*; the tail had not been forfeited; for in this caſe, at the time of the treaſon, he had not any inheritance to forfeit, as the ſtatute 26 H. 8. requires. Jenk. 286. pl. 21.

3. *Right of a diſcontinued eſtate tail, before* 27 *H.* 8. is barred againſt the iſſue of that entail, by the 26 *H.* 8. 13. notwithſtanding the remitter. M. 4 Ja. 12 Rep. 6. Anon.

So was it held in 24 Eliz. in one Armſtrong's caſe. Ibid.——'s; but it was ſaid to be held by all that in one .....s's caſe, that *truſt of a freehold* was not forfeited upon attainder of treaſon. Ibid.

4. *Truſt of a leaſe for years*, granted by the king's patent, is forfeited to the king by attainder of felony. Cro. J. 512. Mich. 16 Jac. B. R. the King v. Daccombe, Exec' of the E. of Somerſet.

5. The

5. The *truſt of a term upon the marriage of W.* was conveyed *to H. till W. payed* ſo much, and *then in truſt for W. and his wife, and their iſſue.* W. is attainted of treaſon, and by the new ſtat. *all eſtates, truſts,* &c. of ſuch perſons, are given to the king. The *money is paid by the wife of W.* and upon a ſpecial verdict in ejectment, it was held, that this truſt is not forfeited to the king; for it is a purchaſe to the wife and their iſſues; and Twiſden J. ſaid, that it had been a great doubt, whether the truſt of an inheritance ſhould be forfeited for treaſon before the new ſtatute; but ſome have been of opinion, that the truſt of a term ſhould be forfeited before for treaſon. Sid. 260. Trin. 17 Car. 2. B. R. Whaley v. Anderſon.

6. A *ſubject of England, attainted* of treaſon, was ſuppoſed to have *married a foreigner*, who was *ceſty que truſt of S. S. annuities* of the value of 50,000 l. It was inſiſted, that if ſhe was married, the law of England ſhould not be the meaſure of the decree of this court, (as to forfeiture or not) but the law of another country, this being a *bare truſt for a foreigner*, and that the court has always a regard for the laws of other nations, as of Holland, and of the Plantations; and that ſince all foreigners are *encouraged by act of parliament, to place their money in the public funds*, it would be very hard that this money ſhould be forfeited; but this point was not determined, the marriage being denied by the lady's affidavit, and no proof made to the contrary, and ſo the ſecurities decreed to be aſſigned to her. 9 Mod. 101. Mich. 11 Geo. in Chancery, Drummond v. Decker.

(C) Forfeiture in Caſes of Treaſon. What Lands, in Reſpect of the Limitations of the Eſtate; or of Statutes made.

1. 26 *H.* 8. *cap.* 13. § 5. ENACTS that *every offender, convict of high treaſon by preſentment, confeſſion, verdict or proceſs of outlawry, ſhall forfeit to the king, all ſuch lands, tenements, and hereditaments, which he ſhall have of any eſtate or inheritance in uſe or poſſeſſion, by any right, title or means within the king's dominions, at the time of ſuch treaſon committed, or after.*

This act *extended* only to lands, which the attainted perſon had in poſſeſſion, and *not to rights conditions*, &c. nor did it extend to *attainders by parliament*, or when the party *ſtood mute*. But the act of 33 *H.* 8. 20. extends to all manner of attainders of treaſon. 3 Rep. 10. b. Trin. 26 Eliz. in the Exchequer in Dowtie's caſe.

The rights, titles, intereſts, poſſeſſion, leaſes, rents, offices, and other profits of all perſons, their heirs and ſucceſſors (except of the offenders or others claiming to their uſe) are ſaved. [439]

2. 33 *H.* 8. *cap.* 20. § 3. makes a forfeiture of lands, tenements, hereditaments, goods, chattles, *uſes, rights, entries, conditions, poſſeſſions, reverſions, remainders, and all other things of ſuch offender*; and that the *king ſhall have as much benefit thereby, and ſhall as well be*

* Yet when a *diſſeiſee* is attainted, now by his attainder, the king

has only a right; for those words shall be construed thus, viz. that he shall be in actual possession without office: that is, as if an office had been found of it; and at common law if the disseisee had been attainted of treason, and the seisin and disseisin had been found by office, the possession should not be in the king, till sci. fa. sued, &c. or seisure at least; because when a stranger is seised at the time of the office found the king shall not be in possession till seisure. And all possessions are saved by this act, as if the said act had not been made; and therefore the possession of the disseisor is saved by it, in the same manner as if an especial office had been found at the common law. 3 Rep. 11. Trin. 26 Eliz. in the Exchequer. Dowtie's case.

The words of this statute, that the king shall be in actual possession, shall not be construed to extend to an actual and absolute possession; but such a possession only, which he had at common law after office found; so as the statute doth not give to the king a larger possession, but an easier without the circumstance of an office. Trin. 26 Eliz. Le. 21. In the Duke of Northumberland's case.——2 Hawk. Pl. C. 452. ch. 49. s. 23.

be adjudged * *in actual and real possession, without any office or inquisition to be found of the same.*

Br. N. C. 37 H. 8. pl. 302. S. C. —Br. Livery, pl. 1. S. P. cites S. C. but Brook makes a quære.

3. Note that Sir John Hussey Knight, *enfeoffed certain persons in fee, to the use of Anne his wife for her life, and after to the* use of the *heirs male of his body*; and for default of such issue, *to the use of the heirs male of the body of Sir W. H. his father*; and for default of such issue, to the use *of his right heirs*: and after *had issue W.* Hussey, and then, *Sir John was attainted of treason* anno 29 H. 8. *and put to execution*; and after *Anne died*, and the said *W. Hussey prayed custer le main of the king*; and by the king's attorney he shall have it; for this name *heirs male of the body, is only a name of purchase*; *and Sir W. Hussey* [the grandson] *shall not have it as heir to Sir John, but as purchasor*; but it was agreed, that the 2*d remainder to the right heirs of Sir John* Hussey *was forfeited by the attainder*; for none can have it but he who is heir in fact; note the difference. Br. Nosme, pl. 1. cites 37 H. 8.

4. Where *tenant in tail is attainted of treason, before the statute of* 26 *H.* 8. his son shall have the land; for he does not claim only as heir, but by the statute, & per formam doni. Br. Nosme, pl. 1. cites 37 H. 8.

S. C. cited Mod. 40. 1 Lev. 279.

5. *Thomas Duke of Norfolk* in anno 11 Eliz. *conveyed* his lands *to the use of himself for life, and after to* the use of Philip Earl of Arundel, *his eldest son in tail*, with divers remainders over, with a *proviso, that if he should be minded to alter and revoke the said uses, and signified his mind in writing, under his proper hand and seal, and subscribed by* 3 *credible witnesses, that then*, &c. and after the said duke was attainted of high treason; this proviso or condition was not given to the queen, by the act of 33 H. 8. because the performance of it was *personal and inseparably annexed* to his person, viz. to signify his meaning by writing under his proper hand, which no other can do but the duke himself. Upon which point, all the possessions of the dukedom so conveyed, ut supra, were saved, and not forfeited by the attainder. 7 Rep. 13. a. cited per Cur. as resolved 11 Eliz. in Duke of Norfolk's case.

D. 309. pl. 76. Pasch. 14 Eliz. S. C. Mo. 100. Hill. 14 Eliz. Cranmer's case.——

6. Cranmer the bishop of Canterbury, made a *feoffment* of land *to the use of himself during his life*; and *after his decease to the use of his executors and assigns for* 20 *years*; and *after to the use of T. Cranmer in tail*, &c. after the archbishop was attainted of treason; and if this was an interest in the bishop or not, was the question; for if so, then it appertained to the queen; and if not, then otherwise.

wife. And it was agreed by the juſtices, that the biſhop had no intereſt in the term and remainder; now it cannot be becauſe the biſhop *did not, nor could he make an executor*, &c. And. 19. pl. 39. Hill. 14 Eliz. Kirke v. Bails, al. Cranmer's caſe. Le. 196. S. C.—2 Le. 5. S. C.—Ben. 207. S. C.

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7. King *H.* 8. *granted* a certain manor *to A. and his wife, and the heirs of their two bodies*, &c. afterwards A. by act of parliament was attainted of treaſon, and *executed, leaving his wife and a ſon*; and by the ſame act it was *ordained, that he ſhould loſe all the lands whereof he was ſeiſed*, &c. The wife died, and the queſtion was if the ſon ſhould have the manor by the entail, or the king by attainder; reſolved that the king ſhould have it as forfeited; though it was argued for the ſon, that his mother ſurviving, he was inheritable to the manor, by deſcent from her, and might claim from her *per formam doni*; and though the blood between his father and him was corrupted, yet it was not ſo between his mother and him. 1 And. 39. pl. 102. Ld. Effingham v. Carew. S. C. D. 332. b. pl. 27. Paſch. 16 El.—S. C. cited Hob. 346. —Entailed lands were never forfeited till the ſtatute 26 H. 8. in caſes of treaſon, and this not by the general words, *all lands, tenements, and hereditaments*, but by the words following, viz. *of any eſtate whatſoever*. Arg. 2 Lev. 170. Trin. 28 Car. 2. B. R. in the caſe of Brown v. Wayte. ——If tenant in tail be attainted of treaſon and dies, the land ſhall not veſt in the king before office found, for the act of 26 H. 8. gives the forfeiture, but neither the act nor the attainder makes a corruption of the blood, as to the deſcent of the land in tail; and ſo it was agreed as Popham ſaid in the caſe of Ld. LUMLEY, that where the *grandfather* was *tenant in tail* and the *father was attainted of treaſon, and died in the life time of the grandfather*, the land ſhould deſcend to the ſon notwithſtanding the attainder, which was affirmed per tot. Cur. to be good law, in which 2 caſes the act of 26 H. 6. gave the forfeiture only, and his attainder is not corruption of the blood for land intailed. But now *by the* 33 *H.* 8. *the actual poſſeſſion is* transferred and *veſted in the king preſently* by the attainder, as well in the life time, as at the death of the perſon attainted, and as well of lands entailed, as of lands in fee ſimple. 3 Rep. 10. b. In Dowtie's caſe.

8. Lands were given *to A. and M.* (whom he afterwards married) *in tail, remainder to B.* in tail, *A. alone ſuffered a common recovery and died*, and *M. ſurviving died without iſſue*, by which writ of error accrued by the ſtat. 9 R. 2. to *B.* in *remainder*, and he *was attainted of treaſon by parliament, and all his rights and conditions given to the crown*, upon which the queen would have brought *a writ of error* to reverſe the recovery againſt W. R. who was the tertenant, and adjudged that ſhe could not have it in reſpect that it was a *thing in privity*, ſo *united to the perſon* of B. that it could not be given by parliament to the crown. Arg. Mo. 323. cites Trin. 25 Eliz. B. R. Braybrocke's caſe. Mo. 95. 125. S. C. 3 Rep. 1. S. C. by the name of the Marq. of Wincheſter's caſe.

9. A ſeiſed in fee, by indenture *in conſideration of blood covenants with B. his nephew to ſtand ſeiſed to the uſe of himſelf for life*, and after to the uſe *of B. in tail*, the remainder *to the right heirs of B. proviſo if the ſaid A. by himſelf, or by any other during his natural life tender to B. a gold-ring to the intent to make void the ſaid uſes, that then the ſaid uſes ſhall be void*; afterwards A. is attainted of treaſon and outlawed upon it; the attainder is confirmed by act of parliament; the king by letters patents under the great ſeal, reciting the uſes, the proviſo, and the benefit thereof given him by act of parliament, *authoriſed E. to deliver the gold ring to B. to the intent to make void the uſes*; E. reads the patent to B. and offers the ring to him, which he *refuſeth to accept*; all which with the patent he certified into the exchequer. Upon which an information was brought in the exchequer, averring the life of A. and it was reſolved; (1) that the Mo. 303. S. C.—4 Le. 135. 169. S. C.—And. 293. S. C.—Poph. 18. S. C.

the condition in the principal caſe, viz. the tender of the gold ring was *not annexed to the perſon of A.* but that any one might make the tender, and that it was given to the king by the act of parliament. (2) That the *tender* and certificate *was good*, without office found. (3) That preſently by the tender, according to the proviſo, the uſes were determined, and the land veſted in the king by force of the act of parliament. Mich. 33 & 34 Eliz. in the Exchequer. 7 Rep. 11. b. Engleſield's caſe.

Jenk. 286. pl. 21.

10. *Tenant in tail* attaint of treaſon, the king ſhall have fee determinable on death without iſſue and has no greater eſtate. 2 And. Arg. 139.

11. Though an *earldom* be a dignity, and within the ſtatute de donis conditionalibus yet it had been forfeited by attainder of treaſon though the ſtatute of 26 H. 8. had never been made; adjudged. Mich. 2 Jac. 1. 7 Rep. 34. in Nevil's caſe.

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12. A. covenants by indenture *to ſtand ſeiſed to himſelf* for life, remainder to B. his brother's eldeſt ſon for life, remainder to the firſt ſon of the ſaid B. and ſo to the 8th ſon, &c. remainder to the right heirs of A. A. is attaint of treaſon, and executed before the birth of any ſon to B. the *ſons born after* are all utterly barred by that attainder, and the king ſhall have the fee diſcharged of all the remainders limited to the ſons not yet born. Noy. 102. Trin. 9 Jac. Sir Thomas Palmer's caſe.

2 Roll. R. 312, 333, 374, 421, 428, 496, 501. S. C. ——Het. 150. S. C. Jo. 69. S. C. Palm. 351. S. C.— Godb. 314. S. C.

13. *Tenant in tail* 6 H. 8. *made a feoffment in fee* to W. and others, to the uſe of his laſt will, and died; the right of the land, together with the *intail deſcended to D. who*, 21 H. 8. *made a feoffment to* the uſe of *himſelf and K. his wife, and the heirs of their two bodies*, and *had iſſue E. a ſon, and F. a daughter*.—D. in 26 H. 8. *was attainted* of treaſon and executed; and 31 H. 8. a ſpecial act of parliament was made of his attainder and forfeiture; 5 Eliz. *E.* ſon and heir of D. *was reſtored in blood* by parliament, *and died without iſſue*; *F. married* J. S. *and* they *had iſſue* W. S. 8 Eliz. K. died; 33 Eliz. all was found by office; 34 Eliz the queen granted the lands to R. and the heirs male of his body. It was reſolved; 1ſt. That the feoffment gave away all the eſtate, which the tenant in tail had concerning himſelf; but concerning his iſſue in tail there remained a right by force of the ſtatute of Weſtminſter 2. And 2d. that this *old right of intail* was forfeited by the ſtatute of 26 H. 8. for that there was an actual entail in the perſon attainted at the time of the attainder. 3d. That their rights were bound by the expreſs words of the ſtatute, there being no ſaving therein for them. Then 4thly, when the office was found the iſſue in tail was barred *notwithſtanding any pretended remitter*. Mich. 13 Jac. in the Exchequer Chamber. Hobb. 334. Lord Sheffield v. Ratcliff.

Palm. 429. S. C. Noy. 79. S. C. ——S. C. cited, Lev. 279.—Mod. 16, 38.— Moreton J. Mod.

14. A. made a *feoffment to divers feoffees, to the uſe of the feoffor for life*, with divers *remainders over, provided always, that if the feoffor during his life, tender a ring, or a pair of gloves, or any ſum of money, to any of the feoffees, or to any of their heirs (ipſo A. declarante that his intent ſhould be to alter the uſe and to make thoſe uſes void)* that then all thoſe uſes ſhould be void; and after this, the ſaid A.

was

was attainted of treaſon, and by a ſpecial act of parliament, 28 Eliz. that he ſhould forfeit to the queen all his lands, tenements, hereditaments, rights, conditions, &c. and after this the *queen by her patent*, reciting all the matter aforeſaid, *authoriſed Sir John Forteſcue to tender a ring accordingly*; and he did ſo, and certified it in the exchequer; after this B. obtained a leaſe of this land, &c. now the queſtion was, whether the power of the tender of the ring, &c. be forfeited to the queen by the attainder aforeſaid, or be tied to the perſon of A. becauſe it is a declaration of the intent annexed to the perſon of A. And adjudged not forfeited. Lat. 24. Harding v. Warner.

40. cited this caſe as a caſe that had walked through all the courts of Weſtminſter hall and that by reaſon of the words *ipſo declarante* it could not be forfeited.——Jo. 134. Trin. 2 Car. B. R. Warner v. Harding. 2 Roll. 393. Warner v. Hargrave.

15. *Tenant in tail* to him, and the heirs males of his body, *reverſion in the crown*, *made a feoffment* of the lands, and afterwards was attainted and executed for treaſon, and by a *ſpecial act of parliament*, by which his attainder was confirmed, it was *enacted that* he ſhould loſe *all his lands*, &c. and that they *ſhould be veſted in the queen without office* found; the queſtion was, whether there was any eſtate, or right remaining in the tenant in tail after the feoffment, which was not forfeited by the attainder and act of parliament? the judges on arguing this in the Exchequer Chamber were divided, ſome held, that by the feoffment of tenant in tail (the reverſion ſtill remaining in the crown) there could be no diſcontinuance of the eſtate tail, and therefore, being in him at the time of the attainder, was by the forfeiture veſted in the king, by the ſtat. 26 H. 8. but if the eſtate tail was not in him, yet the right of the intail remained, which was given to the king by the 33 H. 8. The other judges argued that though the reverſion was in the king and * ſo no diſcontinuance, yet all was diveſted out of the feoffor as ſtrongly as if there had been a diſcontinuance, and ſo nothing remained to be forfeited; † no judgment was given. Paſch. 7 Car. in the Exchequer Chamber, Cro. C. 427. Stone v. Newman.

In this caſe it was agreed by all, that if tenant in tail of a common perſon, where *no reverſion is in the king*, make a feoffment, it is a diſcontinuance, and if he be attainted of treaſon, there is no forfeiture according to 3 Rep. 2. b. Cro. C. 428. in caſe of Stone v. Newman. † Exceptions being afterwards taken in B. R. to the pleadings, it was there agreed, that according to the greater opinion in the Exchequer Chamber, judgment ſhould be entered in B. R. for the plaintiff, [and ſo the eſtate was adjudged forfeited] Paſch. 12 Car. Cro. C. 460.

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16. Land is conveyed by A. *to J. S. and his heirs, to the uſe of him and his heirs, in truſt for A. and his heirs*; the king in this caſe upon the death of A. ſhall not have ward, nor forfeiture for treaſon, or felony; but if J. S. dies, his heir within age ſhall be in ward; if J. S. be attaint of felony, or treaſon, the land and the *truſt is loſt*. In caſe of *chattel* ſo conveyed upon truſt by A. and A. commits felony, or treaſon, the truſt is loſt. Jenk. 219. pl. 66.

17. *Lands* are given *upon condition not to commit treaſon*, and afterwards the party commits treaſon the king's title ſhall be preferred and he ſhall have the land. Arg. Hard. 24.

18. A writ of error was brought in B. R. to reverſe a judgment given in C. B. upon a ſpecial verdict in ejectment; the jury found that one *Simon Mayne* was *poſſeſſed of a rectory for a long term*, and having *conveyed the whole term in part of it to certain perſons abſolutely*,

Lev. 279. S. C.— Vent. 128. S. C.

ſolutely, he *conveyed, his term in the reſidue*, being 2 parts, in this manner; viz. in *truſt for himſelf during life, and afterwards* in truſt *for the payment of the rent reſerved* upon the original leaſe, *and for ſeveral* of his *friends*, &c. *provided* that *if he ſhould have* any *iſſue* of his body *at the time of his death then the truſts to ceaſe*, and the aſſignment to be in truſt for ſuch iſſue, &c. and there was another *proviſo that if he were minded to change the uſes*, or otherwiſe to diſpoſe of the premiſſes, that *he ſhould have power ſo to do by writing in the preſence of two or more witneſſes*, or by his laſt will and teſtament; *he had iſſue* male at the time of his death, *but made no diſpoſition* purſuant to his power; all which was found by verdict, and that in his life time he had committed treaſon, and they find the act of his attainder. The queſtion was, whether the reſt of the term that remained unexpired at the time of his death were forfeited to the king; it was inſiſted that the deed was fraudulent, becauſe he took the profits during his life, and *the aſſignees knew not of the deed of truſt*. But adjudged that nothing was forfeited but during Simon Mayne's life, and the judgment before given in C. B. was affirmed. Paſch. 23 Car. 2. B. R. 1 Mod. 16, 38, 40. Smith v. Wheeler.

2 Lev. 169. S.C. and ſays, that in 1 W. & M. this judgment was affirmed in parliament by one voice only. Ibid. 171. Pollex. 185. 3 Keb. 459.

19. Upon a ſpecial verdict in ejectment, the caſe was, viz. *A.* the father of the leſſor of the plaintiff *was in* anno Dom. 1646, *tenant in tail* of the lands in queſtion, and afterwards inſtrumental in bringing the late king Charles to death, and ſo was *guilty of high treaſon and died*; afterwards the act of pains and penalties, made 13 *Car.* 2. 15. enacted, *that all the lands, tenements and hereditaments, which Sir John Danvers had the 25th day of March* 1646, *or at any time ſince ſhall be forfeited to the king*; and whether theſe intailed lands ſhall be forfeited to the king by force of this act was the queſtion? and adjudged that the lands were forfeited. Mich. 28 Car. 2. B. R. 2 Mod. 130. Brown v. Waite als. Sir John Danvers's caſe.

(D) In Caſes of Felony.

1. IF a felon be *abjured*, he ſhall forfeit his *lands and goods*. Br. Forfeiture de Terres, pl. 121. cites 6 E. 2.

Contra where the *donor diſtrains the tenant in tail for rent*, and after the tenant in tail is *attainted for felony done before the diſtreſs*; for the donor may diſtrain the heir of the tenant in tail after execution of his father; but in the firſt caſe he has no other remedy. Br. Pledges, pl. 31. cites 13 R. 2. 13.

2. A man *diſtrained his termor for rent* arrear, and after the *termor is attained for felony done before the diſtreſs taken*; and by the opinion of the court, the king ſhall not have the diſtreſs as forfeit, unleſs he ſatisfies the *party who diſtrained; for it was *lawfully taken tempore captionis*. Br. Pledges, pl. 31. cites 13 R. 2. 13.

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3. If a man *pledges his goods, and after is attainted of felony*; yet the king ſhall not have the goods pledged, without paying the ſum for which they were pledged. Ibid.

4. *By*

4. *By* 24 *H.* 8. *cap.* 5. *if any be indicted or appealed, for the death of one attempting to murder, rob or commit burglary (and ſo found by verdict) he ſhall forfeit no lands or goods for the ſame, but ſhall be fully acquit and diſcharged thereof.*

5. For ſuch crimes as murder, homicide, burning of houſes, &c. *for which judgment ſhall be given, that he be hanged by the neck till he be dead*; the offender ſhall forfeit all his lands in fee ſimple, and his goods and chattels. Co. Litt. 391. a.

6. *But* for felony by *chance-medley, ſe defendendo*, or *petty larceny*, he ſhall forfeit his goods and chattels, but no lands of any eſtate of freehold or inheritance. Co. Litt. 391. a.

(E) In what Caſes not. Killing in Defence, &c.

1. HE who kills a man *ſe defendendo* * ſhall forfeit his goods; but *the acceſſory* was not arraigned, therefore it ſeems that he ſhall not forfeit his goods; for the principal was not felon of death, and ſhall not have judgment of life; and ſo ſee that *a man ſhall forfeit his goods where judgment ſhall not be given.* Br. Forfeiture de Terres, pl. 13. cites 15 E. 3. Fitzh. Coron. 116. & 11 H. 4. 93.

* Br. Forfeiture de Terres, pl. 51. S. P. cites 4 H. 7. 2.

2. If a man is arraigned de morte hominis, and it is found ſe defendendo, yet he ſhall forfeit his goods; for it was ſaid, that *by the common law, he ſhall have judgment of death*; and the ſtatute of *Glouceſter c.* 9. gives no remedy but for his life only, and not for his goods. Br. Forfeiture de Terres, pl. 15. cites 21 E. 3. 17.

Br. Corone, pl. 40. cites S. C.—— 3 Inſt. 56. 220.

3. A man was arraigned of the death of W. N. and pleaded not guilty; and the jury found, that the *deceaſed ſtruck the defendant to the ground, and drawed his knife to have killed him, and the defendant* * *likewiſe drawed his knife*; and the *deceaſed, for haſte to have killed the defendant, fell upon the defendant's knife, and ſo killed himſelf*, and demanded judgment, &c. Per Knivet, if he had killed him ſe defendendo, he had forfeited his goods and his body at the grace of the king to have his charter of pardon; but now it is found that he killed himſelf; therefore we will adviſe, if he ſhall be adjudged not guilty, or if his chattels ſhall be forfeited or not. Br. Forfeiture de terres, pl. 8. cites 44 E. 3. 44.——And after 44 Aſſ. 17. he was *adjudged not guilty, and his chattels ſaved.* Br. ibid.

* Lying upon the ground. Br. Corone, pl. 12. cites S. C.

4. In appeal of murder againſt A. the jury found that *the deceaſed made the firſt aſſault prope altam viam*, but did *not ſay, ad ipſum murderandum*, and therefore the judges were clearly of opinion that A. ſhould forfeit his goods, and that by the 24 H. 8. c. 5. Mich. 3 & 4 Ph. & Ma. Bendl. 47. pl. 86. Newman v. Punter.

But upon the ſame ſtat. the judges of B. R. held that *where one lies in wait near the highway, or in the highway to murder or rob another, or to commit burglary*; there if the *party* ſo to have been murdered, &c. *kills the felon* in his own defence, he ſhall not forfeit his goods. Mich. 3 & 4 Ph. & Ma. Bendl. 47. pl. 86. Newman v. Punter.

5. *A felon robs a merchant and kills him; the merchant's boy comes quickly after*, and finds this fact juſt done, *and kills the felon.*

In

In this caſe there is no forfeiture of goods to the king; and the ſtat. 24 H. 8. 5. is only an affirmance of the common law. Jenk. 30. pl. 57.

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(F) In Caſes of Felony by Acceſſories.

Br. Corone, pl. 8. cites 43 E. 3. 17. —Br. Appeal, pl. 7. cites 43 E. 3. 17, 18, 19.

1. WHERE *exigent* is *awarded in appeal of death*, the goods are forfeited, and exigent *ſhall not be awarded againſt the acceſſory, till the principal is attainted, if it may appear to the court, who is principal and who acceſſory.* But where *appeal* is brought *againſt* 3, and *at the exigent one is outlawed*, and *the others render themſelves*, and the *plaintiff counts that he who is outlawed was principal, and the other* 2 *receivers of him*, there the goods of the acceſſories are forfeited; for it does not appear to the court till the count; and a thing veſted cannot be deveſted, per Knevet clearly, notwithſtanding that the appeal be adjudged againſt the plaintiff, becauſe the act was done in one county, and the receiving in another county. Br. Forfeiture de Terres, pl. 6. cites 43 E. 3. 18.

2. A man is indicted as acceſſory *to the death of a man before the coroner*; and it was found that he fled for the felony; and by all the juſtices of both places, he ſhall forfeit his goods; and ſo of *all acceſſories at the time* of the felony done, *but not of acceſſories after the felony done.* Per Townſend, where the acceſſory is acquitted, yet it ſhall be inquired of the flying. Per Huſſey Ch. J. this is the courſe in B. R. Br. Forfeiture de Terres, pl. 52. cites 4 H. 7. 18.

(G) In Caſes of Felony. Eſtates in Lands.

1. A Man ſeiſed of land, ſhall forfeit it for felony; and by attainder of him, the *feme* ſhall *loſe her dower.* Br. Forfeiture de Terres, pl. 78. cites 21 E. 3. 49.

2. 25 *E.* 3. *ſtat.* 5. *cap.* 14. enacts that *after a man is indicted of felony before the juſtices to hear and determine, it ſhall be commanded to the ſheriff to attach his body by writ or precept of* capias; *and if the ſheriff return that the body is not found, another* capias *ſhall be made returnable at* 3 *weeks, and in it ſhall be compriſed, that the ſheriff cauſe to be ſeiſed his chattels, and keep them till the return of the writ; and if the ſheriff return that the body is not found, and the indictee cometh not; the exigent ſhall be awarded, and the chattels ſhall be forfeit.*

3. A *diſſeiſor is attainted* of felony, and the land was holden of the crown. The *diſſeiſee enters* into the land, and afterwards *office is found* that the diſſeiſor was ſeiſed. The *remitter is deveſted* out of the diſſeiſee. Arg. Godb. 326. cites 3 E. 4. 25.

4. Tenant

4. Tenant in fee of a *common lord* is attained of felony; his lands remain in him during his life, *until the entry of the lord*, and where the *king is lord*, until office found; but in the caſe of a common lord after the *death of a perſon attainted*, they are in the lord before entry, and in the caſe of the king before office, for the miſchief of abeyances. Arg. 2 Le. 126. in caſe of Venables v. Harris.

5. *Lord and tenant.* Tenant is attaint of petty treaſon or felony. Eſcheat of the *land* of the tenant with the *charters* of the land, *belong to the lord*; but *goods*, *leaſes* for years or life, and *choſes en action* belong *to the king*, and *year day and waſte*. Jenk. 125. pl. 52.

6. *Truſt of inheritance* not to be forfeited by attainder of felony to the lord by *eſcheat*. Paſch. 21 Car. 2. 3 Ch. R. 36. * Att. Gen. v. Sands.——cites 3 Rep. . . . . Marq. of Wincheſter's caſe.

* N. Ch. R. 133. S. C.—S. P. but it is otherwiſe of a chattel. A feoffee of a truſt at this day, commits treaſon or felony, the land is loſt, and eſcheats, and the truſt is extinct; for the king, or lord by eſcheat, cannot be ſeiſed to an uſe or truſt; for they are in the poſt; and are paramount the confidence. Jenk. 190. pl 92. —— *And ſo upon a title elder* than the uſe or truſt, viz. the right of his lordſhip by eſcheat for want of a tenant. Jenk. 245. pl. 30.——Arg. Hard. 466. & per Hale Ch. B. 697. that he who comes in the poſt ſhall not be liable to a truſt. Trin. 9 Car. 2. In Scacc. in caſe of Pawlet v. Att. General.

7. Attainder of felony makes a forfeiture of the eſtate to the *lord* by way of *eſcheat* only, pro defectu tenentis, and the not deſcending is the conſequence of the corruption of blood. 1 Salk. 85. Hill. 8 Annæ, in the Houſe of Lords. Sir Salathiel Lovel's caſe.

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Hard. 496. Att. Gen. v. Sir Geore Sands.—— N. Ch. R. 133. 21 Car. 2. in the Exchequer, S. C.——Jenk. 245. pl. 30.

(H) In Caſes of Felony. What Eſtates in Offices, Dignities, &c.

1. IF the king creates one to be a *baron to him and his heirs males of his body iſſuing, without ſaying of any place*, he ſhall not have an eſtate tail, but a *fee ſimple conditional*, which ſhall lie forfeited for felony. But if he creates him baron of a place, then he ſhall have an eſtate tail. 12 Rep. 81. Paſch. 9 Ja. Anon.

2. *Ceſty que truſt of a grant of the licence of wines for years* committed felony; it was reſolved by the judges una voce, that the ſame was forfeited. And after it was reſolved ſo in the Exchequer. Hob. 214. pl. 275. the E. Somerſet's caſe.

Cro. J. 512. S. C. Mich. 16. Jac. B. R.—Jenk. 293. pl. 39.

(I) In Caſes of Felony, &c. to whom.

9 *H.* 3. *cap.* 22. ENACTS that *the king ſhall* * *not hold the lands of perſons convict* ‡ *of felony, longer than a year and a day, and then they ſhall be delivered to the lords of the fee.*

* If there be *lord meſne and tenant*, and the meſne is attainted of felony, the lord paramount ſhall have the meſnalty preſently; for this prerogative belonging to the king *extends only to* the *land, which might be waſted*, in lieu whereof the year and day was granted. 2 Inſt.

Inſt. 37. ——And this is to be underſtood when a *tenant in fee ſimple* is attainted; for when tenant *in tail, or for life* is attainted, there the king ſhall have the profits of the lands during the life of tenant in tail, or of the tenant for life. Ibid.

‡ This muſt be underſtood of all manner of *felonies puniſhed by death*, and *not of petit larceny*, which notwithſtanding is felony. Ibid. 38.

2. 17 *E.* 2. 14. enacts that *the king ſhall have the eſcheats, during the vacancy of the biſhoprick.*

3. 17 *E.* 2. 16. enacts that *the king have all the goods of felons and fugitives; and the year day and waſte of their land, and then the land ſhall be delivered to the lord of the fee, who may alſo (if he pleaſe) compound with the king for the year, day and waſte.*

Except lands holden in gavelkind, &c. where the lands of the felon go to the heirs by cuſtom; and the wife has dower.

4. *Obligee in truſt is felo de ſe*, ceſty que truſt was relieved againſt the king in equity upon the ſtatute 33 H. 8. 39. Hard. 176. Hill. 12 & 13 Car. 2. in the Exchequer. Hix v. the Att. Gen. and Sir W. Cooper.

5. If I purchaſe an eſtate in the name of J. S. and after am attaint of *felony*, the *truſtees* ſhall hold the land to him and his heirs, *free of all truſts.* Sid. 403. Hill. 20 & 21 Car. 2. in the Exchequer. Sir G. Sand's caſe.

6. In caſes of penalty *by ſtatute for any public offence* the king is intitled to the penalty, if *no particular application of it* is directed. MS. Rep. ſaid to be Ld Harcourt's, tit. Forfeiture cites 23 Feb. 1720. Thornby v. Fleetwood.

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(K) For Crimes at Common Law.

1. ALL felonies puniſhable according to the courſe of the common law, are either by the common law, or by ſtatute. There is alſo a felony puniſhable by the civil law, becauſe it is done upon the high ſeas, as *piracy*, robbery or murder, whereof the common law did not take notice, becauſe it could not be tried by 12 men. If this piracy be *tried before the lord admiral* in the court of the admiralty, according to the civil law, and the delinquents there attainted; yet ſhall it work no corruption of blood, nor forfeiture of his lands; otherwiſe it is if he be *attainted before commiſſioners* by force of the ſtatute of 28 *H.* 8. Co. Litt. 391. a.

2. The judgment againſt a man for felony is, that he be hanged by the neck till he be dead; and *by the* common law he was puniſhed alſo; firſt, in his wife, that ſhe ſhould loſe her dower; ſecondly, in his *children*, that they ſhould become *baſe and ignoble*; and his blood ſo ſtained and corrupted, that they cannot inherit to him or any other anceſtor; thirdly, that he ſhall forfeit *all his lands and tenements* which he had *in fee*; *and* which he has *in tail for term of his life*; and all his goods and chattels, 3 Inſt. 211. but acts of parliament have altered the common law in ſome of theſe points. Firſt, by the *ſtatute de donis conditionalibus* lands in tail were not forfeited, neither for felony nor for treaſon; but for the life of tenant in tail: and this

ſtatute

ſtatute was made to preſerve the inheritance in the blood of them to whom the gift was made, notwithſtanding any attainder of felony or treaſon; and this law continued in force from 13 Ed. 1. until the 26 *of H.* 8. when by act of parliament eſtates in tail were forfeited by attainder of high treaſon; but as to felonies, the ſtatute *de donis conditionalibus* does yet remain in force: ſo as for attainder of felony, lands or tenements in tail are not forfeited, but only during the life of tenant in tail; the inheritance being preſerved for the iſſue. R. S. L. 3 Vol. 197. cites 1 Inſt.

(L) In Caſes of Felony. In reſpect of the Place where.

1. FOR *robbery*, *piracy* or *murder* committed *ſuper altum mare*, and *tried in the* court of *admiralty* by the civil law, and *not by jury*, the attainder there, works no corruption of blood or forfeiture: *but if* he be attainted *before commiſſioners by* force of 28 *H.* 8. it doth. L. P. R. 627.

(M) What may be forfeited.

1. THE *donor in tail* may give or forfeit *his fee ſimple*, quod nota. Br. Eſtates, pl. 40. cites 4 H. 6. 119. and 5 H. 7. 14.

2. A man has the *ward of his ſon and heir apparent*, and he is outlawed; yet it is ſaid, that the father ſhall not forfeit this ward; for he cannot compel his ſon to marry, as the lord may his ward, no more than a guardian in ſocage. Br. Forfeiture de terres, pl. 70. cites 33 *H.* 6. 55.

3. A man is *attainted of felony*, he ſhall not forfeit his *charters of his land*; nor ſhall he, who has catalla felonum & fugitivorum, have them. But, per Moile, the *lord ſhall have the charters with the land*. Br. Forfeiture de terres, pl. 60. cites 10 E. 4. 14. and 21 H. 6. 1.

4. *Goods ſtolen, and waived* are forfeited, quære, if the owner makes *freſh ſuit*. Br. Forfeiture de terres, pl. 62. cites 12 E. 4. 5. [447]

5. *And* in appeal of robbery, if the plaintiff takes * the *mainour* [*or* thing taken in the manner,] and the *defendant diſclaims in the property, and after is acquitted*; the king † ſhall have the *mainour* [*or* thing taken in the manner.] Br. Forfeiture de terres, pl. 62. cites 12 E. 4. 5.

* Orig. (a-meſne le manour.)
† Orig. (avera le manure).

6. Note, if a man be *attainted of treaſon by parliament*, his lands and goods are thereby forfeited, *without words of forfeiture* of land or goods in the act. Br. Forfeiture de terres, pl. 99. cites 35 H. 8. and 4 H. 7. 11. concordat per Townſend.

7. *Grant of* licence *of wines*, ſhall be forfeited for felony of ceſty que truſt. Hob. 214. E. of Somerſet's caſe.

Br. tit. Corody, pl. 5. cites 24 E. 3. 33. 72. ——7 Rep. 13. a. Arg.

8. A *foundership* cannot eſcheat or be forfeited by attainder of felony or treaſon; for it is a thing *annexed to the blood*, which cannot be ſeparated. Arg. 4 Le. 138. cites Br. time of H. 8.

3 Le. 190. S. C.—— 4 Le. 112. S. C. and P.—— Arg. Godb. 316. S. P.

9. *A man ſeiſed in right of his wife*, may grant, but not forfeit; and ſo may * *guardian in ſocage* ——The huſband may grant a term for years, which he hath in the right of his wife, but he cannot forfeit it, &c. Arg. 2 Le. 126. in caſe of Venables v. Harris.

in caſe of Sheffield v. Ratcliff——* Pl. C. 293. Oſborne's caſe.

Executor may give teſtators goods, but not forfeit them by outlawry. Guardian in ſocage may grant his guardianſhip, but not forfeit. Arg. 2 Roll. R. 325. cites Pl. C. Oſborne's caſe.—— 10 E. 4. 1.——Godb 316. Arg.——323. S. P. in caſe of Sheffield v. Radcliff.

Tenant by the courteſy, in the life of his wife, cannot grant his eſtate of tenant by the courteſy, to another, *but he may forfeit it* for treaſon or felony, viz. *by way of diſcharge*, Arg. Godb. 323.

And notwithſtanding attainder and impriſonment of the grantee, yet he may give counſel, if the grantor comes to him as well as he could before the attainder and impriſonment. D. 1. b. 2. a. Mich. 6 H. 8. Oliver v. Emſon.

10. *Annuity pro concilio* impendendo, cannot be granted or forfeited. Arg. 3 Le. 185. becauſe there is a confidence. Wroth's caſe.

11. An *earledom* may be forfeited *by way of diſcharge* and exoneration. Godb. Arg. 325. cites 7 Rep. 33 Nevil's caſe.

* The king ſhall not have the office of keeper for a forfeiture, becauſe it is a *matter of truſt*. But if *keeper of the king's park* be attainted, he ſhall forfeit his office *by way of diſcharge* and exoneration. Arg. Godb. 323. in caſe of Sheffield v. Ratcliff.——Pl. C. 379. Sir H. Nevill's caſe.

12. A park may be forfeited by attainder, but a * *parker-ſhip* is a *matter of ſervice*, and cannot be forfeited as an intereſt may. Arg. Godb. 418, 419. cites Pl. C. 399.

Contra, for if *iſſue in tail in life of his father*, is *attaint* of treaſon and dies, it is no forfeiture of the eſtate tail; but if he levies a fine in his father's life, it is a bar to his iſſue. Arg. Godb. 316. cites 3 Rep. 50. Sir George Brown's caſe.

13. One *may forfeit as much as he may grant*. Arg. Litt. R. 122.

2 Show. 133. Mich. 32 Car. 2. B. R. Anon.

14. If by forfeiture of all *goods and chattels*, a *bond* be forfeited to the king? Per Coke Ch. J. it ſeems not. Roll. R. 7. Paſch. 12 Jac. B. R. Cullom, Betts, &c. v. Sherman.

It is held, that where a perſon hath a grant of bona felonum & fugitivorum, he ſhall have *ready money*.——See inf. pl. 24.

And if a *feoffee upon truſt* at this day, *commits treaſon or felony*, the land is loſt, and eſcheats and the truſt is extinct. For the king or lord by eſcheat cannot be ſeiſed to an uſe or truſt; becauſe they are in the poſt, and are paramount the confidence. Jenk. 190. pl. 92.

15. At common law *ceſty que uſe* did not forfeit the uſe for felony or treaſon; for it was only a confidence; and it is the ſame at this day, for a *truſt of inheritance or freehold, but otherwiſe of a chattel*. Jenk. 190. pl. 92.

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16. *Uſe* was not forfeitable *at common law*, but it was grantable. *Truſt* is not grantable at this day by law, nor forfeitable, but for *chattels*. Jenk. 219. pl. 66. cites Hob. 214.

An uſe in contingency, ſo long as it is ſo, cannot be forfeited; as if the *mortgagor* be attainted and pardoned meſne between the mortgage and day of redemption, &c. per Wray Ch. J. Le. 260. 18 Eliz. B. R. in caſe of Manning v. Andrews.

17. *Common*

17. *Common* or *rent* cannot be forfeited. Arg. Hard. 492. in caſe of Att. Gen. v. Sir Geo. Sands.

18. *Inſtantaneous ſeiſin* gained by a fine is not forfeited for treaſon. 2 Lev. 170. in caſe of Browne v. Waite.

19. It is ſaid, that the inheritance of *things not lying in tenure*, as of *rent-charge*, rent-*ſeck*, *commons*, &c. ſhall be forfeited to the king by an attainder of high treaſon, and that the profits of them ſhall be forfeited to the king by an attainder of felony, during the life of an offender, and that the inheritance ſhall be extinguiſhed by his death; for it cannot eſcheat, becauſe there is no tenure; nor deſcend, becauſe the blood is corrupted. 2 Hawk. Pl. C. 449. cap. 49. ſ. 4. 3 Inſt. 19, 21.

20. It ſeems agreed, that *all things* whatſoever, which are *comprehended under* the notion of a *perſonal eſtate*, whether they be *in action or poſſeſſion*, which the party hath or is intitled to in his own right, and *not as executor or adminiſtrator* to another, are liable to ſuch forfeiture. 2 Hawk. Pl. C. 450. cap. 49. ſ. 9. The book cites as in the marg. Staundf. 45, 46. S. P. C. 187. (D) Cro. C. 566. 12 Rep. 121. S. P. C. 188. Ch. 28. 44 E. 3. 44. Fitz. Coro. 317, 318, 319, 323, 334, 379, 380. 2 Le. 5, 6. And. 19. Mo. 100. D. 309, 310.

21. It ſeems to be ſettled, that a *bond taken in another's name*, or a *leaſe* made to another *in truſt*, for a perſon who is afterwards convicted of treaſon or felony, are as much liable to be forfeited, as a bond made to him in his own name, or a leaſe in poſſeſſion. 2 Hawk. Pl. C. 450. cap. 49. ſ. 10. The book cites Cro. J. 312, 313. Hob. 214. Truſt of a leaſe for years, granted by the king's patent, is forfeited to the king by attainder of felony. Cro. J. 512. the King v. Daccombe, executor of the Earl of Somerſet. ——So it was held, 24 Eliz. in one Armſtrong's caſe. Ibid. ——But, it was ſaid to be held by all, that in one . . .'s caſe, that a truſt of a freehold was not forfeited upon attainder of treaſon. Ibid.

22. Alſo it ſeems to be in a great meaſure ſettled, that the *truſt of a term* granted by a man, *for the uſe of himſelf, his wife and children*, &c. is liable in like manner to be forfeited, if *fraudulently made* with an intent to avoid a ſubſequent forfeiture; but that it ſhall be forfeited ſo far only, as it is reſerved to the benefit of the party himſelf, if made bona fide, whether before or after marriage for good conſideration, without fraud, which is to be *left to a jury on the whole circumſtances of the caſe*, and ſhall never be preſumed by the court, where it is not expreſsly found. 2 Hawk. Pl. C. 450. cap. 49. ſ. 11. The book cites as in the marg. 2 Keb. 564. 608, 644, 763, 772. Lev. 279. Lane 54, 113. Mod. 16, 38. Hard. 466. And. 294. Raym. 120. 2 Roll. Abr. 34, pl. 1, 2. Roll. Abr. 343. F. 5, 6, 7. Mar. 45, 88. Sid. 260, 403. 1 Keb. 909.

(N) In Caſes of Treaſon or Felony. Chattels.

1. IF a man be *arraigned of felony, and takes to his clergy*, he ſhall forfeit his *goods, and the profits of his land*. Br. Forfeiture de terres, pl. 117. cites 4 E. 3. 46.

2. Indictment *of the death of a man, the exigent is awarded*, and the *party comes, and is found not guilty*; yet the goods are forfeited, and the inqueſt compelled to ſay what goods he had: who ſaid that he had to the value of 40 *s.* Thorp aſked what vill ſhould anſwer for the chattels; the inqueſt ſaid the vill of W. and ſo it was entered in the roll. Br. Forfeiture de Terres, pl. 32. cites 22 Aſſ. 81.

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3. A. was brought into the exchequer to anſwer the queen for a *certain ſum of money*, by him *received* of B. *to pay over to C. attainted of treaſon*, and a *bill made by C. to B.* but not ſealed was ſhewn forth, upon which A. demurred in law; and becauſe it is only a *choſe en action*, and a *naked contract* upon the matter, he was diſmiſſed. But if a ſervant receive money to the uſe of his maſter, and brings this into the houſe of his maſter, who after is attainted; this is forfeited which is *in the maſter's poſſeſſion*. Savil. 40. pl. 91. Mich. 24 and 25 Eliz. Anon.

S. P. Br. Forfeiture de Terres, pl. 47. cites 50. Aſſ. 1. & that, though the matter be found by office for the queen—*But* ibid. pl. 48. cites 50. Aſſ. 3. contra. That the queen ſhall have the money, and that the land of A. ſhall be thereof charged, notwithſtanding that A. *might have waged his law againſt C.* where the receipt was by his proper hands. Brooke makes a quere how this caſe, and the former caſe, pl. 47. agree.

Br. Choſe in action, pl. 10. cites S. C. and P. and ſays, that *A. was ſeiſed of* certain *land, after* that he was debtor to the king, *part in fee ſimple, and part for* 20 *years*, and ſhewed who was tenant of the one, and who of the other, by which a ſcire facias iſſued againſt the tertenants, and the king had execution, and ſo ſee *choſe in action* forfeited to the king———Br. Charge, pl. 34. cites S. C.

4. A termor is diſtreined for rent behind; afterwards he is attained for felony, *done before the diſtreſs taken*; the king ſhall not have this diſtreſs as a forfeiture, unleſs he *ſatisfies* the party that diſtreined; for this was lawfully taken tempore captionis, per Doderidge J. 3 Bulſ. 17. Hill. 12 Jac.

5. If A. *gage goods to B. and after A. is attainted of felony*, yet the king ſhall not have the goods thus gaged, without payment of the ſum for which they were gaged; becauſe *neither of them hath the abſolute property* in the goods ſo gaged, per Doderidge J. 3 Bulſ. 17. Hill. 12 Jac.

6. A *covenant to pay money* ſhall be forfeited to the king by attainder of felony, per Cur. Noy. 155. and ſays that ſo it was adjudged in the caſe of George Norris.

It ſeems that this ſhould be dame Hale's caſe in Pl. C. 253. to 264.

7. If a perſon is attainted, the king is intitled to *perſonal things intirely*, as to an obligation, horſe, &c. ſo the attainder of one *jointenant* forfeits all, Arg. Raym. 121. but *not ſo of things in poſſeſſion, which may be divided.* cites 3 Inſt. 55. of a chattel real in poſſeſſion, and that Pl. C. 243. * intimates ſo much, becauſe he inſtances only in entire chattels.

Jenk. 293. pl. 39. cites Hob. 214. Marqueſs of Winchеſter's caſe.———Arg. Hard. 466. and per Hale Ch. B. 467.

8. *Truſt* of a *chattel* is forfeited for felony, if it be a *leaſe* in groſs; but otherwiſe, if it be to *attend the inheritance.* 3 Ch. R. 36. Paſch. 21 Car. 2. in the Exchequer, in caſe of the Att. Gen. v. Sir Geo. Sands.

(O) In Caſes of Treaſon or Felony, what is to be done with Chattels before Conviction.

1. 18. *E.* 2. enacts that *felon's goods may be ſecured before attainder, but he ſhall be maintained out of them, and they ſhall be reſtored to him if acquitted.*

2. *Stat. de catallis felonum*, enacts that *none taken for felony, for which he ſhall be impriſoned, ſhall be diſſeiſed of his lands or chattels, until he be convicted thereof; but as ſoon as he is taken, his tenements and chattels ſhall be viewed by the ſheriff, and other officers of the king and lawful men, and inventoried and kept by the bailiff of him that is ſo taken, who ſhall give ſurety to the juſtices, of the chattels, or the price; ſaving to the accuſed and his family their neceſſaries, as long as he ſhall be impriſoned, and his reaſonable eſtover; ſo that when he is convicted, the reſidue of his chattels (beſides his eſtover) may remain to the king, with the year and day of his lands; but if he be acquit, his chattels ſhall be reſtored.*

3. The *vill may ſeiſe* the goods of a man outlawed for murder, where they can find them. Quod nota. Br. Forfeiture de Terres, pl. 32. cites 22 Aſſ. 81.

4. The officer nor the ſheriff cannot take * the goods away with him, unleſs they he forfeited. But where one is *appealed or indicted of felony*, he muſt ſeiſe and take *ſecurity, that they ſhall not be eſſoigned*, but not remove them; and if the party will not find ſurety, he ſhall put them *into the hands of the neighbours to keep*, per Cur. Br. Forfeiture de Terres, &c. pl. 7. cites 43 E. 3. 24. [450]

* Of a felon, Br. office and Off. pl. 3. cites S. C.—Br. Corone, pl. 9. cites S. C.—Br. Forfeiture de terres pl. 44. cites 44. Aſſ. 14. S. P. per Finch. Quod Curia conceſſit. And it ſeems that this order ought to be of every one that commits felony, till he is attainted.

5. If a man *kill another by misfortune*, he ſhall forfeit his goods, and he ought to have his charter of pardon of grace, per tot. Cur. Br. Forfeiture de Terres, &c. pl. 9. cites 2 H. 4. 18.

6. Where a man is indicted of felony, till he be attainted, his goods *ſhall not be removed out of his houſe, but* ſhall be *in keeping of the neighbours quouſque, &c.* and all the mean time, the felon *ſhall have his living of his goods*; quod nota, that they are not forfeited before attainder. Br. Forfeiture de Terres, pl. 10 cites 7 H. 4. 47. per Hulſ.

7. 1 *Ric.* 3. *cap.* 3. enacts that *no ſheriff, under ſheriff, eſcheator, bailiff of franchiſe, or other perſon, ſhall ſeiſe the goods of any perſon arreſted or impriſoned for ſuſpicion of felony, before he be convicted or attainted thereof, or the ſame goods be otherwiſe lawfully forfeited, on pain of double the value of the goods ſo taken, to the party grieved, to be recovered by action of debt, &c. wherein no eſſoin, &c. to be allowed.* This ſtatute is ſaid to be in affirmance of the common law, 2 Hawk. Pl. 455. ch. 49. ſ. 39.

It was *enacted by* 25 *E.* 3. 14. *that in the ſecond capias*, given by that ſtatute, on the return of a *non inventus, it ſhall be comprized, that the ſheriff* ſhall *cauſe the party's chattels to be ſeiſed, and ſafely kept till the day of the writ or precept returned*, &c. and this is ſtill in force, notwithſtanding this ſtatute of 1 R. 3. 3. for this prohibits only the ſeiſing of the goods of thoſe who are arreſted. 2 Hawk. Pl. C. 455. ch. 49. ſ. 37.

It ſeems plain from this ſtatute, that goods may be ſeiſed as ſoon as they are forfeited; and it ſeems the whole townſhip is anſwerable for them to the king, and may ſeiſe them wherever they can be found. 2 Hawk. Pl. C. 455. ch. 49. ſ. 40.

See Lutw. 132. for the pleadings upon this ſtatute ——— *Debt* upon this ſtatute, for that the plaintiff being *impriſoned upon ſuſpicion of felony*, the *defendant took his goods before he was convicted or attainted, contra formam ſtatuti*, &c. and demanded the double value. Upon the iſſue non debet, it was *found for the plaintiff*, and moved in arreſt of judgment, that the declaration was not good, for that it is *not alledged that they were ſeiſed for this cauſe*. For if he took them as treſpaſs, an action lies not upon this ſtatute, ſed non allocatur. Becauſe it ſhall be *intended*, that he ſeiſed them for this cauſe, when no other cauſe is ſhewn. And the addition of *contra formam ſtatuti explains it*, and makes it good, if it had been before ambiguous. As in 14 Eliz. D. 312. in an action for diſtreining averia carucæ, contra formam ſtatuti; although it be not averred, that he had other goods ſufficient for the diſtreſs, it is well enough. For contra formam ſtatuti implies as much, wherefore it was adjudged for the plaintiff. Cro. E. 749. Paſch. 42 Eliz. B. R. Hill v. Langly.

Treſpaſs upon this ſtatute for taking the plaintiff's goods (being arreſted for ſuſpicion of felony) before conviction, and declares of *ſaſing* a certain parcel of *money*; and after verdict for the plaintiff, it was moved in arreſt of judgment, becauſe the words of the ſtatute are, *that none ſhall ſeiſe the goods of any perſon*, &c. and that money is not goods cites Fitz. Brief. 512. but adjudged for the plaintiff, and that money is goods; and that caſe is only the opinion of Finchden. Mich 32 Car. 2. B. R. Raym. 414. Oſborne v. Wandell.

And upon exception taken in an action upon this ſtatute, after verdict; for that the declaration ſays, bona & catalla, and then alleges money and goods, whereas money is not included under bona according to * Fitzh. it was anſwered, that it is true, though *money cannot be demanded by the name of bona*, yet it *may be granted by that name*; for the perſon who hath the grant of bona felon. & fugitivorum, ſhall, without doubt, have his ready money, though a declaration for money is pro pecuniis numeratis. 2 Show. 132, 133. Mich. 32 Car. 2. B. R. Anon. ſeems to be S. C. as above, Oſborn v. Wandell. ——— * Fitzh. Abr. tit. Brief, 512. cites M. 39 E. 3. 23.

It has been alledged to extend, as well to the ſeiſure of money, as of any other chattels. 2 Hawk. 455.

And another exception was, for that the *declaration recited* the ſtatute, and ſaid, *no ſheriff nor under-ſheriff, nor eſcheator, nor any other perſon*; and *in the ſtatute, under-ſheriffs are not mentioned*; yet held that this doth not enlarge the ſtatute; for that it is included in the word ſheriffs; and then it is, *nor any other perſon*, and therefore that is well enough. 2 Show. 132, 133. Mich. 32 Car. 2. B. R. Anon.

An action being brought upon this ſtatute, and a verdict for the plaintiff, it was moved in arreſt of judgment, that the ſtatute was *miſrecited*, whereupon the parliament roll was brought into court and read, and the ſtatute was for *ſuſpicion of felony*; whereas the declaration was for felony, which being matter of ſubſtance, the court ordered a nil capiat, per billam. Sty. 185. Mich. 1649. B. R. Archer v. Holbidge.

[451] (P) From what Time; and what Power the Offender has over Goods before Conviction.

1. IF *goods are forfeited* by outlawry or attainder of *treaſon*, the property is in the king immediately, and the king may grant them over immediately; and the grantee may have an action in his own name. Br. Forfeiture de Terres, pl. 26. cites 39 H. 6. 26.

2. If a felon be *convicted by verdict*, *confeſſion* or *recreancy*, he doth forfeit his goods and chattels, &c. *preſently*; for, where a reaſon has been yielded in our books, that the * *praying of his clergy* was a refuſal of the judgment of the law, and a flight in law, and that for that cauſe he forfeited his goods and chattels, that doth not hold; for if a man be convict of petit treaſon, or murder, or any other crime, for which he can't have his clergy, yet by the very conviction he forfeiteth his goods and chattels before attainder. And Stanford (ſpeaking of a *felon convict* by verdict) ſaith, that he ſhall forfeit his goods which he had at the time of the verdict given, which is the conviction in that caſe, and by the ſtat. 1 R. 3. 3. no ſheriff, bailiff, &c. ſhall ſeiſe the goods of a felon before he be convicted of the felony, whereby it appeareth that the goods may be ſeiſed as forfeit after conviction. Co. Litt. 391. a.

* See the note on pl. 4.

It was held by all the barons, and ſo they delivered the law to the jury; that where B. entered into a *ſtatute* to A. and A. afterwards was a *fugitive*

a *fugitive* beyond the ſeas in 27 Eliz. and after, *before office*, A. *returned and releaſed this ſtat.* and office is after found, this releaſe ſhall not be a bar to the *king*; for he *was intitled by the flight*, and the office is but an informing of him, and the ſtatute was in him before the office. Mich. 3 Jac. 1. Cro. J. 82. the King v. Sir Rich. Wendman.

4. The goods are not forfeited *till conviction*, and till then the party ought to have them *for his maintenance*. And before conviction they cannot be ſeiſed for the king's uſe, though they may be put *in ſalva cuſtodia*. Godb. 206. Mich. 11 Jac. in the Starr Chamber, in the caſe of Miller v. Reynolds and Baſſet.

The *praying of clergy* does not make any forfeiture, but his goods and chattels are forfeited immediately upon his conviction. 12 Rep. 121. Mich. 12 Jac. Anon.

5. *So*, a felon or traytor may, after the *felony or treaſon*, and before conviction, *ſell bona fide for his ſuſtenance*, &c. his *chattels*, be they *real or perſonal*; per Coke Ch. J. 8 Rep. 171. b. Paſch. 8 Jac. in Sir George Fleetwood's caſe.

6. *Trover* for diverſe goods was brought againſt the defendant, being *ſheriff of London*, by the plaintiff, who was the *ſon of Jones*, who was *executed for robbery*, and burglary; and he being in Newgate, and his goods ſeized by the defendant, Jones *made a bill of ſale* of the goods mentioned in the declaration, to the intent *to make proviſion for the plaintiff*, being his ſon; and by Holt Ch. J. the bill was ruled *fraudulent*; for though a ſale *bona fide*, and for a valuable conſideration, had been good, becauſe the party had property in the goods *till conviction*, and *ought to be reaſonably ſuſtained out of them*; yet ſuch a conveyance as this, cannot be intended to any other purpoſe, than to *prevent a forfeiture*, and defraud the king; and Holt Ch. J. ſaid, that there was a fraud at common law, as in ſuch a caſe as here; and though this bill would not be fraudulent againſt a ſubſequent voluntary diſpoſal by Jones; yet, when he is *convicted for a fact* before the ſale, *this ſhall relate* and avoid the ſale, and no countenance ought to be given to ſuch a contrivance as this, where a man has gained an eſtate to a conſiderable value by robbery, and when he is detected, he would give this to his poſterity; and the plaintiff was nonſuit. Skin. 357. on a trial at Guildhall. Trin. 5 W. & M. Jones v. Aſhurſt.

7. No part of the perſonal eſtate is veſted in the king, before the *ſelf-murder* is *found* by ſome inquiſition, and conſequently the forfeiture thereof is ſaved by a *pardon* of the offence, before ſuch finding. 1 Hawk. Pl. C. 68. cap. 27. ſ. 9. [452]

8. But if there be no ſuch pardon, the whole is forfeited immediately after ſuch inquiſition, from the time ſuch mortal wound was given, and all intermediate alienations are avoided. 1 Hawk. Pl. C. 68. cap. 27. ſ. 10.

(Q) Forfeiture of one Perſon, in what Caſes it ſhall be of another.

1. A. *was bound to two* in 20 l. and *one* of the two *was felo de ſe*, which was found by office, and per Chocke J. the * whole obligation is forfeited. But contrary per Younge; for by the death it is veſted in the other by the ſurvivor; and the office which came after, cannot deveſt this which was veſted before, quære. Br. Jointenants, pl. 34. cites 8 E. 4. 4.

* Br. Forfeiture de terres, pl. 58. S. P. after office found thereof. cites S. C.

——Br. Prærog. pl. 67. cites S. C.——Jenk. 65. pl. 22. S. P. Becauſe the outlawed perſon, without the other, might have releaſed the obligation.

2. Goods *taken by a treſpaſſor* ſhall be forfeited by the *attainder of the owner* for felony; for the right and property remains in the owner, and the law ſhall adjudge them in him, until he makes his *election* to the contrary, *by bringing writ of treſpaſs*. Cro. E. 824. Paſch. 43 Eliz. C. B. in caſe of Biſhop v. Lady Montague.

3. *Two jointenants* of a ward, *one does waſt*, both ſhall be puniſhed in action of waſt. Co. Litt. f. 67. 54.

4. *Mortgagee of lands forfeited* to the king muſt make his demand of the money at the exchequer, and not upon the land, nor need the king tender it. Goldſ. 137. pl. 41. Sir Rowland Heyward's caſe.

5. A. *deviſed to B.* the father *for life*, *remainder to C.* his ſon *an infant in fee*, *and* deviſed 400 *l. to the ſon*, to be paid at 21; A. made the father executor, and left 2000 l. perſonal aſſets, and *B.* having ſpent the perſonal aſſets, *mortgaged* the lands *to J. S. and made affidavit that they were free from incumbrances*, and that he was ſeiſed in fee, *and levied a fine* for corroborating the mortgage, and ſo declared the uſe thereof for him and his heirs; the *ſon* having *entered for a forfeiture*, the mortgagee brought his bill to be relieved, and the court decreed that the mortgagee, notwithſtanding the forfeiture, ſhould hold and enjoy the lands againſt the ſon, during the life of the father. Hill. 1699. Abr. Equ. Caſes 257. Willis v. Fineux.

6. If *tenant for life*, *of the office of marſhal of B. R.* grants an office for life, and then commits a forfeiture of his eſtate; yet the under grantee ſhall continue in for the life of the grantor; becauſe the grantor ſhall not, by his own act, defeat his own grant; per Holt Ch. J. 12 Mod. 558. in Sutton's caſe.

(R) Relation as to Lands and Chattels.

S. P. Br. Relation, pl. 36. cites 33 E. 3.

1. ATTAINDER in *felony* or *treaſon*, by verdict, confeſſion or outlawry forfeits all from the time of the offence committed, as to lands; and ſo it is upon an attainder of ‖ *outlawry*.

lawry. But for † goods, chattels or debts, the king's title ſhall look no farther back than to thoſe goods the party, attainted *by verdict or confeſſion*, had at the time * of the verdict and confeſſion, and in outlawries at the time of the *exigent*, as well in treaſons and felonies. Bacon's Uſe of the Law, 41.

and Fitzh. Forfeiture, 30.——‖ S. P. But Brooke makes a quære

thereof; for he ſays, that it ſeems to him, that it ſhall only be from the time of the *outlawry pronounced, or after*; for outlawry *has no relation*, as verdict has. Br. Forfeiture de Terres, pl. 98. cites 30 H. 6. 8. [but it ſhould be 30 H. 6. 5.]——S. P. Br. Relation, pl. 42. cites 30 H. 6. 5. as well as upon attainder by verdict——*Contra* held in the time of H. 8. of attainder *of felony*; *but* it is good law upon attainder *by* * *verdict*; for this ſhall have relation to the act; contra of outlawry. Note the diverſity. Ibid.——* S. P. Br. Relation, pl. 14. cites 42 E. 3. 26.

Attainder *by outlawry* ſhall have relation unto the ‡ *exigent*, as unto lands and tenements; ſo that a feoffment of the land or grant of a rent, before the exigent awarded by him that is attainted in ſuch manner is good. Perk. ſ. 28.——‡ Br. Relation, pl. 14. cites 42 E. 3. 26. S. P.

And attainder *by verdict* ſhall have relation unto the time of the *felony committed according to the ſuppoſal of the indictment*, as unto lands and tenements, and *ſo* ſhall an attainder *by confeſſion*. Perk. ſ. 28. cites 30 H. 6. 5.

† Perk. ſ. 29. So that a gift made of the goods before judgment, is good. cites 41 Aſſ. 13.—— Br. Forfeiture de Terres, pl. 58. cites 8 E. 4. 4. acc. per Danby Ch. J. and Needham J. *quære, if by covin*, per Brook. ibid.

2. Where a man *is arraigned of felony, and acquitted*, and it is found that he fled for the felony, he ſhall forfeit his *goods which he had at the time of the acquittal, and not* at the time *of his flight*. Br. Forfeiture de Terres, pl. 119. cites 3 E. 3. It. Nor.

S. P. Br. Relation, pl. 31. cites S. C. Goldſb. 135. cites S. C. and Fitzh. Corone, 296.

3. *But* where *the flying is found before the coroner*, they are forfeited which he had *at the time of the verdict taken before the coroner*. Br. Forfeiture de Terres, pl. 119. cites 3 E. 3. It. Nor.

4. In *attaint*, judgment was given againſt the petit jurors, and it was doubted, if the *jurors* having *aliened their lands meſne between the teſte of the writ and the judgment*, whether the king ſhall have thoſe lands or not? therefore quære of the relation of it. Br. Relation, pl. 14. cites 42 E. 3. 20.

The judgment, as to the goods, ſhall have relation *to the teſte of the writ of*

attaint, where they have aliened for fear of the attaint, viz. by covin. Br. Relation, pl. 45. cites 8 E. 2. and Fitzh. Aſſiſe, 369.——S. P. Br. Colluſion, pl. 44. cites 8 E. 2. and Fitzh. Aſſiſe, 396.——Therefore it ſeems contra of goods ſold before, or after the teſte of the attaint bona fide; for if they are ſold before judgment, it ſeems that the ſale is good. Quære, of a ſale before execution.

5. *And* of the relation of a judgment *in premunire alſo*, and ſee the ſtatute thereof. Ibid.

Quære, as to an indictment on a *præmunire*, on 13 Eliz. For it was not reſolved. Cro. C. 172. Mich. 5 Car. B. R. Groſs v. Gayer.——Jo. 217. S. C. by name of Groſs v. Gayne.

6. *And*, it ſeems, that where *treaſon* is *made by ſtatute*, ſhe ſhall forfeit in like manner. Ibid.

7. *Quære*, if it be not *the ſame law in the premunire or attaint*. Ibid.

8. If a man *commits felony, and after purchaſes* land, *and after is attainted*; there the land purchaſed is forfeited, as well as the land which he had at the time of the felony committed, per Perſey and Belknappe. Quod nullus dedixit. Br. Forfeiture de Terres, pl. 80. cites 48 E. 3. 2.

9. If *goods be given to A. by deed in his abſence*, and *A. commits felony* before notice of the gift, yet the king ſhall have the goods; for his notice ſhall have relation to the gift. Br. Done, &c. pl. 30. cites 7 E. 4. 29.

Baron and feme *joint-tenants for years*; the baron *is felo de se*, feme is in by ſurvivor; yet if this be afterwards found by office, the king ſhall have the whole term. Pl. C. 458. Trin. 3 Eliz. Hales (Dame) v. Petit.

10. If one be found *felo de ſe* by office, the office ſhall have relation *to the firſt ſtroke*, per Littleton. Br. Prærog. pl. 67. cites 8 E. 4. 4.

11. There is a great *diverſity*, as to the forfeiture of *land*, *between* an *attainder of felony by outlawry*, *upon an appeal*, *and* upon an *indictment*; for in the caſe of an appeal, the defendant ſhall forfeit no lands, but ſuch as he had at the time of the outlawry pronounced; but in caſe of indictment, ſuch as he had at the time of
[454] the felony committed, and the reaſon of this diverſity is evident; for that *in* caſe of *appeal* there *is no time alledged* in the writ, *when the felony was done*; and therefore of neceſſity it muſt relate, in that caſe, only to the judgment of the outlawry; but in the caſe of indictment, there is a certain time alledged; and therefore, in that caſe, it ſhall relate to the time alledged in the indictment when the felony was committed. Co. Litt. 390. b.

* For then the title of the king appears of record. 8 Rep. 170. in Tourſon's caſe. —and cites Pl. C. 488.

12. *But* in the caſe of the *indictment*, *there is alſo a diverſity* to be obſerved; for as it hath been ſaid, it ſhall relate to the time alledged in the indictment *for avoiding of eſtates*, *charges*, *and incumbrances made* by the felon *after the felony* committed; *but for the mean profits* of the land, it ſhall relate only to the * judgment, as well in this caſe of outlawry, as in other caſes. Co. Litt. 390. b.

13. A. committed treaſon, 18 Eliz. for which 26 Eliz. he was attainted by trial; and in the mean time, between the treaſon and the attainder, he was *conuſee of a fine* of certain lands, conveyed *by one B. to the uſe of the ſaid B. and his wife*, ſiſter of the ſaid A. *and of the heirs of the ſaid B.* And after this, *B. and his feme bargained and ſold* the lands *to J. S. for money, and they conveyed them to him by fine.* And now upon diſcovery of the treaſon, and the attainder of A. J. S. was adviſed by Plowden, Popham, and many others, that the eſtate of the land was in the queen, becauſe the queen is intitled to all the land that traitors had at the time of the treaſon, or after. So the uſe, which ſhould create eſtate to B. and his wife upon the fine, by the relation of the right of the queen by the attainder, is deſtroyed; wherefore J. S. ſued to the queen, and ſhe granted him the land again by patent. Mo. 196. Trin. 27 Eliz. Pimb's caſe.

14. The treaſon of *compaſſing the king's death was laid* in the indictment to be the 30*th of May*, 11 *Car.* 2. yet upon the *evidence*, it appeared that Sir Henry Vane, *the very day the late king was murdered*, *did ſit in counſel* for the ordering of the forces of the nation *againſt the king*, that now is, *and ſo continued* on all along, *until a little before the king's coming in.* It was *reſolved*, that the day laid in the indictment is not material, and the *jury* are not bound to find him guilty that day, but *may find the treaſon* to be as it was in truth, *either before or after the time laid in the indictment*, as is reſolved in Syer's caſe. Co. Pl. Coron. 230. And accordingly, in this caſe, the jury found Sir Henry Vane guilty of the treaſon in the indictment,

indictment, the 30th of January, 1 Car. 2. which was from the very day the late king was murdered, and ſo all his *forfeitures relate to that time*, to avoid all conveyances and ſettlements made by him. Kelyng. R. 16. pl. 6. Trin. 14 Car. 2. Sir Henry Vane's caſe.

15. If there are *two joint-obligees*, and *one* of them *is outlawed*, the king ſhall have the whole, becauſe each had power of the whole. Hard. 26. Arg. cites Fitzh. Execution, 113. *But* if a common perſon's title is prior to the king's, it is otherwiſe. Ibid. cites 49 E. 3. 16.

16. If A. *gives B. a mortal wound*, and then *A. ſells his land*, and then *B. dies*; there ſhall be ſuch relation as to make the land forfeited from *the firſt ſtroke*. Arg. Vent. 371. cites Pl. C. 293. Dame Hale's caſe.

(S) Purged, or diſpenſed with, by what.

1. IT was agreed, that where exigent is awarded in felony, and after the party ſhews *charter of pardon of elder date than the exigent* awarded, *and ſurety put in in chancery, ſecundum formam ſtatuti, before the exigent*, the goods are ſaved and not forfeited; becauſe the charter and ſurety appear by matter of record. Br. Forfeiture de Terres, pl. 6. cites 43 E. 3. 18. Ibid. pl. 46. S. P. cites 45 Aſſ.

2. No part of the perſonal eſtate is veſted in the king before the *ſelf murder* is *found by ſome inquiſition*; and conſequently the forfeiture thereof is *ſaved by a pardon* of the offence before ſuch finding. 1 Hawk. Pl. C. 68. cap. 27. ſ. 9. [455]

3. But if there be no ſuch pardon, the whole is forfeited immediately after ſuch inquiſition, from the time ſuch mortal wound was given, and all intermediate alienations are avoided. 1 Hawk. Pl. C. 68. cap. 27. ſ. 10.

(T) What Charges are avoided by it.

1. *TENANT in tail, reverſion in the king.* Tenant in tail made a *leaſe for years, and levied a fine to the king*. The king ſhall not avoid the leaſe; for he comes in in the reverter. But in ſuch caſe, if he be *attainted* of treaſon, the king ſhall avoid the leaſe. So a ſtatute of forfeiture is ſtronger than a ſtatute of conveyance. Arg. Godb. 324. cites 2 Mariæ. AUSTIN's caſe cited in Walſingham's caſe.

(U) Forfeiture. By Flight; and how to be ſeiſed, and when.

1. NOTE, that if it be *found before a coroner by inqueſt, that a felon or thief withdrew himſelf*, the *chattels* are forfeited without more; and the ſheriff ought immediately to ſeiſe his *land* into

into the hands of the king, by ſimple parol *without inqueſt*, and cauſe to ſeiſe all his chattels into the king's hands, and *to cauſe them to be appriſed, as well by villains as by freemen*, and *put the price in the roll of the coroner, and deliver them to the vill*, to anſwer to the king. Br. Forfeiture de Terres, pl. 33. cites 22 Aſſ. 96.

2. In *appeal of death*, the defendant made *default*, by which *exigent was awarded*; and thereby the goods and chattels were forfeited. A *writ* may iſſue *to the ſheriff, or to the eſcheator*, to ſeiſe them. But per Knevet, *commiſſion out of the exchequer*, to ſeiſe them, is againſt law; for they were not forfeited till now. Br. Forfeiture de Terres, pl. 40. cites 41 Aſſ. 13.

3. A man was taken for *ſuſpicion of larceny, and bailed to J. N. bailiff of D. to keep him*, and he *eſcaped* for default of good keeping; and there it was ſaid, that if he *was not indicted*, his goods ſhall not be forfeited; quod mirum! for he who flies for felony ſhall forfeit his goods. But it ſeems, that this word *(indicted)* is intended, that it ſhall be found by indictment, that he fled for felony before the goods were forfeited; for the flying ought to be of record. Br. Forfeiture de Terres, pl. 43. cites 42 Aſſ. 5.

4. *Appeal* was brought by a feme againſt three, *of the death* of her huſband, *one is outlawed*, and the *other two render themſelves at the exigent*, and their goods were forfeited, becauſe they ſtaid till the exigent. Br. Forfeiture de Terres, pl. 45. cites 44 Aſſ. 16.

5. *Appeal againſt two*, the *one as principal in one county*, and the *other as acceſſary* to the ſame murder *in another county*, and *the exigent was awarded*; and after the *acceſſory goes quit*, becauſe it was in another county, and prayed reſtitution of his goods, and could not have it; for the *goods are forfeited by the awarding of the exigent*, which yet ſtands in force. Br. Forfeiture de Terres, pl. 46. cites 45 Aſſ. 9.

6. Upon a *jury's finding* that the defendant fled at the ſame time that they acquit him of an indictment of capital felony, or as ſome
[456] ſay, of larceny before juſtices of oyer, &c. he forfeits all his perſonal eſtate. But ſuch a finding cauſes no forfeiture of the iſſues of the land; becauſe by the acquittal, the land is diſcharged. Neither will it have any effect as to the goods, if the *indictment* were *inſufficient*; or if the flight be *diſproved on a traverſe*, which, as all agree, may be taken to any ſuch finding, except that by a *coroner's inqueſt*; and as ſome ſay, even to that, as well in reſpect of the flight, as of the particulars of the goods. 2 Hawk. Pl. C. Abr. 445. cap. 49. ſ. 11.

7. Upon a *preſentment, by the oaths of* 12 men, that a perſon, arreſted of treaſon or felony, fled from, *or reſiſted* thoſe who had him in cuſtody, *and was killed* by them in the purſuit or ſcuffle, he forfeits all his *perſonal eſtate*. 2 Hawk. Pl. C. Abr. 445. cap. 49. ſ. 11.

(W) In

(W) In Cafes not Treaſon nor Felony, but of inferior Nature.

1. IF a man be *miſcreant*, it is a forfeiture of his land, per Belknap. Br. Forfeiture de terres, pl. 94. cites 5 R. 2.

2. In treſpaſs, it appears, that where the defendant is *attached for goods in* an action of *treſpaſs, and makes default* at the day, his goods are forfeited. Br. Forfeiture de Terres, pl. 23. cites 14 H. 6. 14.

And the *default of the feme*, in ſuch caſe, is the default of baron and feme. Br. Forfeiture de Terres, pl. 23. cites 14 H. 6. 14.

3. *For petit larceny*, under 12d. the party ſhall forfeit *all his goods, but no land*, quod nota; for this is felony, though not felony of death. Br. Forfeiture de Terres, &c. pl. 1. cites 27 H. 8. 22. per Fitzherbert J.

4. Attainder of *premunire* works no corruption of blood, but is a forfeiture of lands in fee ſimple, but not of *lands in tail*. Co. Litt. 391. a.

5. *By* 9 *Annæ*, 14. *one challenging another for money won at play forfeits his goods.*

6. 1 *Geo.* 1. 55. *Papiſts not regiſtering their eſtates forfeit them.*

7. An *heretick*, though burnt for hereſy, forfeited neither lands nor goods. Becauſe the proceedings againſt him were only pro ſalute animæ. Hawk. Pl. C. cap. 2. ſ. 10.

(X) Where, after Forfeiture, a Subject may enter without Livery of the King.

1. WHERE a man is *attainted of treaſon by parliament, and to forfeit his lands in uſe, and in poſſeſſion*, and after *the heir is reſtored by another parliament after that the king had made a feoffment in fee of a manor*; he ſhall not have ſcire facias to reſume the land, and to have livery; for *where the king departs with fee ſimple, he cannot reſume.* Br. Livery, pl. 13. cites 7 H. 4. 20.

2. *But where* the king is *ſeiſed by attainder of felony, and leaſes for life*, and J. N. has title, he ſhall ſue to have reſumption to the king, and to have livery out of the hands of the king; for the *reverſion and fee was in the king.* Ibid.

So where the king makes a *feoffment in fee of the land of the heir in ward*; there ſhall be reſumption and livery made to the heir; for the *king had not the fee ſimple to give*; contra where he has the fee, and gives the fee; note, a diverſity. Ibid.

3. *Tenant in tail* levied war againſt the king by treaſon, and was *killed in battle*, and ſo died before he was attainted, by which it was *enacted by parliament, that he ſhould forfeit all his lands of fee ſimple*, and that the king ſhould ſeiſe as well the land of fee-ſimple as the land tailed; and by mandamus it was *found that the land tailed was tailed,*

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tailed, &c. *and that the heir is within age*, upon which the heir at full age, ſued in the chancery to have livery of the land tailed, where, upon argument, the beſt opinion was, that he ſhall have livery; for *where the king ſeiſes by a title ſurmiſed, and has other true title, the law will adjudge him in by the juſt title*, which is here by the wardſhip; for nothing was forfeited by the act of parliament but land of fee ſimple, and it appears there, that none ſhall have livery without office ſerving for him; and ſo the beſt opinion is that he ſhall not be put to ſue by petition. Br. Livery, pl. 14. cites 7 H. 4. 32.

4. Office was found that *J. N. who held of the king aliened without licence* to W. S. and returned in the exchequer, and thence ſent into chancery, and thence into B. R. to be diſcuſſed; and there *found for W. S. that it was held of T. R. who held over of the king*; by which he had livery out of the hands of the king, with the iſſues in the mean time. Br. Livery, pl. 15. cites 7 H. 4. 41.

And therefore there, and when a *term is outlawed*, and the term *expires*, the leſſor, or *he who has right, may enter without livery*; for the king is not ſeiſed but of a *chattel*, or of the profits of the land, and never could ſeiſe the ſoil of the tenant of the frankteneement but only the profits in the one caſe, and the chattels in the other. Br. Livery, pl. 5. cites 9 H. 6. 20.

5. *Where the king is intitled to ſeiſe, as for outlawry of felony*, ward, alienation without licence, &c. there the party who has title ſhall be compelled to ſue livery; *contra* upon outlawry *in a perſonal action*; for there the king *ſhall not ſeiſe, but only take the profits*. Br. Livery, pl. 5. cites 9 H. 6. 20.

* See Prerogative.

(Y) Levied or * Recovered. How.

1. 31 *E.* 3. *ſtat.* 1. *cap.* 4. enacts that *the eſcape of felons, and the chattels of felons, fugitives, and clerks convict, adjudged by the king's juſtices ſhall be levied as they fall.*

2. T. B. of Kent, knight, was *attainted of treaſon*, and the *king by his letters patents gave all his goods to W.* and he *brought thereof ſubpœna in chancery eo quod bona devenerunt ad manus ejus*, and per Cur. it lies well, though he may have an action of detinue at common law. Br. Prerogative, pl. 45. cites 39 H. 6. 26.

(Z) Pleadings.

1. 3 *E.* 3. *ſtat.* 1. *cap.* 3. enacts that *if any charged with the goods of fugitives and felons will, in diſcharge of himſelf, alledge another that is chargeable therewith he ſhall be heard, and right ſhall be done him.*

2. In an *information for debt forfeited*, and found by inquiſition to be due to the felon by bond, it muſt be directly charged againſt the debtor; that he became bound by his bond, in ſuch a ſumme, and muſt not be laid by a *prout patet* by an obligation hic in Cur. prolat. per Saunders. Sand. 275. Trin. 21 Car. 2. in the caſe of King v. Sutton.

(A. a) Forfeiture. * Relieved in Equity.

* See (Q.) pl. 5.—See Condition.

1. IN caſe of forfeiture *equity can relieve*, where they can give ſatisfaction. 1 Salk. 156. Grimſton v. lord Bruce & Ux. in Canc. 2 Vern. 594. Mich. 1707. S. C.

2. A *wilful* forfeiture, by *ſuffering a recovery* in point of law was ſupplyed and helped in equity, becauſe of an *agreement precedent*. Paſch. 16 Car. 2. Chan. Caſes 49. Goodrick v. Brown. [458]

3. A forfeiture of a *copyhold by felling timber* was relieved in equity; but lord keeper declared, that in caſe of a *wilful forfeiture* he would not relieve. Hill. 19 Car. 2. Chan. Caſes 96. Mary Thomas v. Porter and the Biſhop of Worceſter. See Copyhold.

4. In caſe of a forfeiture of a *leaſe for non-payment of a ground rent*, and a recovery, in ejectment, chancery will not relieve on tender of arrears and coſts, where the forfeiting perſon was offered the ſame terms by the ground-landlord before the bill brought and refuſed them, per Jefferies C. Vern. 449. Paſch. 1687. Dorrington v. Jackſon and Watſon. See Rent.

5. An *aſſent after refuſal* was allowed to prevent a forfeiture; for a forfeiture ſhall not bind where a thing *may be done afterwards*, or any *compenſation* made for it, unleſs where there is a deviſe over to a third perſon. 2 Vent. 352. Cage v. Ruſſel.

6. Equity will not relieve againſt a forfeiture *incurred by act of parliament*. MS. Rep. ſaid to be Ld. Harcourt's. tit. Forfeiture 1723. Sweet v. Anderſon.

(B. a) How far Equity will aid the taking Advantage of a Forfeiture.

1. UPON the diſabling ſtatute of 11 & 12 *W.* 3. *cap*, 4. § 4. Ld Cowper inclined, upon a bill brought by an after proteſtant remainderman, and upon another bill by the heir at law a proteſtant, to direct an *iſſue to try whether J. S.* to whom a firſt remainder was limited, *was a papiſt at the time that the remainder ſhould have veſted in him*; and this was deſired by the plaintiffs; but in regard, the act inflicts a forfeiture and diſability, and therefore is to be taken ſtrictly, and that J. S. being above 18 at the making the ſettlement, and ſo *not within the clauſe of retrieving* the eſtate *by returning to the proteſtant religion* (which probably was intended by the parliament) his lordſhip would not aſſiſt the plaintiffs ſo far; but left them to go on and try their ejectments upon ſeveral demiſes, and *directed that none of the truſt-terms, or eſtates in the ſettlement, previous to the ſaid eſtate limited to J. S. or meſne betwixt him and the after proteſtant remainder-man, ſhould be given in evidence, or inſiſted upon*; to the intent, that it might be tryed whether J. S. who was ſtrongly affirmed to be a papiſt but had controverted it, was capable of taking or not, and who had the title, in caſe he was not

capable of taking, whether the remainder-man by the ſettlement, or the heirs at law. Wms's Rep. 352, 353. Trin. 1717. Vane v. Fletcher.

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Forgery.

(A) At Common Law, or Now. In Reſpect of the Deed or Writing, or Thing contained therein.

If a man forges a *leaſe for years*, he *is not within this ſtatute*: for where the ſtatute ſays, *to change the lands, and trouble the poſſeſſion and title*, it cannot be intended of an eſtate for years. Pl. C. 80. Arg. in the caſe of Partridge v. Strange.

1. 1 *H.* 5. 3. *WHEREAS perſons have forged falſe deeds to change the lands of the good people of the country, and to deſtroy and trouble the poſſeſſions and titles of the ſubjects of our lord the king, therefore our lord the king &c. provides and ordains, that the party ſo grieved, may have his ſuit in ſuch caſe.*

2. In forger of a deed, becauſe the defendant forged a *deed of certain land, and four ſhillings rent, and letter of attorney* of the ſame land, and rent. Defendant demanded *judgment of the bill*; *for rent does not lie in livery* of ſeiſin, and therefore cannot be * grieved of the rent, by the letter of attorney. And yet becauſe by this the tenant may give 1d. in the name of ſeiſin, and ſo the plaintiff may be diſturbed and vexed, therefore he was awarded to anſwer, quod nota. Br. Forger de faits, pl. 4. cites 33 H. 6. 12.

* Orig. (greave) and in the year book it is (greve.)

3. If a notary, or other perſon, of covin counterfeit *ſeal of any parſon or vicar, and forge letters of reſignation* of his parſonage or vicaridge *in the name of the parſon or vicar of his benefice*, he ſhall thereupon have a writ of diſceit. But whether by that he ſhall be reſtored to his benefice, quære? It ſeemeth not, becauſe the removing of him is a ſpiritual act. F. N. B. 99. (K)

Forgery of a *will, whereby a leaſe for years is conveyed*, &c. is within the ſtatute, by reaſon of the word (writing) only. Trin. 13 El. D. 302. b. pl. 45. Anon.

4. 5 *Eliz. cap.* 14. *ſ.* 2. enacts that, *if any one alone, or with others, ſhall willingly, ſubtilly, and falſly forge or* make, *or cauſe, or aſſent to be forged or made, any falſe deed, charter, or writing ſealed, court-roll, or will in writing, to the intent that the freehold or inheritance of lands, or the right or title thereof, may be troubled, defeated or charged, or ſhall* publiſh *or ſhew forth in evidence, any ſuch forged writing as true, knowing the ſame to be falſe and forged, and ſhall be thereof convicted upon an action of forger of falſe deeds (to be founded upon this ſtatute) at the ſuit of the party grieved, or otherwiſe, he ſhall pay to the party grieved double coſts, &c.*

———Grandfather, father and daughter. Land deſcended from the grandfather to the father. *The father made a leaſe for* 100 *years and died. The daughter, to avoid an execution of a*

ſtatute

ſtatute-ſtaple, (the leaſe being defeated) forged a will of the grandfather, by which he gave the land to the father for life, the remainder to the daughter in fee. It was argued by the ſolicitor general, to be within the firſt branch of the 5 Eliz. becauſe *leſſee for years* has a title, an intereſt, and a right, and therefore within the words of the ſtatute, and that thoſe words ſhall be referred to the words, *lands, tenements, &c.* but Coke on the other ſide ſaid, that they ſhould be referred to the words precedent, viz. *eſtate of freehold or inheritance*, and then a leaſe for years is not within them. Then the ſolicitor inſiſted, that a *teſtament in writing* is within the words, *if any plead, publiſh, or ſhew forth, &c. to the intent, to have or claim* thereby *any eſtate of* inheritance, freehold *or leaſe for years.* And he ſaid, that a *ſtatute ſtaple* is an eſtate for years, though it be not a leaſe for years, becauſe it is not certain. But Coke anſwered, that the ſtatute is whereby an *eſtate for years ſhall be claimed*, and that in this caſe, *the daughter would defeat an eſtate for years*, and not claim one, and a ſtatute ſtaple is not a leaſe for years, and that the ſtatute is a *penal law, and not to be taken by equity.* The ſolicitor replied, that when the ſtatute is extended it is a leaſe for years, though it be uncertain. If a man forge a leaſe for years, it is directly within the ſtatute. But if a *man has a leaſe, and another is forged to defeat it*, it is a queſtion, whether it be within the ſtatute. And all the doubt of this caſe, is upon the *reference of theſe words, right, title, and intereſt.* And it was adjourned. Godb. 62. Mich. 28, 29 Eliz. B. R. Sturgie's caſe.——Nelſ. Abr. tit. Forgery. pl. 3. S. C. ſays, the court ſeemed to incline, that this was not within the ſtatute; for an eſtate for years was not ſuch an intereſt or title as is intended by the ſtatute, by ſuch a forged will or deed; beſides the defendant did * not claim the leaſe, for her intent was to defeat it; and this being a penal ſtatute, ſhall not have an equitable conſtruction, and cites S. C. and book. But quære; for there is nothing more there, than in the principal caſe here.

If a *perſon convicted of publication* of a deed of feoffment or rent charge, knowing the ſame to be forged, *afterwards forges another deed* of feoffment or rent-charge, the firſt whereof is within the ſecond branch of the ſtatute, and the ſecond, viz. forging is within the firſt branch, it was reſolved, that the ſecond offence, (though not of the ſame nature with the firſt offence, the one being publication and the other forgery) is felony; ſo if he be convicted of forging or publiſhing any writing, concerning freehold, within the firſt branch, or concerning intereſt or term for years, within the ſecond branch, and be convicted, if he afterwards offends, either againſt the firſt or ſecond branch, the ſame is felony. 13 Rep. 34. Paſch. 7 Jac. Read v. Booth.

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§ 3. *A forger, &c. of a* leaſe for years, *of land not copyhold, or of an* annuity, obligation, bill, acquittance, releaſe, *or other diſcharge of any perſonal thing, and he who ſhall publiſh and give the ſame in evidence ſhall pay double coſts, &c.*

One Handford, *before this ſtat. forged a leaſe for years, which leaſe was afterwards* redeemed by one Weynman for 200*l. and cancelled.* After Weynman, perceiving it to be forged, ſued Handford for reſtitution of the 200 *l.* and then Handford, after this ſtat. maintained the leaſe as good and true; whereupon Weynman ſued him in the ſtar chamber, and there *it was holden, not to be within the ſtatute*, becauſe the deed was cancelled, and Hanford made no title to the intereſt of the term. 3 Inſt. 172. cites Trin. 11 Eliz. Weynman v. Hanford.

The 5 *Eliz.* 14. *extends not* to forgery of a deed, conveying a gift of *chattels perſonal*, and as to that point, extends *but to obligations, bills obligatory, * acquittance, releaſe or other diſcharge.* And it extends not to an aſſignment of a *leaſe of land in Ireland.* But the court may puniſh ſuch offences, as miſdemeanors at common law. 3 Le. 170. Mich. 29 Eliz. in the ſtar chamber. Newman v. Sheriff.——4 Le. 25. Mich. 29 Eliz. S. R.——*Counterfeiting an acquittance of money, was held forgery, though without a ſeal. 2 New. Abr. 568. cites Mich. 12 Geo. 1. the K. v Ward.——S. P. Sid. 278. Paſch. 18 Car. 2. B. R. the King v. Ferrars——The defendant was indicted for publiſhing a falſe, forged and counterfeited *affidavit, and* likewiſe *a certificate of J. S a juſtice of P.* knowing the ſame to be forged, by virtue and colour whereof, he did unlawfully and fraudulently *procure the ſum of* 57*l.* 8*s. to be paid him for four months penſion, due to A. B. as a widow of a ſeaman* who died in the ſervice. It was moved in arreſt of judgment, that this was no offence indictable at common law; for that the forging ſuch affidavit and certificate was no offence; and if ſo, the publiſhing ſuch affidavit could be none neither. The court eaſily over-ruled the exception, admitting the forgery not to be a common law offence: becauſe it was making uſe of the affidavit, whether forged or not, as a falſe token, and in order to cheat. But it was likewiſe reſolved, per Cur' that this would have been a good indictment for forgery at common law, and that had it been laid on any of the ſtatutes of forgery, it would have been ill, for the ſtat. of 33 H. 8. ſpeaks only of counterfeit letters and privy tokens, which has always been interpreted real tokens; as a watch, ring, &c. belonging to the party. The 5 Eliz. extends only to deeds and charters relating to land, and the 2 Geo. 2. 25. extends to deeds, bills of exchange, notes and aſſignments, indorſements of bills of exchange, and nothing elſe; and they held, that nothing could be inferred from its being omitted in the ſtatutes, to prove it therefore to be no offence at law; but that all forgeries were indictable as ſuch, before any ſtatute was made, where it appears, that *a third perſon* has been *prejudiced* thereby. For all which, the caſe of the KING v. WARD. Mich. 12 Geo. 1. was relied on, as in point. Mich. 14 Geo. 2. B. R. King v. Obrian.

Forgery

Forgery of a *rent charge*, or a *leaſe for years*, is within the ſtatute. But forgery of *an aſſignment*, or [of] a *rent charge in eſſe*, or a *leaſe for years*, is not within the ſtatute; for that does not charge the inheritance of any; ſaid by Coke to have been agreed by the juſtices in the ſtar chamber. Noy. 42. in Markham's caſe ——S. P. 3 Inſt. 170. ſays it was ſo reſolved, Paſch. 38 Eliz, in the ſtar chamber, between the lady Greſham and Booth. Markham & al.

Indictment for forging a *deed of aſſignment of a leaſe ſigned with the mark of* one Godard. Cujus tenor ſequitur, but *ſets down the mark*, as in the aſſignment, and yet well. 1 Salk. 342. Paſch. 2 Annæ, Queen v. Smith.——It is directly within the ſtatute. 3 Inſt. 170.

§ 9. *Provided this act ſhall not extend to charge any ordinary, commiſſary or official for putting their ſeal of offi e to any will not knowing the ſame to be forged, nor for writing ſuch a will or the probate thereof.*

§ 12, 13, 14. *Provided, this act ſhall not extend to any proctor, advocate or regiſter, for writing, ſetting forth, or pleading of any proxy for the appearance of any perſon cited to appear in the eccleſiaſtical court, nor to any archdeacon, nor official for putting their ſeal to ſuch proxy, nor to any eccleſiaſtical judge, for admitting the ſame, nor to any attorney or counſellor for pleading or giving in evidence any ſuch forged writing, being not party nor privy thereunto, nor to any perſon that ſhall plead or ſhew forth any writing exemplified under the great ſeal, or the ſeal of any of the courts of this realm, nor to any judge, juſtice, or other perſon that ſhall ſet any ſuch ſeal thereunto, not knowing the ſame to be forged.*

[461] 5. If a man forge *a ſtatute ſtaple, or a recognizance in the nature of a ſtatute ſtaple*, viz. *acknowledges them in the name of another*; theſe are obligations within the ſtatute; for each of them hath the ſeal of the party; otherwiſe of *a ſtatute merchant, or recognizance*, becauſe they have no ſeal of the conuſor. 3 Inſt. 171. cites Mich. 13 and 14 Eliz. Hinde v. Grevill.

Error of a judgment in Ireland, was aſſigned, that forging a *bare recognizance*, is not within the ſtatute, as [it would be] if it were in the nature of a ſtatute ſtaple, being only before a maſter of chancery there. But per Cur' this recognizance, being no writing ſealed by the conuſor is not within the ſtatute. 3 Keb. 486. pl. 22. Trin. 27 Car. 2. B. R. the King v. Leſtrange.——cites Newton's caſe.

3 Le. 108. Jenk. 240. pl. 23.

6. A copyholder of a manor made a *cuſtomary of the manor* in parliament, *with labels and ſeals* of himſelf, and other tenants of the manor, *inſerting therein diverſe cuſtoms* very falſe, tending to the diſheriſon of the lord, and by the title thereof, pretended to be collected, renewed, and ſet forth by conſent of all the freeholders and copyholders of the manor, being at leaſt 100, and allowed and permitted by the lord of the manor, and ſeveral names were ſubſcribed and ſeals put, and mentioned to be ſo done the day and year abovementioned, but no day nor year appeared in the title, nor was there in fact any conſent of all the tenants, or allowance of the lord: this by the opinion of the major part of the judges, upon a reference to them, was held to be forgery within the ſtatute. D. 322. b. pl. 26. Paſch. 15 Eliz. in the Star Chamber. Taverner's caſe.

7. If a *ſoldier* counterfeits the *warrant of his captain*, it is felony. 2 Roll. R. 266. Mich. 20 Jac. B. R. in Stone's caſe cites ſtatute 39 E. 3. 17.

8. An information was brought againſt three for forging, &c. an entry *in the regiſter book* of a *marriage*, between the huſband and another woman, *to the impeachment of the dower of the true and lawful wife*,

wife, and to the deprivation of the inheritance of the daughters by the true wife, and judgment was given againſt him. Paſch. 1658. B. R. 2 Sid. 71. Dudly's caſe.

9. One counterfeited *a protection*, *in the name of a privy counſellor of the king*, *but neither a nobleman nor member of parliament*, and ſold this protection for 6 *l.* he was tried, and found guilty of this counterfeiting and extortion. It was moved, that this was no offence, inaſmuch as the *protection was merely void.* But the court thought it a great offence, becauſe by ſuch protections many were impoveriſhed and diſabled to recover their juſt debts, and fined him 50 *l.* and impriſonment till paid. Sid. 142. Paſch. 15 Car. 2. B. R. the K. v. Deakins.

10. The *plaintiff produced a deed inrolled*, at a trial at the aſſiſes, *which* in fact, *never was inrolled*; and the defendant moved for a new trial, which the court refuſed although there is no remedy againſt any of the parties for forgery or perjury. And Twiſden ſaid that ſo was the caſe of one POLINGTON, who had paid fees, but the clerk omitted the inrollment, and the party added it, and no remedy againſt him; ſo of a *cyrograph of a fine*. But by Keeling, ſuch an indorſement is forgery, when nothing will paſs without it; ſed Curia contra, that it is *only a great miſdemeanor*, but no forgery. 1 Keb. 568. pl. 15. Mich. 15 Car. 2. Noy v. Tucker.

11. Putting the *chief juſtice's hand to common bail*, is forgery. 1 Keb. 841. pl. 28. Hill. 16 & 17 Car. 2. B. R. Sherwood's caſe.

12. Defendants were indicted at common law for forging two patents under the great ſeal, by *affixing an old ſeal to a new patent*. 2 Keb. 74. pl. 57. Trin. 18 Car. 2. B. R. the King and Monox v. Winter & al.

13. In information for *deceit in counterfeiting a letter*, the court were divided, whether it was puniſhable as an offence at the common law, where *no miſchief is intended*, *nor* does *any enſue*. Mich. 30 Car. 2. 2 Show. 20. the King v. Emerton.

14. A. B. and C. were indicted upon the coroner's inqueſt for the murder of R. D. at H. in Kent, and were thereupon indicted and arraigned. The fact upon the evidence appeared to be, that the priſoners were cuſtomhouſe officers, and ſuſpecting that ſome wool would be tranſported, went to the ſea ſide in the night, where there happened an affray, and A. was twice knocked down, and recovering himſelf, ſhot the deceaſed. They were all accquitted of the murder, and then upon complaint made, that A. only was found guilty upon the coroner's inqueſt, two of the jury depoſed in court, that they, *upon the coroner's inqueſt*, *found the indictment againſt A. alone*, which indictment was *in Engliſh*; *but* one *J. D. who was then mayor of H. and* by virtue of that office was *alſo coroner*, *took the indictment*, *and told the jury it muſt be turned into Latin*, which was done; *and he then inſerted the names of B. and C.* the other two priſoners at the bar, whereupon J. D. was called, and he appearing, was bound in a recognizance to anſwer this matter. And upon an information, was found guilty; but having ſpoke with the proſecutor, he was only fined 20 nobles. 3 Mod. 66. Paſch. 1 Jac. 2. the King v. Marſh. [462]

15. A

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Indictment for forging a *deed of aſſignment of a leaſe ſigned with the mark of* one Godard. Cujus tenor ſequitur, but *ſets down the mark*, as in the aſſignment, and yet well. 1 Salk. 342. Paſch. 2 Annæ, Queen v. Smith.——It is directly within the ſtatute. 3 Inſt. 170.

§ 9. *Provided this act ſhall not extend to charge any ordinary, commiſſary or official for putting their ſeal of office to any will not knowing the ſame to be forged, nor for writing ſuch a will or the probate thereof.*

§ 12, 13, 14. *Provided, this act ſhall not extend to any proctor, advocate or regiſter, for writing, ſetting forth, or pleading of any proxy for the appearance of any perſon cited to appear in the eccleſiaſtical court, nor to any archdeacon, nor official for putting their ſeal to ſuch proxy, nor to any eccleſiaſtical judge, for admitting the ſame, nor to any attorney or counſellor for pleading or giving in evidence any ſuch forged writing, being not party nor privy thereunto, nor to any perſon that ſhall plead or ſhew forth any writing exemplified under the great ſeal, or the ſeal of any of the courts of this realm, nor to any judge, juſtice, or other perſon that ſhall ſet any ſuch ſeal thereunto, not knowing the ſame to be forged.*

[461] 5. If a man forge *a ſtatute ſtaple, or a recognizance in the nature of a ſtatute ſtaple*, viz. *acknowledges them in the name of another*; theſe are obligations within the ſtatute; for each of them hath the ſeal of the party; otherwiſe of *a ſtatute merchant, or recognizance*, becauſe they have no ſeal of the conuſor. 3 Inſt. 171. cites Mich. 13 and 14 Eliz. Hinde v. Grevill.

Error of a judgment in Ireland, was aſſigned, that forging a *bare recognizance*, is not within the ſtatute, as [it would be] if it were in the nature of a ſtatute ſtaple, being only before a maſter of chancery there. But per Cur' this recognizance, being no writing ſealed by the conuſor is not within the ſtatute. 3 Keb. 486. pl. 22. Trin. 27 Car. 2. B. R. the King v. Leſtrange.——cites Newton's caſe.

3 Le. 108. Jenk. 240. pl. 23.

6. A copyholder of a manor made a *cuſtomary of the manor* in parliament, *with labels and ſeals* of himſelf, and other tenants of the manor, *inſerting therein diverſe cuſtoms* very falſe, tending to the diſheriſon of the lord, and by the title thereof, pretended to be collected, renewed, and ſet forth by conſent of all the freeholders and copyholders of the manor, being at leaſt 100, and allowed and permitted by the lord of the manor, and ſeveral names were ſubſcribed and ſeals put, and mentioned to be ſo done the day and year abovementioned, but no day nor year appeared in the title, nor was there in fact any conſent of all the tenants, or allowance of the lord: this by the opinion of the major part of the judges, upon a reference to them, was held to be forgery within the ſtatute. D. 322. b. pl. 26. Paſch. 15 Eliz. in the Star Chamber. Taverner's caſe.

7. If a *ſoldier* counterfeits the *warrant of his captain*, it is felony. 2 Roll. R. 266. Mich. 20 Jac. B. R. in Stone's caſe cites ſtatute 39 E. 3. 17.

8. An information was brought againſt three for forging, &c. an entry *in the regiſter book* of a *marriage*, between the huſband and another woman, *to the impeachment of the dower of the true and lawful wife*,

wife, and to the deprivation of the inheritance of the daughters by the true wife, and judgment was given againſt him. Paſch. 1658. B. R. 2 Sid. 71. Dudly's caſe.

9. One counterfeited *a protection, in the name of a privy counſellor of the king, but neither a nobleman nor member of parliament*, and ſold this protection for 6 *l.* he was tried, and found guilty of this counterfeiting and extortion. It was moved, that this was no offence, inaſmuch as the *protection was merely void*. But the court thought it a great offence, becauſe by ſuch protections many were impoveriſhed and diſabled to recover their juſt debts, and fined him 50 *l.* and impriſonment till paid. Sid. 142. Paſch. 15 Car. 2. B. R. the K. v. Deakins.

10. The *plaintiff produced a deed inrolled*, at a trial at the aſſiſes, *which* in fact, *never was inrolled*; and the defendant moved for a new trial, which the court refuſed although there is no remedy againſt any of the parties for forgery or perjury. And Twiſden ſaid that ſo was the caſe of one POLINGTON, who had paid fees, but the clerk omitted the inrollment, and the party added it, and no remedy againſt him; ſo of a *cyrograph of a fine*. But by Keeling, ſuch an indorſement is forgery, when nothing will paſs without it; ſed Curia contra, that it is *only a great miſdemeanor*, but no forgery. 1 Keb. 568. pl. 15. Mich. 15 Car. 2. Noy v. Tucker.

11. Putting the *chief juſtice's hand to common bail*, is forgery. 1 Keb. 841. pl. 28. Hill. 16 & 17 Car. 2. B. R. Sherwood's caſe.

12. Defendants were indicted at common law for forging two patents under the great ſeal, by *affixing an old ſeal to a new patent*. 2 Keb. 74. pl. 57. Trin. 18 Car. 2. B. R. the King and Monox v. Winter & al.

13. In information for *deceit in counterfeiting a letter*, the court were divided, whether it was puniſhable as an offence at the common law, where *no miſchief is intended, nor* does *any enſue*. Mich. 30 Car. 2. 2 Show. 20. the King v. Emerton.

14. A. B. and C. were indicted upon the coroner's inqueſt for the murder of R. D. at H. in Kent, and were thereupon indicted and arraigned. The fact upon the evidence appeared to be, that the priſoners were cuſtomhouſe officers, and ſuſpecting that ſome wool would be tranſported, went to the ſea ſide in the night, where there happened an affray, and A. was twice knocked down, and recovering himſelf, ſhot the deceaſed. They were all acquitted of the murder, and then upon complaint made, that A. only was found guilty upon the coroner's inqueſt, two of the jury depoſed in court, that they, *upon the coroner's inqueſt, found the indictment againſt A. alone*, which indictment was *in Engliſh*; *but* one *J. D. who was then mayor of H. and* by virtue of that office was *alſo coroner, took the indictment, and told the jury it muſt be turned into Latin*, which was done; *and he then inſerted the names of B. and C.* the other two priſoners at the bar, whereupon J. D. was called, and he appearing, was bound in a recognizance to anſwer this matter. And upon an information, was found guilty; but having ſpoke with the proſecutor, he was only fined 20 nobles. 3 Mod. 66. Paſch. 1 Jac. 2. the King v. Marſh. [462]

15. A

5 Mod. 137. S. C. —— For forging a cocket for five packs of linnen cloth. 6 Mod. 87. Mich. 2 Annæ. The Queen v. Browne.

15. A man was indicted for forging *a bill of loading*, but the indictment being uncertain, was held naught. 1 Salk. 342. Mich. 7 W. 3. The King v. Stocker.

16. It is no forgery, where *no perſon can be prejudiced but* the *perſon doing* it. 1 Salk. 375. Hill. 11 W. 3. B. R. The King v. Knight.

17. A man was indicted, for that he *quoddâm ſcriptum obligatorium fabricavit & contrafecit*; exception was taken, that it was a *bond to the ſheriff* of London, *for the appearance* of a perſon under arreſt *a die purificationis in octavis diebus*, and there is no ſuch day, and therefore the *bond is void*, not being according to the ſtatute, and by conſequence, the forgery, no crime, becauſe *no prejudice to any*. But it was held, that the *octavis diebus*, may well be underſtood for the octave of, &c. beſides theſe bonds are not merely void by the ſtatute, but only voidable, and therefore you muſt plead the ſpecial matter, and not non eſt factum. And you may ſay, that a forged bond binds no body, (as in truth it does not) and thence infer, that it is no crime to forge. Per Holt, Ch. J. and the Queen had judgment, notwithſtanding this and other exceptions. 7 Mod. 150, 151, 152. Hill. 1 Annæ. The Queen v. King.

18. By 7 *Annæ, cap.* 20. § . *Any perſon forging or counterfeiting any* entry of the acknowledgment of any memorial, certificate, *or* indorſement, *as is therein mentioned or directed* to be regiſtered, *and be thereof lawfully convicted, ſuch perſon ſhall incur, and be liable to ſuch pains and penalties as are impoſed upon perſons for forging and publiſhing of falſe deeds, &c. by* 5 *Eliz. cap.* 14.

19. By 8 *Geo.* 1. *cap.* 22. § 1. *forging authorities, &c. to tranſfer* ſtock, *or receive dividends, &c. and perſonating proprietors is made felony.*

20. 9 *Geo.* 1. *cap.* 12. § 4. enacts that *if any perſon after the ſecond of April*, 1723, *ſhall forge or counterfeit, or procure to be forged, &c. or knowingly act or aſſiſt in the forging, &c. any* order *made forth in purſuance of the acts of* 6 *Geo.* 1. *c.* 11. *and* 8 *Geo.* 1. *c.* 20. *or of this act*, or *any* aſſignment of ſuch order, or of the annuities payable thereon, or *any* receipt or diſcharge to the exchequer, for the annuity due *on ſuch ſtanding order*, or *any* letter of attorney, *or other authority*, to transfer, aſſign, *&c. any ſuch order*, or to receive the annuities due *thereon*, or *ſhall* counterfeit, *&c.* any name of the proprietor *of ſuch order, in any aſſignment, receipt, letter of attorney, &c.* or *ſhall fraudulently* demand to receive any ſuch annuity, by virtue of ſuch forged receipt, *&c.* or *ſhall falſly, and deceitfully* perſonate any true proprietor *of any the ſaid orders, thereby aſſigning or endeavouring to aſſign any ſuch order, or receiving or endeavouring to receive the money of ſuch proprietor, as if ſuch offender were the lawful owner thereof, in every ſuch caſe, every ſuch perſon, (being convicted thereof in due form of law) ſhall be adjudged guilty of felony, without benefit of clergy.*

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21. 12 *Geo.* 1. *cap.* 29. § 4. enacts that *perſons convicted of forgery, &c. practiſing as* attornies, &c. *offending againſt the act for preventing frivolous and vexatious arreſts ſhall be* tranſported for 7 years.

22. 2 *Geo.*

22. 2 *Geo.* 2. *cap.* 25. § 1. enacts that *forger, &c. or counterfeiter, or aſſiſter, &c. of any deed, will, teſtament, bond, writing obligatory,* bill of exchange, *or* promiſſory note *for payment of money, indorſement or aſſignment of ſuch bill or note, or any* acquittance *or receipt either for money or goods, or ſhall utter or publiſh any ſuch deed, &c. with intention to defraud any perſon knowing the ſame to be falſe, &c. ſhall ſuffer death as a felon, without benefit of clergy.*

23. 4 *Geo.* 2. 18. § 1. enacts that *any perſon forging or counterfeiting any paſs, for any ſhip, commonly called a* Mediterranean paſs, *or who ſhall alter or eraſe any paſs, made out by the commiſſioners for executing the office of lord high admiral; or ſhall publiſh as true, any forged, altered, or eraſed paſs, knowing the ſame to be forged, &c. ſhall be guilty of felony without benefit of clergy.*

24. 7 *Geo.* 2. 22. *makes the forging, altering, &c. the* acceptance of bills *of exchange, or the number or principal* ſums of accountable receipts, *for any note, bill, or other ſecurity for payment of money, or delivery of goods, &c. and the uttering, &c. the ſame as true, with intent to defraud any perſon, and knowing the ſame to be falſe, &c. to be felony without benefit of clergy.*

25. 9 *Geo.* 2. 11. *makes the* 2 *Geo.* 2. *perpetual.*

(B) In Reſpect of the making or proclaiming the Deed or Writing, &c.

1. TWAS agreed, that if a man *forges a deed, and does not proclaim it,* action does not lie. Br. Forger de faits, pl. 1. cites 9 H. 6. 26. Br. Forger de faits, pl. 12. cites 22 H. 6. 16. S. P. Per Paſton

2. If the *father forges a deed and dies,* and the *ſon knowing it, proclaims it*; action lies againſt the ſon, *quod ipſe ſciens factum illud fore falſum & fabricatum illud proclamavit.* Per Bab. & Patton. Br. Forger de faits, pl. 1 cites 9 H. 6. 26.

3. In treſpaſs upon the caſe, the beſt opinion was, that where a man *forges an obligation againſt me, and puts it in ſuit,* I ſhall have action upon my caſe for the vexation; *contra, if he forges* it *and does not put it in ſuit.* Br. Action ſur le caſe, pl. 89. cites 5 E. 4. 126.

4. So, I ſhall have action upon the caſe for *forging of a falſe teſtament, or* of a falſe *releaſe which is pleaded againſt me, by which I am delayed*; wherefore after argument, the defendant pleaded not guilty, notwithſtanding it was ſaid for the defendant, that the action does not lie, inaſmuch as the plaintiff, in ſuit thereupon, may plead non eſt factum; and action upon the ſtatute is not given in this caſe. Ibid.

5. If *one forges* a deed, *and another proclaims* it, action of forgery of deeds does not lie againſt him who proclaimed; for the *writ is fabricavit & proclamavit,* and it is ſufficient for the defendant to *traverſe the forging, without the proclaiming in an action againſt one,* otherwiſe it is in an action againſt two; for one may forge and the other proclaim. Per Needham J. Br. Forger de faits, pl. 18. cites 14 E. 4. 32.

And if the feoffee cauſes the *livery to be indorſed generally*, without eſpecial

6. If A. makes a deed of feoffment in December, and after this, and before livery and ſeiſin executed, the *feoffor ſells the land by good aſſurance to another*, and *after this, firſt feoffee takes livery of ſeiſin of the feoffor*; this is forgery in the feoffor and feoffee. Mo. 655. Mich. 44 & 45 Eliz. in the Star Chamber. Salway v. Wale.

day of the making of it, this indorſement is alſo forgery, becauſe 'tis written to the intent to defraud the mean aſſurance. So it is of * *antedating* of a deed, for ſuch purpoſe. Mo. 655. Salway v. Wale ——* 3 Inſt. 169.

That antedating is not forgery, if there be not a mean intereſt in any *third perſon to be prejudiced by it.*

7. *And antedating*, a counterfeit deed is forgery, and ſo is *counterfeiting the hands, names, and ſeals of the feoffees to the counterpart* of the forged deed. And. 102. Trin. 24 Eliz. Puckering v. Fiſher and Langton.

Mo. 635. Salway v. Wale.

If *a* man makes an obligation in my name, I ſhall not have diſceit, becauſe I may *plead non eſt factum.*

8. If a man forges a *bond in my name*, it is poſſible I may be damniſied by it, but 'till it is put in ſuit againſt me, I cannot bring *action* againſt the forger. Per Gold. J. Arg. 6 Mod. 46. cites 19 H. 6. * 24. Hob. 267. 6 E. 4. 7. 2 Bulſ. 268.

F. N. B. 96. (B) Marg. cites 19 H. 6. 44 —* This ſeems miſprinted.

9. A perſon *cut off a dead man's hand, and put a pen and a ſeal in it, and ſo ſigned and ſealed and delivered the deed with the dead hand*, and ſwore that he ſaw the deed ſealed and delivered, and upon this he was convicted of forgery. Sti. 362, 363. Hill. 1652. The King v. Howell Gwin.

10. Darnell (Serj.) ſaid, that defendant may bring an action upon his *caſe* againſt the plaintiff, *for ſuing him upon a forged bond*, and that a *verdict therein would be evidence* for him, it being between the ſame parties. 6 Mod. 234. in caſe of Selby v. Green.

(C) In Reſpect of the Alteration of the Deed, &c.

If ſuch perſon ſo inſerts a clauſe in the will concerning the deviſe of any lands or tenements,

1. ONE wrote the will of a perſon mortally ſick, and *inſerted a clauſe in the will after the teſtator was ſpeechleſs and without memory and without any direction before*, for the inſerting of it, and it being moved, whether this was forgery of the will and puniſhable, by the ſtat. 5 Eliz. it was agreed and reſolved by the better opinion, that it was not. D. 288. pl. 52. Paſch. 12 Eliz. in the Star Chamber. The caſe of Sir John Marvin's will.

which teſtator had in fee ſimple falſly, without any warrant or direction, though he did not forge, or falſly make the whole will, yet he is puniſhable by the ſtatute 5 Eliz. as hath been often held in the Star-Chamber, contrary to the opinion reported by my Ld. Dyer. 3 Inſt. 170.

Noy. 99. S. P. Mich. 42 & 43 Eliz. Black v. Allen.— 1 Salk. 375. S. P. Hill. 11 W. 3. B. R. in caſe of the K. v. Knight.

2. If obligee alters or razes *(libris)* & inſerts *(marcis,)* this is not forgery puniſhable, becauſe it prejudices no body but himſelf in voiding his bond, and leſſening the duty; but if he had *increaſed the ſum*, or *leſſened it to avoid any collateral prejudice to himſelf*, or to prejudice another, it would be forgery. Mo. 619. Mich. 42 and 43 Eliz. in the Star Chamber. Blake v. Allen.

3. *Omitting*

3. *Omitting* a thing or *legacy out of a will*, which is appointed to be inſerted is not forgery. But if he is directed to give eſtate for life, with remainder to another in fee, and he *omits the eſtate for life, by which remainder* in fee *takes effect preſently*, this is forgery. *Writing a will* and bringing it to a perſon *of non ſanæ memoriæ*, and he allows it, it is void but no forgery; but *filling up blanks*, during the time of his being non ſanæ memoriæ, was thought to be a *miſdemeanor if he knew him* to be non ſanæ memoriæ. Mo. 760. [465] Paſch. 3 Jac. in the Star Chamber, Combes's caſe.

4. If A. makes a *true deed* of feoffment of the manor of *Dale* unto B.—and B. or ſome other *raſe out D.* (the firſt letter of Dale) and *put in S.* whereby it is falſly altered, and made the manor of *Sale:* this is within the ſtatute. 3 Inſt. 169.

So if a rent charge of one hundred pounds by the year be granted out of land in fee, or for life, &c. and the grantee or any other *raſe out (one)* and inſtead thereof *write (two)* this is within the ſtatute. 3 Inſt. 169.

5. *But* if one having a *leaſe for twenty years*, alters the ſame into *thirty* years; this is no forgery, becauſe it was a good deed, and not forged at the firſt making. Star Chamber Caſes, 44.

6. A man may loſe an honeſt debt by playing a trick to come at it; and Sir Wm. Beverſham's ſiſter's caſe, was cited, who *adding a ſeal to a note*, which was ſufficient without a ſeal, loſt her ſecurity; cited by Hutchins commiſſioner. Trin. 1690. 2 Vern. 162. in caſe of Hitchcox v. Sedgwick.

(D) Forger. Who.

1. NO *acceſſary* can be in forgery, but all are principals. Mich. 44 & 45 Eliz. Mo. 666. Booth's caſe.

2. *To cauſe, is to procure or counſel one to forge*, &c. *To aſſent*, is to give his aſſent or agreement afterwards to the procurement or counſel of another; *to conſent*, is to agree at the time of the procurement or counſel, and he in law is a procurer. 3 Inſt. 169.

3. In a ſtrict ſenſe, he that *cauſes* a forgery to be done is a forger himſelf; but then it ought to be laid ſo in the indictment. 5 Mod. 138. Per Cur. Mich. 7 W. 3. in caſe of the King v. Stocker.

(E) Publication thereof; What is, or amounts to it.

1. FORGER of deed lies where *termor may pray to be received, and ſhews a forged deed of leaſe*; per Moile; for he cannot be received without ſhewing deed. Br. Forger de faits, pl. 15. cites 9 E. 4. 37,

2. A man ſhall ſhew deed *in formedon* in remainder, and yet, though when it is ſhewn, the tenant ſhall not have anſwer to it, if

the deed be forged, he ſhall have an action of forger of the deed; per Cur. Br. Forger de faits, pl. 20. cites 10 E. 4. 1.

3. If *A. telleth B. that ſuch a deed is falſe, and forged*, and *yet B. will after pronounce or publiſh this to be a true deed*, and afterwards it falleth out by proof, that the relation of A. was true, and the deed forged; *B. is in the danger* * *of this ſtatute*; and ſo was it reſolved in the caſe of the LADY GRESHAM v. BOOTH, &c. 3 Inſt. 171.

* 5 Eliz. cap. 14. which ſee at (A)

4. If an *innocent perſon receive money upon a forged note*, not knowing any thing of the forgery, it is no crime in him; but he ſhall anſwer for the money ſolely; *but* receiving money upon a forged note, *knowing the forgery*, is a publication of the forgery. Per Holt, Ch. J. 12 Mod. 494. Paſch. 3 W. 3. the King v. Eller.

[466] (F) What may be done in Caſe a Deed be denied, as forged; And if found forged, what ſhall be done with the Deed, &c.

1. *ASSISE* was *adjourned* into banco, *upon demurrer of baſtardy*, and the *defendant at the day would have pleaded releaſe*, and was not ſuffered; for *it was not made after the adjournment*, and the plaintiff recovered; and notwithſtanding that the *deed of releaſe appeared to be falſe*, and ouſter is confeſſed; yet the defendant was not impriſoned, for the juſtices are out of the county where the aſſiſe was brought. But it ſeems to me that the reaſon is, becauſe the plea was not admitted of the releaſe; for the juſtices of banco, upon adjournment, ſhall give ſuch judgment as the juſtices of aſſiſe ſhould give in the county. Br. Impriſoment, pl. 54. cites 23. Aſſ. 5.

2. In aſſiſe, the tenant *pleaded falſe releaſe*, to which the plaintiff was a ſtranger, and therefore they were at *iſſue upon the ſeiſin of the feoffor*, and found for the plaintiff, and that the releaſe was falſe, and the tenant was taken, quod mirum! where the releaſe was not in iſſue, and alſo the releaſe was *made to A. que eſtate the tenant claimed, and not to the tenant himſelf.* Br. Impriſonment, pl. 55. cites 24. Aſſ. 3.

3. In *debt for forging* of deeds, if *judgment* paſs for the plaintiff, it ſhall be *a good barr in every court* afterwards, in action brought upon this deed, quod nota bene. Br. Faits, pl. 43. cites 37 H. 6. 13. per Choke.

4. When a deed is denied, the law has appointed it to remain in court, and the *cuſtos brevium to have the cuſtody of it.* 5 Rep. 75. a. per the reporter cites F. N. B. 243. (L) [but it ſhould be (I).]

5. If the *huſband and wife ſue a bond, made to the wife*, in C. B. and the deed is there denied, for which reaſon it remains in the keeping of the cuſtos brevium, and the *huſband dies*, the *wife may have*

have a writ out of chancery, directed to the *cuſtos brevium* in C. B. *to deliver the deed to the wife*, becauſe the plea is determined by the death of the huſband. F. N. B. 243. (I)

6. A deed upon evidence was found not to be the defendant's deed, and by conſequence forged; and it was inſiſted on, that the court ought to cancel it, yet the court denied it, becauſe *there might be error in the proceedings*, for which the verdict might be ſet aſide, and then the bond would ſtand unimpeached, and ſo the matter be brought in queſtion again; and ſo it was reſolved it ſhould not be cancelled, but *remain in court uncancelled*. 6 Mod. 233. in caſe of SELBY v. GREEN. Cited per Holt, Ch. J. as Sir Sol. Swale's caſe.

A bond being found forged, the defendant prayed, that it might remain in court, but the court denied it, and ſaid, that ſuch matter had been often moved, but never granted, and cauſed the bond to be delivered to the plaintiffs. Sid. 131. Paſch. 15 Car. 2. B. R. Guillims v. Huley.—Jenk. 70. in pl. 32.

A deed found forged by verdict, and which concerned an eſtate of 1200 l. a year, was, *by order, brought into chancery, and a year's time given to juſtify* the deed, by a new trial, where he pleaſe; and becauſe within the year he had a *new trial* at Cheſter, and *found againſt* him, it was now moved, that the year being paſt, the deed ſhould be *cancelled*, and damned, and decreed accordingly. Sid. 170. Mich. 15 Car. 2. Gerard v. Phitton.

7. A. was ſued as executor to J. S upon a *bond* of 10,000 l. ſet up by an old woman, that looked after J. S. an old miſer, as his nurſe; and upon *non eſt factum* pleaded, it was *found* upon a trial at bar, *not to be the deed* of J. S. and upon the authority of † WYMARK's caſe, in 5 Rep. it was made a queſtion if the bond ſhould not be cancelled? and it was *held that it ſhould not be cancelled*, becauſe the judgment might be reverſed by writ of error, but ſhould be kept in court. 1 Salk. 215. cited per Holt, Ch. J. as Sir Huley's caſe.

* Sid. 131. Paſch. 15 Car. 2. B. R. S. C.

† 5 Rep. 74.

8. The plaintiff making default, and upon opening of the cauſe, it appearing that the plaintiff had forged ſeveral notes or writings in the defendant's name, it was prayed by the defendant's counſel, that ſuch bills or notes might be torn or obliterated; but Mr. Solicitor General obſerved to the court, that a forged deed or writing, *cannot be torn or defaced by law*, *but* muſt be *kept*, ſo *that the king may proceed upon it* againſt the criminal. Mich. 1682. Vern. 66. Frankland v. Hampden.

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9. The *obligee made* a material *razure in the condition* of a bond, and after brought an action upon the bond; and the defendant having had *oyer*, and the bond being now in court, and the razure diſcovered, the defendant pleads non eſt factum, and notice of trial given; but when the plaintiff underſtood that the defendant had found out the cheat, and could prove it, he countermands the notice; and it was moved, upon affidavits of this matter, that the bond ſhould *remain in the cuſtody of the officer* of the court till the cauſe was tried; for otherwiſe the plaintiff would ſtay until the defendant's witneſſes were dead, and put this forged bond in ſuit againſt him, when he could by no poſſibility relieve himſelf againſt it; and now if he ſhould try it by proviſo, the plaintiff would be nonſuited, and might begin again. Per Cur. the defendant's beſt way would be to carry the cauſe down by proviſo; and if the plaintiff would ſuffer himſelf to be nonſuited, whereby the ſuit would be at

Darnel, ſerjeant, moved this caſe, and after the court had given their opinion, he ſaid, that the defendant might bring an action on the *caſe*, *for ſuing him on a falſe bond*; and that a verdict therein would be evidence

for him, it it being between the ſame parties; and ſo he took nothing by his motion.

an end, and the plaintiff entitled to take his bond out of court, yet the *nonſuit would be great evidence* againſt him *in another action* to be brought thereupon, or elſe he might get his witneſſes teſtimony perpetuated in chancery. 6 Mod. 233. Mich. 3 Annæ, B. R. Selby v. Green. Ibid. 234.

10. In *ejectment* the plaintiff made his title under ſeveral deeds, but the jury *found againſt the deeds*; and upon motion, the *court ordered them to be kept in the officer's hands, in order to a proſecution for forgery*; but upon application to the *court of chancery, whence the iſſue was directed, a new trial was granted*, and therefore the *plaintiff moved to have the deeds out of court*; and Holt, Ch. J. held, that they muſt be delivered out, as this caſe was, becauſe the deeds *were not in iſſue directly upon the pleadings* in the cauſe; otherwiſe if the iſſue had been non eſt factum. 1 Salk. 215. Hill. 4 Annæ, B. R. Fitch v. Wells.

(G) Actions and Pleadings.

1. CONSPIRACY *againſt ſeveral for forging a deed of entail* of land of the plaintiff, by which he was put to great travail, coſts, and expences, and [forced] to ſell his chattels, but becauſe *it was quod talis procuravit ſuch a one to forge the deed, and he was the ſame perſon who was named in the writ*, and ſo he cannot procure himſelf, therefore the writ was abated quod nota; but it is badly reported. Br. Conſpiracy, pl. 7. cites 46 E. 3. 20.

2. In forger, &c. defendant ſaid, *that at the time of the making and publiſhing ſuppoſed he himſelf was ſeiſed of the tenements in fee, abſque hoc that the plaintiff then had any thing*. Newton ſaid, it was no plea, for it may be that he diſſeiſed us, and made the deed, and we re-entered, and ſo diſturbed of the poſſeſſion; after Cot. J. ſaid the plea is good prima facie; for then you cannot be diſturbed of your poſſeſſion, and if you have ſpecial matter ſhew it. But note, that the
[468] ſtat. of 1 H. 5. 3. ſpeaks of poſſeſſion and title, and diſſeiſor has title. Br. Forger de faits, pl. 9. cites 8 H. 6. 33.

3. If a man brings an action, and *ſuppoſes that the defendant forged and proclaimed a deed*, he *ſhall anſwer to both*. per Bab. Br. Forger de faits, pl. 1. cites 9 H. 6. 26.

* Not guilty was admitted for good iſſue, without argument.

4. If an action be brought *againſt two*, and *one ſays*, that *he did not forge*, and the *other ſays*, that *he did not proclaim*, it is not good; but *each muſt plead* not guilty as to all*. per Bab. Br. Forger de faits, pl. 1. cites 9 H. 6. 26.

Br. Forger de faits, pl. 17. cites 37 H. 6. 37.——S. P. Ibid. pl. 21. cites 21 H. 7. 15. and 10 H. 6. 3. acc.

Br. Accord. pl. 8. cites S. C.—Br. Barre, pl. 22. cites S. C.

5. Forger de faits; defendant, *proteſtando that he did not forge, pro placito* ſaid *he gave a gallon of wine in ſatisfaction of the treſpaſs, to which plaintiff agreed*, judgment ſi actio. Plaintiff ſaid, this is no plea,

plea, without ſaying, that they accorded, &c. Newton ſaid, defendant has pleaded beſt; *by which plaintiff ſaid, he did not receive it in ſatisfaction of this treſpaſs, priſt.* 19 H. 6. 29.

6. In forger of deeds, the *defendant ſaid that the plaintiff was ſeiſed of the manor of D. in fee, and covenanted with J. N. to enjoy it him* of the manor of D. *and J. N. prayed the defendant to write the deed* accordingly, which he did, and put a ſeal to it, by the command of the plaintiff, and read the deed at the [making] the livery and ſeiſin, which is the ſame forging and proclaiming; judgment ſi actio; and a good plea, per tot. Cur. notwithſtanding that the writ be * ſeparalia facta fabricavit; *and he juſtified vera facta*; quod nota. Br. Forger de faits, pl. 10. cites 21 H. 6. 4.

* The writ was, that *ſ paralia facta* fabricavit, and *counted* that he forged *one deed only*; judgment of the count; & non allocatur; the reaſon ſeems to be, becauſe *there is no other form* of the writ. Br. Forger de faits, pl. 9. cites 8 H. 6. 3. Br. General Brief, pl. 6. cites S. C. 8 H. 6. 34.

7. The *defendant ſaid, that the plaintiff had nothing in the franktenement at the time* of the forgery and proclaiming, which was admitted a good plea, and iſſue taken thereupon; quod nota bene. Br. Forger de faits, pl. 11. cites 21 H. 6. 51.

S. P. per Paſton, though he *does not ſay, at the time of the proclaiming*; for the forgery and proclaiming is ſuppoſed on one and the ſame day; and after they were at iſſue ut ſupra, viz. without mentioning of the proclaiming as it ſeems. Brook ſays, he wonders at the plea; for it may be that he had in *reverſion or remainder*, though he had not in the franktenement, and the iſſue is good. Br. Forger de faits, pl. 12. cites 22 H. 6. 16.

8. In forger of deeds, for that the defendant ſuch a day and year forged and proclaimed a *deed, by which the feme of the plaintiff made a feoffment to N. of his land* in D. *and letter of attorney, by which the ſame defendant ſhould be attorney to deliver ſeiſin* to the ſaid N. &c. to which the *defendant ſaid, that the feme, before the coverture, was ſeiſed in fee, and cauſed the defendant to write the ſaid deed and letter of attorney* of the ſaid lands in D. to the ſaid N. *but he alledged other date than the plaintiff alledged, and that he wrote it, and delivered it to the feme of the plaintiff to ſeal, which ſhe ſealed and delivered as her deed, by which the defendant made livery of* ſeiſin, *and publiſhed it prout ei bene licuit, abſque hoc*, that he is guilty of any ſuch falſe forging or publiſhing modo & forma. Br. Forger de faits, pl. 3. cites 27 H. 6. 3.

And the iſſue was received. 27 H. 6. 3. a. pl. 21 —— Fitzh. tit. Iſſue, pl. 61. cites S. C.

9. Forger and proclaiming of a *deed by A. to W. N.* in fee, &c. the *defendant ſaid that A. was ſeiſed, and infeoffed W. and his feme in fee who died, and he as heir read and proclaimed the deed*, &c. and the beſt opinion was, that it is no plea without *traverſing* the forgery; but by others it cannot be *intended the ſame deed*, for that which was a deed to W. and his feme, was a deed alſo to W. and ſeveral e contra, in as much as it was not to W. only, therefore quære. Br. Confeſs and avoid, pl. 62. cites 32 H. 6. 1.

Br. Traverſe, per &c. pl. 380. cites 32 H. 6. 12.—But it ſhould be 32 H. 6. 1. b. pl. 4.

10. The plaintiff counted (inter alia) that he forged a falſe *releaſe by which J. ought to releaſe to the defendant all the right which he had* in certain land, the *defendant ſaid, that the ſaid J. by the deed which he ſhewed, releaſed to him all the right*, &c. which is *the ſame deed*, which he pronounced, publiſhed, and read; *abſque hoc that this releaſe is forged and falſe*, &c. and *no plea*; *for* the abſque hoc, *does*

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not answer the declaration; by which he justified ut supra, *absque hoc, that he is guilty of the making, pronouncing, or publishing of any such deed as in the declaration aforesaid specified*; and a good plea. Br. Forger de faits, pl. 5. cites 33 H 6. 21.

11. *And* note, that none can justify as above, if he has not the deed in his hands ready to shew; and if not, must plead not guilty generally Br. Forger de faits, pl. 5. cites 33 H. 6. 21.

S. P. Br. Count, pl. 22. cites S. C.——* In Br. it is Count.

12. In forger of deeds, the *writ was, diversa separalia facta & minimenta*, and the *count was of a deed of feoffment, and a letter of attorney*; and therefore the best opinion was, that the *count shall abate*, because it is not warranted by the * writ. Br. Forger de faits, pl. 7. cites 35 H. 6. 37.

13. Forgery of deeds, and proclaiming of them *at D. by which the plaintiff was interrupted of his possession of certain land in S.* the *defendant said* that *no such vill hamlet nor place was known out of the vill and hamlet, by the name of S. in the same county*; and this, &c. judgment of the writ, and the others e contra, and this issue seems to be by reason of the vine. Br. Forger de faits, pl. 19. cites 3 E. 4. 26. and 4 E. 4. 41. accordingly.

14. And quære if it be a good plea to say, *that the plaintiff never had land or tenement in S.* for it seems that he may plead not guilty, and *give this matter in evidence.* Br. Forger de faits, pl. 19.

15. Forgery of deeds, the *defendant said that J. S. made the deed, and sealed it, and delivered it to the defendant, secundum vim facti, absque hoc, that he forged or proclaimed*; Wood said, *the special matter shall* not *be entered*, & Cur. contra. But per Brian, he shall shew the deed, and otherwise it shall not be entered, because it seems that it is only the *general issue.* Br. Forger de faits, pl. 23. cites 10 H. 7. 29.

16. Note, it was agreed arguendo, that *ne forgea pas*, or *not guilty*, is a good issue in forgery of deeds. Br. Forger de faits, pl. 21. cites 21 H. 7. 15.

17. For pleadings on this statute, 5 *Eliz.* 14. *s.* 2. see Lutw. 190. Collingwood v. Jefferyes.

(H) Actions; By what Persons, in respect of Estate.

So where *one abates and forges*, &c. the *heir* shall have action, Br. Forger de faits, pl. 14. cites 4 H. 6. 25.

1. IN forger of deeds by W. against J. and said that he had *forged and proclaimed* certain false deeds of such land *in disturbance of the title and possession* of the plaintiff. Hals. *protestando, not confessing the making*, and *for plea said, that at the time of the making supposed, &c. the defendant himself was seised of the land in fee.* Cot. *before the defendant had any thing the father and mother of the plaintiff were seised in fee, in right of the wife, and had issue the plaintiff*; the *feme died*, and the *father was tenant by the curtesy till disseised by the defendant, which defendant,*

seised

ſeiſed by diſſeiſin, made the falſe deeds, &c. and ſo ſee, that at the time of the diſſeiſin, he in reverſion had neither poſſeſſion nor reverſion, but *right of reverſion*; and yet, by the opinion of the court, the action well lies; by which he bid Hals. to anſwer. Quod nota. Br. Forger de faits, pl. 14. cites 4 H. 6. 25.

2. Plaintiff declared, that the defendant forged a *releaſe in name of the anceſtor of the plaintiff.* Fulthorp ſaid, that the ſame anceſtor made the releaſe to R. then tenant of the land, whoſe eſtate we have, and after the releaſe came to us, and we proclaimed it prout bene licuit, abſque hoc that we forged prout, &c. Per Paſton, you forged, priſt, &c. and ſo ſee here, that *the heir ſhall have this action of forgery in the time of his anceſtor.* Br. Forger de faits, pl. 8. cites 7 H. 6. 34. [470]

3. If a man diſſeiſes me, and, *during the time of the diſſeiſin, J. N. forges deeds*, &c. *and I re-enter*, I ſhall not have action; per Newton. Br. Forger de faits, pl. 12. cites 22 H. 6. 16.

4. In forger of deeds by T. M. againſt R. D. *defendant ſaid, that where the writ is of forger of deeds, of his lands and tenements in D.* he ſaid, that *the plaintiff had nothing in them the day of the writ purchaſed, nor ever after*, Priſt. the *plaintiff ſaid, that long time before the forging, A. was ſeiſed in fee, and gave to K. in tail, the remainder to the plaintiff*, &c. and the *ſtatute is, ſi quis de poſſeſſione terre & tenementi turbatus & vexatus fuerit*, &c. And the beſt opinion was, that it well lies, for he has *poſſeſſion of the remainder*, though he has not poſſeſſion of the demeſne during the tail; but it is not adjudged; and cited 15 E. 4. by Skreene, that a remainder may be limited, and therefore it is a tenement. Br. Forger de faits, pl. 6. cites 33 H. 6. 22.

5. If a man forges deeds *of the land of my father, in the life of my father, and after his death it is proclaimed*; I who am *heir* at the time the deed was proclaimed, ſhall not have a writ of forger of falſe deeds; for the ſon *had no right in the life of the father*, and the *action is forging and proclaiming.* Br. Forger de faits, pl. 14. cites 15 E. 4. 24. per Brian, Littleton, and Choke.

6. *But* if a man forges *in the time of the diſſeiſor*, and *the diſſeiſee re-enters, and the forgery is proclaimed*, the *diſſeiſee* ſhall have an action; for he *had right during the diſſeiſin.* Per Chocke, Littleton, and Neale. Br. Forger de faits, pl. 14. cites 15 E. 4. 24. *And* per Littleton, where a man *forges and proclaims in the time of the diſſeiſor*, and the diſſeiſee re-enters, *each of them ſhall have forger of deeds*; for *one had right*, and the *other had poſſeſſion.* Br. Forger de faits, pl. 14. cites 15 E. 4. 24.

7. *And* if *tenant for life* be, the *remainder over in fee*, and a man forges and proclaims falſe deeds, the *tenant for life ſhall have action, and* he in *remainder* ſhall have *another action alſo.* Br. Forger de faits, pl. 14. cites 15 E. 4. 24.

(I) Indictment.

(I) Indictment. Before whom.

1. BY 5 *Eliz. cap.* 14. § 4. Juſtices of oyer, and terminer, and aſſiſe, *in their ſeſſions ſhall hear and determine theſe offences.*

So of forging *a letter in the name of J. S.* &c.

2. *Juſtices of the peace in their ſeſſions*, cannot inquire of forging a *falſe deed* on the ſtatute of 5 Eliz. Cro. E. 87. Hill. 30 Eliz. B. R.

For their power is created by act of parliament within time of memory, and they have no other authority than what is thereby given them; and the general words of their commiſſion, de omnibus aliis tranſgreſſionibus & malefactis quibuſcunque, muſt be underſtood of ſuch crimes as they have power over by the ſeveral ſtatutes which created or enlarged their power. 1 Salk. 406. Mich. 9 Annæ, B. R. the Queen v. Yarrington.

3. *But* this felony is to be heard and determined *before juſtices of oyer and terminer, and juſtices of aſſiſe*, in their circuit; and though juſtices of peace have power to hear and determine felonies, treſpaſſes, &c. yet they are not included under the name of juſtices of oyer and terminer; for juſtices of oyer and terminer, are known by one diſtinct name and juſtices of peace by another. But the *juſtices of B. R.* are juſtices of oyer and terminer within this ſtatute. 3 Inſt. 103. cap. 41.

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Indictment taken before juſtices of peace, *concluding contra formam ſtatuti*, being coram non judice; *yet*, being for forgery, the *court refuſed to quaſh* it, but left him to demur, or plead. 3 Keb. 773. pl. 12. Trin. 29 Car. 2. B. R. the King v. Nithingale.

4. Indictment for forgery upon the ſtatute of the 5 El. *before A. and B. juſtices of the peace, nec non ad diverſas felonias*, &c. *audiend. & terminand. aſſignat.* It was held by three judges, Popham doubting, that they had not power to take this indictment; for the *ſtatute*, which appoints that the offences ſhall be enquired before juſtices of aſſiſe, or of oyer and terminer, *intends* thoſe who have *general commiſſions*, and not thoſe who have but a ſpecial commiſſion, as juſtices of peace. Mich. 39 & 40 Eliz. B. R. Cro. E. 601. Wilſon's caſe.

(K) Indictment. Exceptions to Indictments, or Informations.

* Non allocatur. 2 Keb. 501. S. C.—† To this it was anſwered Arg. that were it not a bargain and ſale to raiſe an uſe by the ſtatute yet it carries an uſe at common law;

1. THE indictment was, that he *ſcienter ſubdole & falſo fabricavit quoddam falſum factum & ſcriptum indentatum barganiæ & venditionis*, which was ſaid to be *inrolled, per quod A. and B. did ſell to J. S. ſuch lands*, and then ſets forth the indenture verbatim, *& quod poſtea prædictus R.* (the defendant) *ſciens prædict. chartam eſſe falſam & contrafactam vi & armis pronunciavit & publicavit*, and this was *ea intentione ad perturbandum ſtatum titulum & intereſſe of A. and B. and their heirs.* It was aſſigned for *error* * that *the indentures ſet forth were a leaſe and releaſe*; but the indictment was of a bargain and ſale, *and it did* † *not appear where it was inrolled*, and

and it must be inrolled in one of the four courts at Westminster, or before the justices of peace at the sessions, to make it a bargain and sale; and *that only A. was party to the deeds set forth*, though the indictment is of a deed by which A. and B. did sell; and that it ought to have been ‡ *in quo continetur that they did sell*, and not that they did sell; because the deed was void, which was said to be oppositum in objecto; and *that vi & armis chartam pronunciavit*, &c. should have been vi & armis *predictam chartam* pronunciavit, &c. and also that the forgery was laid to be ea intentione *ad perturbandum statum, &c. of them and their heirs*, and it did ‖ *not appear that they had a freehold*; and also, that it ** *ought to appear in whom the freehold was at the time of the forgery*. Adjornatur. Vent. 23, 24. Pasch. 21 Car. 2. B. R. the King v. Ring.

and per Cur. any thing purporting a deed is within the statute. But adjornatur. 2 Keb. 502. S. C.—This is but inducement, and therefore non allocatur. 2 Keb. 501. Pasch. 21 Car. 2. S. C.

‡ It seems by Keble, that those words were in the indictment, and that for want of alledging, that he did sell or convey, it was held by Twisden to be ill, but Keeling and Windham contra. 2 Keb. 245. Trin. 19 Car. 2. S. C.——But 2 Keb. 532. Trin. 21 Car. 2. says it was assigned for error, that the indictment was *fabricavit scriptum*, and that by that deed A. and B. bargained and sold, and does not say, *calo*, or that he forged a deed purporting a bargain and sale, and that Twisden agreed this exception on Haydon's case, that, being on an indictment, it must be taken strictly, and must express all without intendment, which is without prejudice, because the party may be indicted again; but curia contra; yet adjornatur.—‖ Per Cur. this is *intended a freehold*, the forgery being of a deed, by which copyhold cannot pass; and a lease for years may pass without it. 2 Keb. 532. S. C.——** Non allocatur. 2 Keb. 501. S. C.——3 Keb. 51. S. C. and judgment for the king.

2. An information was brought *against three* for forging, and maliciously conspiring and contriving an entry of a marriage in the register book, between Sir R. Dudley and Fra. Vavasor, to the impeachment of the dower of the true wife of Sir R. Dudly, and to deprive his daughters of their inheritance; *one only* of the defendants was *found guilty*. It was objected in arrest of judgment, that as two were acquitted, the other could not be alone guilty of the conspiracy; but it was answered that the indictment was good without the *conspiracy*, which *was only an inducement* thereto, and not the ground of the indictment. Judgment was given against the defendant. Pasch. 1658. B. R. 2 Sid. 71. Dudly's case. [472]

3. The statute requires it to be a *deed sealed, and* here it was only *scriptum*; sed non allocatur; for when the deed is recited, it is concluded with dat. & sigillat. such a day and year, though before it is only said quoddam scriptum; the judgment was affirmed. Pasch. 30 Car. 2. B. R. 2 Show. 5. the King v. Marriot.

4. Error was assigned, for that the indictment had not in it *vi & armis*, and that the indictment was not for nonfeasance, but for misfeasance; and Jones J. held that this is cured by the express words of the statute 37 H. 8. 8. and cited Cro. J. HART's case, so resolved. But Twisden and Windham J. totis viribus contra, and to this Rainsford Ch. J. inclined; but as to this curia advisare vult. But afterwards, on reading the statute, it was agreed by all, that the want of vi & armis was cured. Another error was, that the indictment lays, that he *forged it super caput suum proprium*, where it ought to be ex imaginatione sua propria or ex capite suo proprio; for as it is, it must be intended, that the writing was written upon his head, and this might be by another; but this was a *literal translation of the words of the statute*, and therefore by all held well enough, though

though it be not ſo elegant tranſlation as might be. 2 Lev. 221. Paſch. 30 Car. 2. the King v. Mariot.

5. Information ſet forth, that the defendant did forge *quoddam ſcriptum continens in ſe ſcriptum obligatorium per quod* quidem ſcriptum obligatorium *A. obligatus fuit prædict. defendenti in* 40 *libris*, &c. the defendant was found guilty, and exception was taken, that the fact alledged was *a contradiction of itſelf*; for how could A. be bound when the obligation was forged? and alſo, that it did *not ſet forth what that ſcriptum obligatorium was, whether* it was ſcriptum *ſigillatum or not?* per Cur. the defendant is found guilty of the forging of a writing, in which was contained quoddam ſcriptum obligatorium, and *that may be a true bond.* Judgment was arreſted. 3 Mod. 104. Paſch. 2 Jac. 2. the King v. . . . .

5 Mod. 137. S. C.

6. The indictment was, that the defendant *fabricavit ſeu fabricari cauſavit* a bill for loading, and it was held naught upon demurrer; for an indictment ought to be certain and poſitive. 1 Salk. 342. Mich. 7 W. 3 the King v. Stocker.

The reaſon of the exception was, that if it was forged, it was not obligatory;

7. Indictment was for forging *quoddam ſcriptum obligatorium of J. S.* it was objected that it ſhould be *ſcriptum purporting a writing obligatory* of J. S. Sed non allocatur; for the 5 Eliz. 14. mentions falſe deeds as well as falſe writings. 1 Salk. 342. Hill. 1 Annæ, B. R. the Queen v. King.

but the court reſolved, that though in reality it is not, yet in ſhew and appearance it is, and that is enough; and ſo it is an obligation, though a falſe one. 7 Mod. 151. S. C.

8. In the indictment it was laid, that the defendant *falſo & malitioſe, &c. quoddam ſcriptum obligatorium fabricavit & contrafecit.* Exception was taken, that the crime charged was *forging falſely*, whereas it could be no crime, if it was not truly forged; but per Holt. Ch. J. the falſo fabricavit is as much as to ſay, that he, being a falſe and malicious man, did forge, and not that the forgery was a true forgery, but the thing forged was not true but falſe; and judgment accordingly. 7 Mod. 150, 151. Hill. 1 Annæ, the Queen v. King.

9. Indictment was for *forging a cocket for* 5 *packs of linnen cloth*; and it was moved in arreſt of judgment, for that it was too *uncertain*. But it was held well enough; and per Holt it ſuffices that the things which it contains be certain enough, and if any new action be brought, defendant ſhall ſay, that a former action was brought for the ſame by the name of ſo many bundles, &c. and the queen had judgment. 6 Mod. 87. Mich. 2 Annæ, the Queen v. Browne.

10. Indictment for forging a deed of *aſſignment of a leaſe ſigned with the mark* of one Goddard, cujus tenor ſequitur; *but ſets not down the mark as in the aſſignment*; and this was objected for without that it could not be a forgery. Sed non allocatur. 1 Salk. 342. Paſch. 2 Annæ, Queen v. Smith.

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11. The defendant was convicted on an indictment, for that A. and his wife being *ſeiſed of lands, &c.* known by the name of *Jaywick*, the *defendant forged a conveyance from them of Jaywick-Park*, with intent to moleſt and diſturb the ſeiſin and enjoyment, &c. and for this variance it was moved in arreſt of judgment, there being *no averment*, that Jaywick was known by the name of Jaywick-Park, or was parcel thereof, or that A. and his wife were ſeiſed thereof, or that

that there was a previous treaty concerning Jaywick, and that in conſequence thereof, a conveyance was of Jaywick-park, an averment of any of which, it was held, would have been material; but as there was a forgery, and an * intent to moleſt the owners of Jaywick fully laid in the indictment, and found by the jury, it was adjudged by the whole court to be within the ſtatute. Paſch. 2 Geo. 2. B. R. Gibb. 57. and 261. Paſch. 4 Geo. 2. the King v. Croke.

* S. P. 3 Keb. 51. Trin. 24. Car. 2. B. R. the King v. Ring.

(L) Verdict, &c. What is a ſufficient Finding, or Proof.

1. IN forger of deeds the defendant pleaded not guilty, and it was *found* that he was *guilty of the publication and not of the forgery*; and it was doubted if the plaintiff ſhould recover or not. Br. Forger de Faits, pl. 2. cites 20 H. 6. 11.

And yet it was agreed by Forteſcue and Newton, that if forger of deeds be *brought againſt two*, and it is found that *one is guilty of the forgery, and not of the proclaiming, and* that the *other proclaimed, but not forged*, that by this the plaintiff ſhall recover. Br. Forger de faits, pl. 2. cites 20 H. 6. 11.

2. In forger of deeds, if judgment paſſes for the plaintiff, this ſhall be a bar in every court, in an action brought upon this deed after; quod nota bene; and ſo ſee that a deed found forged is not pleadable. Br. Forger de faits, pl. 16. cites 37 H. 6. 13.

S. P. per Choke and Priſot. Br. Bar, pl. 45. cites S. C.

3. A. brought a writ of forger of falſe deeds againſt B. and *counted of an indenture in quo continetur* quod quidam abbas monaſterii de Glouceſter *dimiſit ſitum manerii de R. & terras dominicales*, &c. The leaſe produced in evidence contained the *ſite, and all the demeſne lands, except 2 ſeveral cloſes there, &c. called, &c.* This evidence was held good enough; for it is not neceſſary to conſtrue terras dominicales to mean omnes terras dominicales, for the lands not excepted are terræ dominicales, and ſo the count is ſatisfied by that evidence, &c. 1 Le. 139. pl. 192. Hill. 30 Eliz. C. B. Atkins v. Hales.

Information ſuppoſed that defendant had forged a *leaſe*, and ſaid, that the leaſe was *of diverſe lands by name, and Long Meare was inſerted amongſt the reſt*, but upon producing the diſputed leaſe *Long Meare was not contained in it*, either by name, or by general words, but all the reſt of the lands were in it. And the defendant having pleaded not guilty, the court held, that as the bill was laid, he was not guilty; for it *is not the ſame leaſe*. Hob. 272. pl. 358. Mich. 17 Jac. Meyre's caſe.

4. The wrong alledging the *time* of the forgery is not material, be it *before or after the offence committed, if* it be *committed before the exhibiting the bill*; but if the *date* of the writing ſuppoſed to be forged had been *miſtaken*, there the defendant could not be condemned of a deed of another date; for that is not the offence complained of in the bill, of which the court can give ſentence; reſolved in the Star Chamber. 13 Rep. 34. Paſch. 7 Jac. Read and Booth.

5. Upon an *indictment for forging and publiſhing* a deed, the jury found the defendant *guilty of the treſpaſs and forgery aforeſaid*; it was objected, that this was inſufficient; becauſe nothing is found as to the

S. P. tho' it was objected that there were other treſ-

paſſes in the indictment which ſatisfied the word treſpaſs; for tranſgreſs prædict. includes forgery and all the other treſpaſſes. 2 Lev. 221. Paſch. 30 Car 2. the King v. Marriot.

the publication, ſed non allocatur; for de tranſgreſſione prædicta includes it, as in treſpaſs of aſſault and battery. 2 Lev. 111. Trin. 26 Car. 2. B. R. the King v. Newton.

[474] 6. In a writ of error brought on a judgment given upon an indictment for forgery ſome of the exceptions were, that *the jury had found him guilty, de forgeria*, whereas there is *no ſuch word*; ſed non allocatur. For the words make it plain enough what their verdict means. Paſch. 30 Car. 2. B. R. 2 Show 5. the King v. Marriot.

* See (A) (M) * Puniſhment. And what ſhall be recovered.

1. 5 *Eliz. cap.* 14. § 2. enacts that *any one who ſhall be convicted upon an action of forger of falſe deeds (to be founded upon this ſtatute) at the ſuit of the party grieved, or otherwiſe, ſhall pay to the party grieved* double coſts and damages *to be aſſeſſed in the court where ſuch conviction ſhall be, ſhall be* ſet upon the pillory *in ſome market town, or other open place, and there have* his ears cut off, *and alſo his* noſtrils ſlit and ſeared with an hot iron; *he ſhall alſo forfeit to the queen her heirs and ſucceſſors the iſſues of his land*, and ſuffer perpetual impriſonment *during his life; and the ſaid coſts and damages ſhall be firſt levied upon the goods and iſſues of the lands of the offender, notwithſtanding the queen's title thereunto.*

A. being indebted to B. upon a *recognizance* of 600 *l.* penalty for payment of 300 *l.* was

§ 3. *A forger, &c. of a* leaſe for years *of land not copyhold, or of an* annuity, obligation, bill, acquittance, releaſe, *or other diſcharge of any perſonal thing; and he who ſhall publiſh and give the ſame in evidence, (except lawyers &c. not party or privy to the forgery) ſhall pay* double coſts and damages *to the party grieved, be pilloried and loſe an ear, &c.*

convicted in the Star Chamber of forging a *releaſe* thereof; and the queſtion was, whether the *double damages*, given by the ſtatute, ſhould be according to the penalty, or only the debt? It was reſolved, by all the judges, that the *damages* ſhould be aſſeſſed to *double the penalty*; for the penalty ſhould have been recovered by law, if the releaſe had not been. Mich. 13 & 14 Eliz. D. 304. pl. 51. Mich. 13 & 14 Eliz. Hind v. Grevil.

§ 4. *Remedy for coſts, &c. may be by original writ out of chancery as in caſe of treſpaſs by bill in the King's Bench or Exchequer, and no eſſoign, &c. to be allowed.*

§ 6. *Plaintiff's releaſe ſhall not ſtop the proceedings for the forfeitures to the Queen*

* Mr. Hughes in his Abridgment, tit. Forgery, pl. 11. calls the offender a (taverner) and Mr. Nelſon in his Abridg-

2. A. *delivered* 1000 *l. to a * ſcrivener to put out at intereſt*, who ſpent the money but *delivered to A. ſeveral bonds, as entered into by ſeveral perſons of credit and ſufficiency*, for ſeveral diſtinct ſums, amounting in all to the ſaid ſum of 1000 *l.* and he witneſſed the ſame as a public notary, but in truth, the parties knew nothing of the matter, and the bonds were forged by the ſaid ſcrivener, as he confeſſed on his examination upon interrogatories. The doubt was *whether* he *ſhould loſe one ear only, or both his ears?* and whether A. being but the

the *obligee*, and not any of the parties in whoſe names the obligations were forged, *ſhould have double coſts and damages?* and reſolved, per Fleming and Coke Ch. Juſtices, he ſhall loſe but one ear; for it ſhould be *taken as one forgery*, being made at one time, and A. was the *party grieved* within the ſtatute; but the Ld. Chancellor expounded the *double damages* not to be *intended* double intereſt but only *the principal debt*. 2 Brownl. 49. Hill. 8 Jac. Andrew v. Ledſam.

ment has varied the word into (vintner) but the book is plainly (ſcrivener) as here.

3. For forging the Chief Juſtice's hand to common bail, and taking fees thereof, as attorney, being only a clerk, the court adjudged him *to pay a fine of* 20 l. to *come with papers to every court with his confeſſion*, to *ſtand in the pillory here* from 10 to 12, and *in London* 2 hours, *and in the marſhalſea* an hour, 3 *months impriſonment, and good behaviour for a year*. 1 Keb. 841. pl. 28. Hill. 16 & 17 Car. 2. B. R. Sherwood's caſe.

4. One was convicted of forging an acquittance, and *fined* by the court 100 *l.* and to be on his *good behaviour for one year*. Note, he was a perſon of 700 *l.* per annum, and the acquittance forged for 7 *l.* Paſch. 18 Car. 2. B. R. Sid. 278. the King v. Ferrers. [475]

5. For forging a will, he had judgment to *ſtand in the pillory* 3 *times*, viz. at Weſtminſter, the Exchange, and Ratcliff; was *fined* 40 l. *and impriſoned*, till ſureties found for good behaviour during life. 2 Keb. 376. pl. 32. Trin. 20 Car. 2. B. R. the King v. Tymberley.

(N) Puniſhment for ſecond Offence.

1. 5 *Eliz. cap.* 14. § 7. 8. ſecond offence *after conviction, or condemnation as aforeſaid, is made felony without benefit of clergy, but not to bar* dower, *or diſinherit the* heir.

The forgery which is felony by this act ought to be after the conviction, or condemnation, as to a former writing; for the forgery of ſeveral writings one after another, ſo as the ſame were all forged before any conviction, is not felony by the expreſs words of the ſtatute. 13 Rep. 35. Paſch. 7 Jac. Read v. Booth.

(O) Puniſhed in Chancery, and Relieved.

1. A Perſon was *ſentenced in* the court of *chancery* for forgery. 8 Jac. Toth. 167, 168. Barker v. Ireland & Morris.

2. A. by a forged *letter of attorney* atteſted by 2 witneſſes *transfers S. S. Stock of B. to J. S.* for a valuable conſideration paid by J. S. who after received the next dividend; Lord Macclesfield held this transfer void, and that it was incumbent on the purchaſor, and more in his power than any other perſon's, to ſee that the letter of attorney be valid, and real; and decreed, that the company, (who were (as he ſaid) only inſtruments and conduct pipes) take the ſtock from the defendant, the transferree, and reſtore it to the plaintiff, the original proprietor, and that the defendant, and not the company, pay back the dividend, which he has without any good authority received, to the plaintiff, and pay both the company and plaintiff their *coſts*, the

the default being the defendant's by reaſon of his neglect. 2 Wm's Rep. 76. to 78. Trin. 1722. Hildyard v. S. S. Company & Keate.

3. *So* of a *forged letter of atorney* in the name of a copyholder to A. *to ſurrender copyhold to the uſe of J. S.* who ſurrenders accordingly, and J. S. is thereupon admitted, yet this *admittance is void*; per Lord C. Macclesfield. Ibid. 77, 78.

Formedon.

(A) Of Formedon in General.

1. FORMEDON *is a writ of poſſeſſion, and* no writ of right.* Br. Formedon, pl. 31. cites 38 † E. 1. 37.

* Br. Formedon, pl. 44. cites 4 H. 7. 10. contra, per Fairfax J.——Br. Monſtrans, pl. 18. cites S. C. per Huſſey and Fairfax, that it is in the right.—— Br. Formedon, pl. 48. cites 18 E. 4. 23. That formedon in deſcender is a *writ of right* in its nature, per tot. Cur'——*So* ibid. pl. 77. cites 40 E. 3. 21. per Belk.—— † This ſeems to be miſprinted in all the editions, and that it ſhould be 38 E. 3. 37. Vid. Br. Juris Utrum S. C. and P.

[476] S.P. agreed Arg. and ſays that at common law, there was no formedon *in deſcender*, but that it is given by W. 2. 1. Goldſb. 5, 6. pl. 11. Paſch. 28 Eliz. in Capel's caſe.

2. Formedon *in remainder* was *not at common law*; becauſe at common law all eſtates in fee were fee ſimple abſolute, or fee ſimple conditional, which now are called eſtates tail, and ſo no remainder could be limited on the later, becauſe it was a fee ſimple. But the formedon in remainder was by the *ſtat. de donis.* See Pl. C. 239. a. b. Trin. 4 Eliz. Arg. in caſe of Willion v. Berkley.

3. Formedon, or de forma donationis is *ſo called, becauſe* the writ comprehends the form of the gift. Co. Litt. 326. b.

(B) Of the Formedon in the *Deſcender*, and in what Caſes it lies.

3 Rep. 9. a. in HEYDON's caſe, cites Litt. S. P. and adds, that it appears in our books, that in ſpecial caſes, formedon in deſcender lay at common law before the ſtatute of Weſtm. 2. and cites 4 E. 2. tit. Formedon 50. and 10 E. 2. tit. Formedon 55. 21 E. 3. 47. Pl. C. 246. b. &c.——Contra by Popham and Fenner. Poph. 34 Mich. 35 and 36 Eliz. in caſe of Gravenor v. Brooke.—— And ſo is 2 Inſt. 336.

1. LITT. S. 76. tit. tenant by copy, takes notice of a formedon in deſcender *at common law.*

As where an aſſiſe of mortdanceſtor would not ſerve the iſſue, as if a man had iſſue a ſon, and his wife had died, and then he took another wife, and *land was given to him and his ſecond wife, and to the heirs of their bodies*, begotten, and they have another ſon, and the ſecond feme dies, and then the father dies and a ſtranger abates; in ſuch caſe, before the ſtatute, the ſon could not have aſſiſe of mortdanceſtor, becauſe one point of the writ is to inquire if demandant be *next heir to his father*, which he is not, but his elder brother is, and therefore he ſhould have a formedon in deſcender, before the ſtatute, which was no other than a writ founded upon his caſe; but then this writ was *to recover fee ſimple.* per Bendlowe Pl. C. 239. 4 Eliz. in caſe of Willion v. Barkley.

2. *If*

2. *If the iſſue in tail be barred by warranty, and aſſets deſcend*, and after he *aliens the aſſets and has iſſue and dies*, or if *the aſſets be recovered againſt him by elder title*, the *iſſue* of *the iſſue ſhall have formedon* of *the firſt land tailed*; ſaid, per Finch. for law. Br. Formedon, pl. 18. cites 48 E. 3. 9.

But Brook makes a quære thereof, for 'tis ſaid contrary, tempore H. 8. if he be barred by judgment. But if ſuch a thing happens, *before he be barred by judgment*, the iſſue of the iſſue ſhall have formedon, as appears in the formed. in Old Nat. Br. Formedon, pl. 18.

3. If land in fee ſimple, and fee tail deſcend to two ſiſters, and ſhe who has the fee ſimple land aliens it, and has iſſue and dies, the iſſue ſhall have formedon of the moiety of the land tailed. And ſo ſee that *after partition* the one heir ſhall have formedon alone. Br. Formedon, pl. 2. cites 20 H. 6. 2. 13.

4. Formedon in deſcender is *grounded upon the ſtat. of Weſtm.* 2. *c.* 41. and lies where a man gives lands *to one and the heirs of his body*, or *unto a man and woman, and the heirs of their bodies*, or unto a man and woman, who is couſin, in frank-marriage, by force of which gift, they are ſeiſed, and afterwards he alieneth theſe lands, or is diſſeiſed of them, and dies; his heir ſhall have the writ; and ſo, upon every gift in tail of lands or tenements, if the anceſtor aliens or be diſſeiſed and dies, he who is heir by force of the gift ſhall have ſuch writ. F. N. B. 211, 212. (L)

Formedon lies for a *younger ſon inheritable by the cuſtom.* F. N. B. 436. in the notes there (a)

5. Tenant in tail *diſcontinues in fee and dies*; the *diſcontinuee makes a leaſe for life*, and *grants the reverſion to the iſſue*; he ſhall not have a formedon againſt the tenant for life; for by his formedon he muſt recover the eſtate of inheritance, which the leſſee for life hath not, but the iſſue in tail hath it himſelf. Co. Litt. 297. b.

(C) In the *Remainder*. In what Caſes it *lies*. [477]

1. FORMEDON in remainder, upon an eſtate tail, *lay not at common law*; becauſe it was a fee ſimple conditional, whereupon no remainder could be limited at the common law; but ſince the ſtat. W. 2. 13 E. 1. a remainder may be limited upon an eſtate tail in reſpect of the diviſion of the eſtates. 2 Inſt. 336.

2. Formedon in remainder lieth, where a man *giveth lands* to one *in tail*, the *remainder to another in tail*, and the *firſt tenant in tail dieth without iſſue*, and a *ſtranger abateth* and deforceth him in remainder, he in remainder, or his heir ſhall have this writ. F. N. B. 217.

So it is if the iſſue of the *iſſue* in tail, *dies without iſſue*; for then on the whole matter, the tenant in tail is dead without iſſue. F. N. B. 499. (b) in the notes cites D. 4 Eliz. 233.

3. *So* if the *firſt tenant* in tail *alieneth* in fee* *and dieth without iſſue*, he in remainder ſhall have this writ to recover his eſtate. F. N. B. 217. (D)

* Or in tail, or for life. F. N. B. 217. (E.)

4. If a man *give lands for* term of *life*, the *remainder to another and the heirs of his body*, and the *tenant for life dieth*, and a *ſtranger abateth*, and deforceth him in remainder, he in remainder or his heir ſhall have formedon in remainder to recover his eſtate. F. N. B. 217 (E.)

So ſeems if a man leaſe lands *for life remainder to another in fee*, and the *tenant for life aliens* in fee, or in tail, or for life, *and dies*, and a *ſtranger abates*, he in remainder, or his heir ſhall have this writ. F. N. B. 217. (E)

5. If he, who hath the remainder, or his heir be once *ſeiſed* of the lands *by force of the remainder*, he ſhall never have a formedon in remainder for that land but a formedon in deſcender, becauſe the remainder is once executed. F. N. B. 219. (A)

(D) In the *Reverter*. In what Caſes it lies.

1. A *T common law*, if a gift had been to a man and his heirs of his body, or heirs males of his body, *if he had iſſue*, then *he ſhould have fee ſimple*, and if he dyed his *iſſue ſhould have mortdanceſtor*; for it was fee ſimple at common law; contra after the ſtatute of Weſtm. 2. c. 1. Per Grene J. and Huſe agreed to the mortdanceſtor, and that *after iſſue had, he might alien*; but if he died without iſſue and did not alien formedon in reverter * lay; and by him, heir collateral ſhall not have mortdanceſtor. Br. Tail & Dones, &c. pl. 19. cites 18 Aſſ. 5.

*Formedon in reverter lay at common law. 2 Inſt. 336.

2. If a man *gives land in tail, ſo that the donee may alien in advantage of his iſſue, and warrants* the land *to him, his heirs and aſſigns*, and the *donee aliens and dies without iſſue*, the donor ſhall not have formedon in reverter, per Wilby; becauſe he has warranted the land to the donee and his aſſigns, and the *alienee is aſſignee*. But Brook makes a quære thereof; for *nothing is given but eſtate tail*, and the words after, and the warranty, cannot make fee ſimple in a donee; contrary it may be in a deviſe or will. Br. Formedon, pl. 57. cites 46 E. 3. 4.

*So if one give lands to another *in tail*, the *reverſion in fee to another*, and the donee in tail dies without heir of his body, the grantee of the reverſion, ſhall have a formedon in reverter to recover the land. F. N. B. 219. (E)

3. Formedon in reverter lieth where one *gives lands* to a man *in tail* or frankmarriage with his daughter, and afterwards the *donee or his heirs die without iſſue*, then the donor or his heirs may bring this writ againſt the tenant of the lands ſo given. F. N. B. 219. (E)

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(E) Lies *of what*.

1. IN ſcire facias, a *fine* was levied to J. S. ſur conuſance de droit *come ceo*, &c. and the *conuſee* grants and *renders to the conuſor* again for life, the *remainder* over *in tail*, it is ſaid there by diverſe, that he in remainder ſhall not have formedon, becauſe there is not any gift, and others e contra; therefore quære, if formedon lies not as well *upon a grant and render*, as upon a gift. Br. Formedon, pl. 9. cites 42 E. 3. 5.

2. *For* of *land recovered in value* formedon lies, and yet it was not given. *And* formedon lies *upon deviſe*. Br. Formedon, pl. 9.

3. *Rent is given with a ſeigniory in tail*, and *donee aliens the rent*; the *tertenant does felony and is attainted*; the *donee dies without iſſue*;

iſſue; the *donor ſhall have writ of eſcheat*; *but if the donee had not aliened, but had entered into the land after the attainder*, and had died without iſſue, the *donor ſhould have formedon in reverter* of the land, and not writ of eſcheat; for this was in lieu of the land, and veſted. And ſo ſee formedon [lies] *of a thing which was not given.* Br. Formedon, pl. 15. cites 46 E. 3. 4.

4. If *lands* are *recovered in value for lands intailed*, the iſſue ſhall have formedon in deſcender upon the ſpecial matter. Br. Scire facias, pl. 47. cites 48 E. 3. 11.

5. The iſſue in tail ſhall not have formedon of an *advowſon in groſs* aliened by his anceſtor, but a quare impedit at the next avoidance in his time, and ſo it ſeems, that præcipe quod reddat lies not of an advowſon. Br. Formedon, pl. 28. cites 4 H. 14. 33. Br. Formedon, pl. 65. S. P. cites 33 E. 3.

6. A man may have a formedon in deſcender of the *profit apprender in lands* or tenements, *or iſſuing thereout.*——*As*, if a man grants 20 *s.* or, &c. iſſuing out of lands or tenements unto a man and the heirs of his body, or unto a man in frankmarriage with his daughter, if the donee aliens that *rent*, or is diſſeiſed and dies, his heir who is his ſon or daughter ſhall have the writ. F. N. B. 212. (A) *So* if a man grants the *moiety of the profits of his mill* unto another and the heirs of his body, and the donee dies, and his heir is deforced, the heir ſhall have formedon in deſcender. F. N. B. 212. B.

7. *So* it ſeems, if a man grants to one and the heirs of his body *paſture for* 20 *oxen*, or 100 ſheep, &c. and the donee dies, and his ſon, who is his heir, is deforced thereof, he ſhall have formedon in the deſcender. F. N. B. 212. (B) *But* if *common of paſture* be granted to one and the heirs of his body, and the donee die and the heir be deforced, the heir ſhall not have formedon in deſcender, but a *quod permittat*, in the nature of a formedon. F. N. B. 212. (B)——A formedon in deſcender of a *ſeſſeuty of the cathedral of L.* brought againſt the biſhop there, and one J. S. was, without being joined to a quod permittat, adjudged good. F. N. B. 487. Notes (C) there cites 18 E. 3. 27.

8. A formedon ſhall be brought of * *gorſes*, but not of an *advowſon*. F. N. B. 217. (B) * Pl. C. 154. b. Arg.

9. If *land eſcheat to the ſeigniory, which was given in tail*, formedon lies of the land, and yet the ſeigniory was given, and not the land. Br. Formedon, pl. 43. cites 3 H. 7. 9.

10. Formedon may lie of *a copyhold* in the deſcender, *by proteſtation, in nature of a writ of formedon in deſcender at the common law*, and well by all the juſtices, for though formedon in deſcender was not given, but by ſtatute, yet now this writ lies at common law, and it ſhall be intended, that it has been a cuſtom there time out of mind, and the demandant recovered by advice of all the juſtices. Br. Tenant per Copie, &c. pl. 24. cites † 15 H. 8.—and Brook ſays, the like matter was in Eſſex, Mich. 26 H. 8. and that Fitzherbert affirmed it afterwards in the dutchy chamber, * and that the ſame is agreed by Littleton, in his chapter of tenants by copy. Litt. f. 77. Co. Litt. 60. a. b. —† S. C. cited by Popham and Fenner. Poph. 34. Mich. 35 & 36 Eliz. in caſe of Gravenor v. Brookes.

11. It will not lie of a *croft of land*; but an aſſiſe doth well lie, becauſe a formedon is breve adverſarium; therefore, where a judgment was given in a formedom for a croft, and for other parcels of land, it was reverſed for the whole upon a writ of error; 2 Bulſt. 214. Paſch. 12 Jac. Ellis v. Wallis. *[479]

(F) In what Cafes Formedon *in general lies.*

1. IF *alienation* [were made] *by the donee* in tail, *before the ſtatute, and before iſſue had*; yet if he *had iſſue after, the alienation* was good. Br. Formedon, pl. 70. cites 19 E. 2. and Fitzh. Formedon, 61.

But if he *died without iſſue, formedon in reverter lay for the donor,* his heirs or aſſigns. Br. ibid.——*And* ſee that a leaſe was made *for life* the *remainder in tail*, the *remainder in fee* to the demandant. Br. Formedon, pl. 70. cites Fitzh. Formedon, 66. and 11 E. 3. ca. 31. *And upon a deviſe for life*, the *remainder to B. and his heirs*, B. ſhall have formedon in remainder, where there was no tail in any part of the gift. Br. Formedon, pl. 70. cites 34 E. 3. ca. 68.

And ſee in the ſaid writ of formedon in remainder in Old Nat. Br. that *upon a leaſe for life*, the *remainder in fee*, he in *remainder ſhall have formedon* in remainder. Br. Formedon, pl 69. cites 24 E. 3.

2. Formedon *in remainder was at common law*; for it lay *upon a leaſe* for life, the *remainder over* for life, *or in fee*, and where there was no tail and ſo it continues to this day; which cannot be by reaſon of the ſtatute of *W.* 2. *c.* 1. for it is not tail, and the ſtatute *gives formedon in deſcender*. And it was ſaid, that formedon in reverter is enough uſed in Chancery; for by the common law the donee had fee ſimple conditional, and had power to alien, but if he had aliened before he had iſſue, and had died without iſſue, *formedon in reverter lay at common law*, and ſo if he had had iſſue, and after, he or his iſſue died without iſſue; formedon in reverter lay at common law, contrary if he had had iſſue, and had aliened and died without iſſue. But formedon in remainder is not mentioned in the ſtatute aforeſaid, therefore it ſeems that this was at common law, and eſpecially where there is no tail, as above. Br. Formedon, pl. 69. cites Old Nat. Br.

Contra where the *tenant in tail aliens* the land *or charges it, and enters into religion*; for this ſhall take effect during his natural life; contrary of abatement, ut ſupra. Br. Formedon, pl. 74. cites Old Nat. Br.

3. If *tenant in tail enters into religion, and J. N. enters*, the *iſſue in tail ſhall have formedon immediately*, inaſmuch as his father took upon him a religious habit. Br. Formedon, pl. 74. cites Old Nat. Br.

4. If the *heir in tail* be *once ſeiſed after the death of his anceſtor*, he *ſhall not have formedon, till this ſeiſin be lawfully defeated, though he be ouſted, but* ſhall have *action of his own poſſeſſion*. Br. Formedon, pl. 47. cites 7 E. 4. 19. Per Danby Ch. J.

And if the iſſue in tail *enters* after the death of his anceſtor, *upon the diſcontinuee within age, and aliens in fee*, he ſhall not have formedon, but *dum fuit infra ætatem*, becauſe the *diſſeiſin is not purged by the deſcent*. Br. Formedon, pl 47. cites 7 E. 4. 19. Per Danby Ch. J.

5. *As* where the *iſſue in tail enters upon the diſcontinuee, and another ouſts him*; he ſhall not have formedon unleſs *the diſcontinuee enters*. Br. Formedon, pl. 47. cites 7 E. 4. 19.

6. If the *huſband alieneth the land of his wife in fee, and* afterwards the huſband and wife *are divorced*; the wife ſhall have a writ of cui ante divortium againſt the alienee. *But* if the lands be *to the wife of an eſtate tail*, and *not in fee*, and after they are divorced, and the *wife dieth*; the *heir* of the wife ſhall not have a ſur cui in vita

ante

ante divortium againſt the alienee, but in ſuch caſe the *heir ſhall be put to his writ of formedon* in the deſcender. Fitzh. Nat. Br. 204. (F) (K)

7. In a formedon in the *diſcender*, if the demandant be *barred by verdict or demurrer*; *yet the iſſue* in tail *ſhall have a new formedon* in the deſcender: *ſo if* he be *barred in* a writ of *error upon the releaſe of his anceſtor*, his iſſue ſhall have a new writ of error; for he *claims in, not only as heir, but per formam doni*, and by the ſtatute of Weſt. 2. ſhall not be barred by feint, or falſe pleading of his anceſtors, ſo long as the right of the entail remains. 6 Rep. 7. b. in Ferrer's caſe.

(G) Writ and Pleadings in general.

1. *OMISSION of the coſinage* in the writ of formedon ſhall abate the writ, notwithſtanding that it be expreſſed in the count; contra in ſcire facias. Br. Omiſſion, pl. 5. cites 49 E. 3. 20, 21.

2. Formedon in reverter *by baron and feme*, [where the reverſion was limited to the feme] *ſhall be ad virum & uxorem revertere debet*, &c. But formedon in deſcender by them ſhall be *ad uxorem* deſcendere debet*; for the baron is not heir to the tail. Br. Formedon, pl. 68. cites 19 H. 6. 46.

S. P. Ibid. pl. 36. cites S. C. And in formedon in remainder, it ſhall be *to them* remanere debet*; for ſhe is purchaſer, and it cannot remain to one without the other. S. P. Ibid. pl. 4. cites 35 H. 6. 10. 13. per Wangforde; quod nullus negavit.

3. In formedon upon a *gift made to W. and J. his feme, and that after the death of W.* &c. and did not ſpeak of the death of J. his feme, the other donee, and therefore the *writ was abated* without amendment. Br. Formedon, pl. 64.

4. By 1 *H.* 7. 1. *it was maintainable againſt the pernor of the profits.*

5. In formedon, if the *tenant pleads non-tenure*, the *demandant ſays, that he made a feoffment to perſons unknown* to defraud him of his action, and avers that he took the profits; there the feoffment to perſons unknown is not traverſable. Br. Traverſe, per, &c. pl. 180. cites 4 H. 7. 9.

6. In every formedon, there are *two things requiſite*; one is the *gift*, the other is *conveyance to the demandant*; and if either of theſe fail, the writ is inſufficient in ſubſtance, nor helped by the ſtatute. Hill. 43 Eliz. Goldſ. 126. Dewnall verſus Cateſby.

7. 21 *Jac.* 1. *cap.* 16. *ſ.* 1. enacts, that *all writs of formedon in deſcender, in remainder, and in reverter, ſhall be ſued within* 20 *years after the title and cauſe of action firſt fallen; and no perſon ſhall make any entry into lands, but within* 20 *years after his right or title ſhall firſt accrue.*

S. 2. *If any perſon, that ſhall be entitled to ſuch writs, or ſhall have ſuch right or title of entry, be at the time of the ſaid right or title firſt accrued within the age of* 21 *years, feme covert, non compos mentis, impriſoned*

impriſoned or beyond the ſeas; ſuch perſon and his heirs may bring action, or make entry, within ten years after their full age, diſcoverture, coming of ſound mind, enlargement out of priſon, or coming into this realm, or death.

8. A. brought formedon in deſcender againſt B. for 23 acres of land in H. The *tenant vouched to warranty C.* The *plaintiff counterpleaded* the voucher, *that the vouchee, nor any of his anceſtors, aliquid in tenementis prædict. &c.* (leaving out the word *habuerunt.*) The *vouchee joined iſſue* upon it, and *niſi prius awarded*, demandant appeared, but *tenant made default*; ideo prædict. 23 acres capiantur in manus, & ſum. returnable 1 Mich. & vic. non miſit breve, and ſummons in nature of a petit cape returned, and tenant made default, and ſheriff returned quod cepit in manus domini regis, upon which judgment pro quer. and *error* brought; and though no iſſue was well joined for default of (habuerunt) yet, when the tenant made default, * all the pleading before the counterplea of the voucher, was out of the court, and judgment well given, and the firſt judgment affirmed. Jo. 412. Mich. 14 Car. B. R. Brookebutt v. Tomlyn.

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* And the judgment is only upon the default. Cro. C. 517. Mich. 14 Car. B. R. S. C. by name of Tomlins v. Brett.

9. In formedon in deſcender; exceptions were taken to the count, for that the demandant, (being *brother to the tenant in tail*, who died without iſſue) *ſet forth, that the lands belonged to him poſt mortem of the tenant in tail*, without ſaying, *that he died without iſſue*; the precedents are *quæ poſt mortem* of the donee *reverti debent, eo quod the donee died without iſſue*; which is very true *in a formedon in reverter*, becauſe there the eſtate-tail being ſpent, the donor may not know the pedigree; and thereupon it is ſufficient to ſay, that *poſt mortem* of the tenant in tail *deſcendere debet, without ſetting forth, that he died without iſſue*; for if he had any iſſue, then it could not deſcend to the brother. Trin. 28 Car. 2. C. B. 2 Mod. 94. Anon.

(H) Pleadings. Writ and Declaration in the Deſcender.

1. FORMEDON in deſcender, the demandant *counted that A. gave to B. in tail*, and *from B. it deſcended to H.* as ſon and heir, &c. and *from* H. *to G. the demandant*, as ſon and heir, &c. and the *writ was*, and *that after the death of the aforeſaid B. to the aforeſaid G.* couſin and heir of the aforeſaid B. *deſcendere debet, &c.* which was challenged for variance between the writ and the count, becauſe *H. did not* * *hold eſtate*; and therefore there is no occaſion to make mention of him in the writ, as in a writ of *Aiel*, [for] there the demandant ſhall make himſelf heir to the grandfather and not to the father. Br. Formedon, pl. 66. cites 5 E. 3.

* Viz. was never *ſeiſed.*

2. Land is *given to J. and his firſt wife whom he ſhould marry, and to the heirs of their bodies*, &c. and after *he eſpouſed A. and had iſſue, and aliened, and died*, the iſſue brought *formedon as heir of the bodies of J. and A.* and therefore the writ was abated; for A. had

A. had nothing by the gift, and therefore it ſhould be, that deſcendere debet to the demandant, *as heir of J. of the bodies of J. and A. begotten.* Br. Formedon, pl. 78. cites tempore E. 3. Itin. North.

3. Formedon in remainder; the *demandant ſet forth ſpecially*, (as he ought) that is to ſay, *that the land given to N.* &c. *revertatur to the demandant*, where it *ſhould be remaneat*, &c. and the tenant challenged it, and dared not demur; for revertatur *is a good remainder*, and this action does not lie without ſhewing ſpecialty; and yet when it is ſhewn, the party, tenant, ſhall not have anſwer to it, and *ne dona pas by the deed* is no plea, wherefore by award he was compelled to anſwer over, and ſaid, that he, *ne dona pas as ſuppoſed by the writ*, Priſt; and the others e contra. Br. Formedon, pl. 33. cites 21 E. 3. 49.

4. Formedon of a *gift to his grandfather*, and *makes the deſcent from him to his father, and from him to the demandant*; Fencot ſaid, after the death of the grandfather, the father was ſeiſed, ſo *ought he to be made heir to his father*, and demanded judgment of the writ; the *demandant ſaid, that the grandfather enfeoffed the father, and his feme, and the heirs of the feme, and this eſtate continued till he died*; judgment; the *tenant ſaid*, that the father was *within age at the time of the feoffment, and ſo remitted and ſeiſed in tail*; and after they paſſed over: and ſo ſee that *laſt ſeiſin* is a good plea to the writ in formedon. Br. Formedon, pl. 29. cites 38 E. 3. 24.

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5. In formedon by B. the writ was, and *that after the death of R. and W. ſon and heir of the ſame R. to the aforeſaid B. ſon and heir of the aforeſaid W.* deſcendere debet, &c; and the tenant * pleads that *W. was never ſeiſed*; judgment of the writ, which makes him heir to W. where he ſhould be made heir to him who was laſt ſeiſed, and by award the writ is good, for by this way he is made heir to R. alſo. Br. Formedon, pl. 38. cites 39 E. 3. 10.

S. C. cited F. N. B. 488. In the Notes *(e)*— * Orig. (tend)—— Contra. that he ought not to mention every heir in the writ, though he muſt make himſelf heir to him who was laſt ſeiſed of the eſtate tail. Het. 78. Hill. 3 Car. C. B. Jenkins v. Dawſon.

6. Formedon of a *gift to E. in tail*, the *remainder to P. and that after the death of the aforeſaid E. and P. and R. ſon of the ſame P. to the aforeſaid W.* the demandant, *brother and heir of the aforeſaid R.* deſcendere debet, *becauſe the aforeſaid R. died without heir of his body*; and becauſe he did *not ſhew* alſo, *that E. is dead without iſſue*; therefore his writ was abated, and yet it was formedon in deſcender. Br. Formedon, pl. 39. cites 39 E. 3. 27.

S. C. cited F. N. B. 502. (a) in the notes there.—— *But* Brook ſays, that it ſeems, that he *might have ſuppoſed the immediate gift* to have been *to P. and omitted E.* as he is *dead without iſſue*, and then well. Br. Formedon, pl. 39.

7. Formedon *as couſin*, the plaintiff ought to *ſhew how couſin in the writ*, otherwiſe it ſhall abate; *contrary in ſcire facias*, as couſin and heir. Note a diverſity. Br. Formedon, pl. 6. cites 41 E. 3. 14.

In ſuch caſe it ſhall abate *ex officio curiæ after the view*, and ſo it ſeems that the party ſhall not plead it after the view, but ſhall *ſhew it as amicus curiæ*, and the court for error ought to allow it. Br. Brief, pl. 124. cites 12 H. 4. 1.

8. In formedon in descender, the *demandant made the descent from H. the donee to A. daughter*, &c. and *from A. to the demandant, as cousin and heir to H.* The *tenant said, that A. mother of the demandant, was seised by force of the tail, after the death of H. and therefore she ought to have been made heir to A.* judgment of the writ; and the demandant was compelled to answer to it; per Cur. Br. Formedon, pl. 53. cites 43 E. 3. 7.

9. *Wherefore* he *said, that A. was seised in fee by the feoffment of H.* judgment, &c. The *tenant said, that H. leased to A. for life, and* after *died, by which he was then seised in tail*; the *demandant said, that he was seised in fee*, Prist; and the others e contra. Note, the *last seisin* was in issue. Br. Formedon, pl. 53. cites 43 E. 3. 7.

Br. Omissiion, pl. 4. cite S. C. —— * Orig. (tend)

10. Formedon of a *gift to the baron and feme* in tail, the *demandant made descent from them to P. as son and heir*; and *from P. to the demandant, as to the son and heir*; the *tenant said, that the baron and feme had issue D. elder than P. who* * *held the estate, and survived the donees, and died seised*, of which D. he has made *omission*, judgment of the writ; and because *P. was made* son and *heir* to the baron and feme, *where he ought to have been made brother, and heir to D. of the bodies of the baron and feme begotten*, therefore the writ was abated. Br. Formedon, pl. 55. cites 46 E. 3. 9.

* He must shew expressly the name of him who was last seised as heir. D. 216. a. pl. 56. Trin. 4 Eliz. Anon.— And he must make himself either *son and heir*, or *cousin and heir*; for a later seisin in any heir in tail after will abate the writ. 8 Rep. 88. b. Resolved in Buckmer's case.

11. In formedon of a *gift to J. and A. his feme in tail*, the *writ was*, and *that after the death of the aforesaid J. and A. and R. son and* heir of the aforesaid J. and A. and *T. son of the aforesaid R. to the aforesaid plaintiff, son of the aforesaid T. as cousin and heir of the aforesaid R. descendere debet* by form of the gift aforesaid, &c. And the tenant demanded judgment of the writ, for where the demandant is made heir to R. he said, that the said R. never had any thing, and the other e contra, but not de rigore juris, but by accord; and so it seems that that the * *demandant ought to make himself heir to him who was last seised.* Br. Formedon, pl. 17. cites 48 E. 3. 7.

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12. In formedon the writ was præcipe the tenant quod juste, &c. reddat to the demandant, &c. the *manor of D. which J. T. gave to R. and M. his wife, and the heirs of their bodies, &c. and that after the death of the aforesaid R. and M. and N. son* and heir of the aforesaid R. and M. *and N. son and heir of the aforesaid N. and R. son and heir of the aforesaid N. son of N. son of the aforesaid R. and M. to the aforesaid demandant*, cousin and *heir of the aforesaid R. son of N. the son of N. son of the aforesaid R. and M. descendere debet*, by form of the gift, &c. And the demandant counted further, how she was cousin and *heir to the said R. son of N. viz. daughter of T. son of M. sister of N. son of R. and M.* the donees; and * because the cosinage was not alledged as well in the writ as in the count, the court was of opinion, that the writ should abate; and after, because the *tenant had had the view*, though *no count was made before* the view, and so affirmed the writ, therefore he shall not have advantage after, and so the tenant was awarded to answer to the writ, quod nota. Br. Formedon, pl. 19. cites 49 E. 3. 20.

* Ibid. pl. 26. cites 12 H. 4. 1. S. P. and therefore the writ was *abated after the view*, ex officio curiæ —— *But* in writ of *aiel and cosinage*, he need not shew how cosin in the writ. Note, a diversity. E. k. Ibid.

13. *But*

13. *But* contrary *in ſcire facias* upon tail by fine, there it ſuffices to count * further; note a diverſity. Br. Formedon, pl. 19. cites 49 E. 3. 20. per Wiching.

* Orig (dehors)

14. And in formedon, *the writ ſhall be (where the heir is not ſeiſed)* and *that after the death of the donee, and R. ſon of the donee*, &c. without this word *(heir)* and *to make the demandant heir to him who was laſt ſeiſed*. Br. Formedon, pl. 19. cites 49 E. 3. 20. per Wiching.

The younger ſon of the donee counted in formedon, *that his eldeſt brother was heir to his father, and that after his death, he is now heir*, and exception was taken, that this cannot be; for that none is heir to the father, but the eldeſt ſon, and that the elder brother being dead without iſſue, the next brother is heir to him who was laſt ſeiſed, and not to the father: but the court held it to be no contradiction to ſay, that two are heirs of one *tempore deviſo*. 2 Mod. 94. Trin. 28 Car. 2. C. B. Anon.—But 1 Mod. 219. is S. C. by name of Burrow v. Hagget.

15. *But where the heir is ſeiſed*, there he ſhall ſay, and *that after the death of the donee, and R. ſon and heir of the aforeſaid donee*, and ſo on. Br. Formedon, pl. 19. cites 49 E. 3. 20.

16. Formedon in deſcender, and counted how the *donor leaſed to W. for life*, and granted the *reverſion to J. and T. and to the heirs of T. who granted* the reverſion *to the father of the demandant in tail, and that the tenant for life is dead*, and ſo *deſcended* to him *by form of the gift and grant* aforeſaid, and it was doubted of the form, if he ſhall ſay by form of the *gift only*, or not. Br. Formedon, pl. 20. cites 50 E. 3. 1.

Where a *leaſe* is made *for life*, the *remainder over in tail*, and the *tenant for life dies* and he in *remainder enters*, and *alien and dies*; the *iſſue in tail*, after the death of the leſſee, and of his father, who entered and diſcontinued, may chuſe in his writ to *make mention of the leaſe for life*, and of the remainder; or to *allege immediate gift* to be made to his father. Quod nota. Br. Formedon, pl. 62. cites 11 H. 6. 20.——The iſſue need not make mention of the leaſe for life, but that the donor gave to his anceſtor, &c. per Marten, J. Br. Formedon, pl. 79. cites 9 H. 6. 53.

17. In formedon in deſcender, the count was, *that the land deſcended from the donor to B.* and from B. *to C.* and from C. *to the demandant, as brother and heir*; and it was pleaded to the writ, becauſe he did *not ſhew that C. his brother was dead*; but non allocatur in this action; contra in formedon in remainder. Br. Formedon, pl. 21. cites 3. H. 4. 1.

Formedon in deſcender; the tenant pleaded in abatement, and excepted againſt the *count*, becauſe it *was that the right deſcended to him after the death of* Leonard, *as brother and heir to* Leonard, who was *ſon and heir of the donee*, and did *not allege, that Leonard died without iſſue*; it is true, this might have been an objection in a formedon in remainder or reverter: but it is not in a formedon in deſcender; for in the laſt caſe the demandant is only to ſet forth the pedigree, and therefore they do not mention, that the perſon under whom they claim, died without iſſue; beſides, in this caſe the demandant could not be heir to Leonard, if he had left iſſue; Nelſ. a. 882. pl. 5. cites 1 Mod. 219. * Burrow verſus Hagget.——* Trin. 28 Car. 2. C. B.

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18. Formedon in deſcender, though the *gift* was *of a reverſion of a tenant for life to two in tail*, the *remainder to the anceſtor of the demandant, who was ſeiſed by the remainder*, ſo that the remainder was *executed*, the *plaintiff may ſay*, in his writ and declaration, *that the gift was immediate to his anceſtor*. Br. Formedon, pl. 23. cites 11 H. 4. 39.

Br. Nugation. pl 4. cites S. C. —Ibid. pl. 10. cites S. C.——*But* if a *gift* be made *in tail to D.* and his heirs males, the *remainder to A. in tail*, and *D. diſcontinued in the life of A.* and died without iſſue, and *the heir of A. brought his writ, as the immediate gift to A.* his anceſtor who never was ſeiſed in his life, and for that cauſe the writ was naught: but if A. had been ſeiſed of the land, then it had not been neceſſary to have ſhewed the firſt gift to D. by the opinion

opinion of the whole court. 1 Brownl. 155.——When the *remainder is once executed*, formedon in remainder does not lie, but the *general writ in the deſcender* ſhall ſerve, and he ſhall *count as of an immediate gift*. 8 Rep. 88. Trin. 7 Jac. a note of the reporter's in Buckmere's caſe.——S. P. and ſhall not mention the remainder. F. N. B. 219. (D) ſays, it ſo appears by the rule in the regiſter.

If tenant in tail hath two ſons, and a ſtranger abates, and enters, into the land, and afterwards the eldeſt ſon dies before he entereth, the youngeſt need not name his eldeſt brother heir to his father, in the writ, but only ſon, becauſe he never had ſeiſin. F. N. B. 212, 213. (I)

19. If *tenant in tail has iſſue a ſon and a daughter, and diſcontinues*, and after the *ſon dies without iſſue, in the life of the father*, and then the *father dies*; the daughter ſhall have formedon, and may make *omiſſion of the ſon*, becauſe he died in the life of his father, and therefore now the *daughter is immediate heir* to him who was laſt ſeiſed. Br. Omiſſion, pl. 7. cites 11 H. 4. 72.

If the father does not ſurvive the grand father, the ſon need not mention the father in his writ. F. N. B. 489. in the notes there (a) cites 5 E. 2. 8 E. 2. pl. 54.

20. *Contra* it ſeems, *where there are grandfather, father, and ſon, and the grandfather tenant in tail diſcontinues*, the *father dies*, and after *the grandfather dies*, and the *ſon* brings formedon, he *ought to make mention of the father, for* the ſon *cannot be immediate heir to the grandfather*, but by means of the father. Ibid.

S. C. cited F. N. B. 488. in notes (a)

21. In formedon the writ was, *that R. P. gave to N. and B. his wife, and to the heirs which the ſaid N. of the body of the ſaid B. ſhould beget*; Norton demanded judgment of the writ, for it ought to be, that R. gave to N. and B. his wife, and the heirs of their bodies *begotten*; & non alloeatur; but the writ awarded good, for it is all one. Br. Formedon, pl. 26. cites 12 H. 4. 1.

22. Formedon in deſcender; the writ was, and *that after the death of W. the donee, and W. ſon and heir of the aforeſaid W.* [and] *J. ſon and heir of the aforeſaid W. ſon of W. and W. ſon and heir of the aforeſaid J. and T. ſon and heir of the aforeſaid W. to the aforeſaid A. the demandant, as daughter and heir of the aforeſaid T. deſcendere debet*, &c. the *tenant ſaid, that T. never held eſtate*, and yet the writ awarded good by judgment, for where he is made heir to every one as here, therefore he is made heir to the donee, and to him who was laſt ſeiſed, whoſoever he was, and where the grandfather is donee, and he and the father die, the father not ſeiſed, and the writ of the ſon is, and that after the death of the grandfather, and the father, ſon and heir to the grandfather, to the demandant, ſon and heir of the father deſcendere debet, &c. it is a good writ, per Cur. and *laſt ſeiſin pleaded in a writ of aiel, mortdanceſtor and coſinage goes to the action*, therefore it is a good plea there accordingly. *But in formedon it does not go but to the writ.* quod nota diverſity. Br. Formedon, pl. 62. cites 11 H. 6. 20.

In formedon by E. ſuppoſing the *gift* to be *to A. and M. his wife for life*, the *remainder to B. and N. his* * *wife in tail, and that after the death of the aforeſaid A. and M. B. and N. and C. ſon of the aforeſaid B. and N. and D. ſon of the aforeſaid C. to the aforeſaid E. daughter and heir of the aforeſaid C. deſcendere debet*, &c.

23. *And* note per Cur. that where the *writ is*, and *that after the death of the donee, and W. ſon of the donee, without the word heir, &c. to the demandant deſcendere debet as ſon and heir of W.* ſuch writ ſhall abate, for he does not make himſelf heir to the donee; for it may be that W. was younger ſon; for in formedon in deſcender, the *demandant always ought to be made heir to the donee, and to him who was laſt ſeiſed*, &c. Br. Formedon, pl. 62. cites 11 H. 6. 20.

Skrene demanded judgment of the writ; for *E. ought to be made ſiſter and heir to D.* & non allocatur, becauſe *C. was the laſt who was ſeiſed*, and ſhe is made heir to him, as ſhe ought. And therefore the tenant was compelled to anſwer. Quod nota. Br. Formedon, pl. 25. cites 11 H. 4. 72.

24. In formedon *upon diſcontinuance*, the *demandant counted that deſcendit jus, &c.* and *not, quod deſcendit ſibi.* But *contra upon abatement againſt the abator* Br. Formedon, pl. 61. cites 19 H. 6. 30.

25. In formedon, if the deſcent be made [thus, viz.] *from the donee deſcendit jus, &c. to J. as ſon and heir to him*, and *from J. to R. as ſon and heir to him*, and *from R. to W.* as ſon and heir to him, and *from W. to him*, as ſon and heir, *and makes himſelf heir to the ſaid W. his father and no other*; albeit that *W. was not ſeiſed by force of the gift, but* ſome of the *others, by whom he has made the conveyance*, were ſeiſed, the writ is good, and ſhall not abate, becauſe he has made every one heir to the other. Per all the juſtices. Br. Formedon, pl. 37. cites 22 H. 6. 36.

S. C. cited, and ſays, that the moſt ſure way for the demandant is to make every one, who is named in the writ, to be ſon and heir in the writ, though they never were ſeiſed by force of the tail, and if he names them heir, it is not material whether they were ſeiſed or not, and by this means the demandant will be certain to make himſelf heir as well to the donee, per formam doni, as to him that was laſt ſeiſed. 8 Rep. 88. b. the 4th reſolution. Buckmer's caſe. —— F. N. B. 212. (H) S. P. and S. C. cited in the notes there (e) —— Hob. 51. in caſe of Freake v. Bindford.

26. *But* if the writ be [thus, viz.] *and from the donee deſcendit jus to J. as ſon and heir*, and *from J. to R. ſon of J.* and *from R. to W. ſon of R.* there *he ought to make himſelf heir to him who was laſt ſeiſed by force of the tail.* Per all the juſtices. Quod nota diverſity. Br. ibid.

S. P. Hill. 3 Car. C. B. Hetley. 78. Jenkins v. Dawſon.

27. Formedon *by two barons and their femes in jure uxoris*; the writ was, *& quod poſt mortem, &c. to the barons and their femes deſcendere debet*, where it ſhould be to the femes only, and it was amended; for it was not well. But per Wangforde, *in formedon in remainder*, he ſhall ſay, remanere debet to the baron and feme. Quod nullus negavit. Br. Formedon, pl. 4. cites 35 H. 6. 10. 13.

S. P. Hob. 1. and S. C. cited Mich. 11 Jac. Rot. 66. in caſe of Clanrickard (E. of) v. Sidney.

28. In formedon in deſcender, which is only by ſtatute, the *ſtatute is not re-hearſed*, but this is *inaſmuch as the writ is re-hearſed in the ſtatute*, as it is of the quod ei deforceat. Br. Action ſur le ſtatute, pl. 47. cites 5 H. 7. 17.

29. The *demandant ſhall make himſelf heir in formedon in deſcender to him who was laſt ſeiſed in fact*, and not of the laſt ſeiſin in law, and yet he *ſhall make mention in his writ of him who ſo* * *held eſtate though he did not enter in fact*, but ſhall not make himſelf heir to him; but yet the pleading of him who held eſtate is, to ſay, that he was ſeiſed; and ſo without ſeiſin in him, the writ ſhall not abate, which is ſeiſin in fact, as it ſeems. Br. Formedon, pl. 60. cites F. N. B. 212. (F).

None holds an eſtate but he who ſo was the anceſtor. Br. Omiſſion, pl. 8. cites 4 E. 2. and Fitzh. Formedon, 48.

49. —— But ſee there 11 E. 2. pl. 56. that *it is not holding* of an eſtate, *unleſs he* who held *was ſeiſed.* Brook ſays, *quære inde*, for the *deſcent to the heir who dies before entry is a ſeiſin in law*, and upon this the younger brother ſhall make himſelf heir to him of the body of his father. Br. Omiſſion, pl. 8.

* Orig. (tend.)

30. The clauſe of *(eo quod, &c.)* ſerves moſt conveniently when eſtate tail is ſpent, and ſo is well in formedon in reverter or remainder, but not in deſcender, unleſs *in ſpecial caſes.* 8 Rep. 88. b. a nota of the reporter.

31. In

31. In a formedon, the count was of a *gift to B. and hæredibus de corpore suo* legitime *procreat.* The tenant demanded judgment of the writ, for that (among other things) the word (procreat) ought not to be in the writ, but *exeuntibus.* But the court thought it might be amended. Het. 78. Hill. 3 Car. C. B. Jenkins v. Dawson.

This is only a state of the case, and the observations of the serjeant, and nothing is mentioned of the court in the whole report, and as to the opinion of Fitzherbert, he cites Br. tit. Pleadings, pl. 3. where Brooke makes a quære of it, and cites Litt. S. 26. where it is said, that if lands are given to the baron and feme, and to the heirs of the body of the baron, in this case the baron has estate in tail general, and the feme has only an estate for life, and the common form of precedents is accordingly.——† It should be 2 Lutw. 974 to 976.

32. In a formedon in descender, the demandant set forth *that* H. O. being *seised in fee, made a feoffment,* &c. *to* the use of *himself for life,* remainder *to* the use of *E. V. and Ellen his wife, for their joint lives,* and * after their decease *to* the use of the heirs of the body of the husband begotten *on the body of the wife*; that *H. O. died, and that,* by virtue of the said feoffment, the *husband and wife were seised,* that is to say, the husband in fee-tail, and the wife of the freehold, during their joint lives; that the *husband died, and* then the wife became *sole seised* for life, *remainder to* H. *her son*; *that the wife died,* and then the whole survived *to her son, and from him,* jus descendit *to the demandant, as cousin and heir of E. V.* (that is to say) *son and heir of Hugh,* who was *son and heir of H.* (the son) who was *son and heir of E. V. on the body of Ellen begotten*; in this case the seisin was alledged right, contrary to the opinion of Fitzherbert, who held that seisin must be thus alledged, (viz.) by virtue whereof the husband and wife were seised together, and to the heirs of the body of the husband begotten on the body of the wife, and must not say, that either of them were seised of a freehold for life, or of a fee-tail. Nelson. Abr. tit. Formedon, 879. pl. 12. cites † 1 Lutw. Rep. 974. Vaughan v. Rowland.

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(I) Pleadings, Writ and Declaration in the Remainder.

In formedon in remainder the plaintiff intitled himself, because the *issue in tail is dead without issue,* but does *not say the tenant in tail is dead without issue.* Holt Ch. J. held, that it must be shewn, that the tenant in tail is dead without issue; for that it is the very point of the action; and it must be shewn, that the first donee is dead without issue; and it is *not implied* at all, that because the issue is dead without issue, that therefore the tenant in tail is; for he may have other sons besides his eldest. 5 Mod. 17. Hill. 6 W. & M. Herbert v. Morgan.

1. WHERE a man conveys by remainder, he *ought to allege the gift, in tail, and all the remainders before him to be determined* by dying without issue, otherwise his writ shall abate. Br. Formedon, pl. 39. cites 39 E. 3. 27.

S. P. where the formedon in remainder is *brought as heir.* 8 Rep. 83 a. in a note of the reporters, in Buckmere's case.——Br. Omission, pl. 1. cites 42 E. 3. 19, 20.

2. In formedon in remainder or reverter, the demandant shall make *mention of the death of every one who held estate and survived,* &c. *contra in scire facias.* Br. Formedon, pl. 11. cites 42 E. 3. 20.

3. Formedon

3. Formedon in remainder was brought upon an eſtate *tail limited to B.* remainder *to C. in fee, and* was, *which, after the death of B. and C. to D. ſon and heir of C. remanere debet.* And the writ was adjudged good *without laying expreſsly the death of C.* though the form of the regiſter was ſo; becauſe the *laying of D. to be heir of C.* imports as much. Hob. 51. in caſe of FREAK v. BINDFORD, cites * 5 E. 5. 35. and 7 E. 3. 47, 48. cited in the regiſter.

* Same caſes cited 3 Lev. 219. and there it is ſaid, in the regiſter 243. they are mentioned to be ruled good, and that there is no mention there, of their being not good, but only that the form of the regiſter is better, Arg. and the court ſeemed to be of the ſame opinion. Trin. 1 Jac. 2. C. B. in caſe of Dinghurſt v. Batt.

4. If a *leaſe for life* be made to A. *remainder in tail to B.* remainder *in tail to C.* If *B. dies without iſſue in the life of A.* and afterwards a formedon in remainder is brought by *C.* he *ought to mention the remainder to B.* though it was determined and ſpent as aforeſaid; for the demandant, in the formedon in remainder, ought to mention all precedent remainders in tail. 8 Rep. 88. a. in a nota of the reporter, cites 8 E. 3. 19. a.

5. In formedon, the demandant *counted, that J. was ſeiſed, and aſſigned it in dower to A. and* after *granted the reverſion to G. for life,* the *remainder to S. in tail,* and that *S. was ſeiſed and conveyed to the demandant*; and the writ was, that J. granted, &c. and after the death of A. &c. to hold, &c. and that after the death of the aforeſaid G. remainder to S. &c. and does *not mention in the writ, whether the baron was ſeiſed, ſo that* there may be *dower*, &c. or not, and yet well, per Thorp. For it is the courſe of the chancery. Quære, for it is not expreſsly adjudged. Br. Formedon, pl. 8. cites 41 E. 3. 27. [487]

6. Formedon in the remainder, the writ was *præcipe quod redaat one meſſuage and one acre of land*, &c. ſo that if the aforeſaid donee ſhould die without heir, &c. that then the aforeſaid *meſſuage, land, and meadow* ſhould remain to the demandant, &c. ſo that there was *more in the perclaſe than in the premiſſes*, by this word *(meadow)*, &c. and therefore Fencot pleaded it to the writ. Finch. ſaid, you have had the view, therefore it is paſſed the advantage, and it *is only ſurpluſage*, which ſhall not abate the writ. Per Fencot, of falſe Latin, and thing apparent, a man ſhall have advantages always before judgment, quod non negatur; and the writ awarded good, and this by reaſon, that it is only ſurpluſage, as it ſeems. Br. Brief, pl. 68. cites 44 E. 3. 14.

7. J. S. and M. his wife brought formedon in remainder in right of M. of 3 meſſuages, which *A. gave to B. in tail, remainder to C. in fee* and ſets forth, *that after the death of the ſaid B. and C. to the aforeſaid J. S. and M. daughter and heir of E. brother and heir of D. ſon and heir of C. aforeſaid remanere debet by form of the gift* aforeſaid, *eo quod, the aforeſaid B. died without heir of her body iſſuing*, &c. The defendant pleaded in abatement of the writ, that by the form in the regiſter, demandant ſhould have ſuppoſed, that *after the death of B. and C. to the aforeſaid J. S. and M. as couſin and heir of C. remanere debet, &c.* But it was held good enough by three J. againſt Warburton J. becauſe it appears to the court, by the pedigree ſet down, that ſhe is, and muſt needs be couſin and heir

heir to C. And that the form in the regiſter may bear ſuch an alteration. Hob. 51. Hill. 11 Jac. Rot. 30. Freak v. Bindford.

8. In formedon in remainder, the demandant declared of a *gift to A. for life, remainder to M. the wife of A. and the heirs of her body, by A.* ita quod, *after the death of A. M. and E. their daughter, to* (the demandant) *G. ſon and heir of E. remanere debet*, &c. The defendant *pleaded* in abatement, *that E. had iſſue F. a ſon and heir, who ſurvived M. and E. not named in the writ, judgment* of the writ; and the court upon the firſt argument inclined, that the writ was ill by reaſon of the omiſſion of F. who had a *right though* he had *never any ſeiſin*. But afterwards, upon a further argument for the demandant, in which the * above and other books were cited, they gave judgment to anſwer over niſi cauſa, within a week. 3 Lev. 218. Trin. 1 Jac. 2. C. B. Dinghurſt v. Butt & al.

* Pl. 3. Marg.

(K) Pleadings, Writ and Declaration in the Reverter.

In formedon in reverter, he ought to mention the eldeſt brother, who

1. *IN formedon in reverter, omiſſion* is not material, *unleſs he who is omitted* in the deſcent *ſurvived his father*. As where the father has iſſue two ſons, and the eldeſt dies in the life of his father without iſſue, there the omiſſion of him is not material. Br. Omiſſion, pl. 10. cites * 18 E. 2.

ſurvived the father, &c. becauſe he held the eſtate, although he was not ſeiſed of the land. F. N. B. 220. (D)——* S. C. cited F. N. B. 489. in notes there. (a)

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If one brings formedon in the reverter

2. In formedon in reverter he need not ſhew otherwiſe, but *that the donee died without heir of his body*, though 20 were ſeiſed after his death, &c. Br. Formedon, pl. 37. cites 22 H. 6. 36. per all the juſtices.

or remainder as heir, the *omiſſion of an eldeſt ſon, who ſurvived his father*, or the like *in the pedigree of the part of the donor*, or of him in remainder, ſhall abate the writ. *But of the part of the donee*, (though the donee had many iſſues in lineal deſcent, inheritable to the eſtate tail, and who held the eſtate) the *demandant need not name any* of the iſſues in the clauſe, et quæ poſt mortem; but ſhall ſay, *et quæ poſt mortem of the donee ad ipſum reverti debet, eo quod* the donee *obiit without iſſue*. Becauſe the demandant is a * *ſtranger to the p digree of the donee*. And alſo becauſe if the iſſue ſhall be ſuppoſed by the writ to die without iſſue, yet it may be, that the eſtate tail is not ſpent; for the *iſſue may have brothers or couſins inheritable to the donee*, and the land ought not to revert to the donor ſo long as the eſtate tail continues. 8 Rep. 88. a. in a nota of the reporter in Buckmere's caſe.—And he ſays that in ſome ancient written regiſters, the clauſe is, (eo quod the iſſue died without iſſue) but the printed regiſter which intimates the moſt ancient and trueſt precedents, is (et quod poſt mortem of the donee reverti debet, eo quod the donee died without iſſue,) and cites 22 H. 6. 36.——* D. 216. a. pl. 56. Trin. 4 Eliz. Anon.——But adds a quære of formedon in the remainder.

Brownl. 134. S. C.

3. A formedon in the reverter was brought by J. S. and F. his wife againſt W. R. of divers meſſuages and lands in E. which lands A. *and the ſaid F. then his wife did give to B. and C. to the uſe of E. daughter and heir of Sir P. S. Knt. and the heirs of her body, & quæ poſt mortem prædict. Eliz. ad præfatum F. revertere debent,*

debent, &c. The defendant pleaded in abatement of the writ, that the ſaid F. at the time of the death of the ſaid Eliz. *was married to the plaintiff, ſo that the right* of the ſaid lands *ſi quod*, &c. *to her huſband and her did revert*, and ſo by the writ it ought to have been ſuppoſed; upon which the demandant did demur in law. It was adjudged, that the writ was good: and this *difference* taken, if it were a *formedon in the deſcender*, upon a deſcent to the wife, there the deſcent *muſt be* made in the writ *to the wife alone*, for the deſcent followeth the blood, and to that the huſband is a ſtranger; *but* in a formedon *in the reverter*, where nothing is already veſted, but the right only returns, there this right *may be* layed to return either to the wife alone, or to the huſband and wife: Hughes's Abr. 966. pl. 7. cites 33 H. 6. 54. Mich. 11 Jac. in C. B. The Earl of CLANRICKARD, and the Lord Viſcount Sidney's caſe, Hob. 1. and 2.

4. Note. If the demandant in a formedon in the reverter, be *barred of a third part of the land upon her own ſhewing*; as where *the demandant ſheweth, that a fine was levied of a third part* of the land; in ſuch caſe, the whole writ of formedon, brought for the whole land, ſhall abate; for that the writ is *teſtified by the demandant's own ſhewing; and that in a ſubſtantial point. Hughes's Abr. 966. pl. 2. cites Hobart. 279. Mich. 13 Jac. in the Earl of Clanrickard's caſe.

* Nelſ. Abr. Formedon, (C) pl. 2. 5. C. and there this word is (ſatisfied). —But it ſhould be (falſified).

5. In a formedon in reverter, the caſe was, Wm. Veſcy the father, being ſeiſed in fee, deviſed his lands *to his eldeſt ſon John Veſcy, and the heirs males of his body; and for default* of ſuch iſſue, *to William Veſcy, and the heirs males of his body*, being another ſon; and for default of ſuch iſſue, remainder over, &c. The *father died*, then *John entered and died without iſſue male, leaving two daughters*, Elizabeth and Sarah, the now demandants; then *Wm.* the other ſon *entered and* in conſideration of a marriage intended between him and Anne Hewet, he *made a feoffment to two truſtees, and their heirs*, habendum *to the uſe of* the ſaid *Wm.* the feoffor, *for life*, then to *Anne, his intended wife, for life*, (who was now tenant) remainder to the uſe of *the heirs males of the ſaid Wm. and Anne in ſpecial tail*, remainder *to his own right heirs, with warranty* from him and his heirs, to the feoffees and their heirs; *and* afterwards he *died ſeiſed without any iſſue*; after his death *Anne his widow entered*, and had the poſſeſſion, and the demandants Elizabeth and Sarah, *the daughters*, and co-heirs of John, and couſins and co-heirs of William Veſcy the teſtator, *brought a formedon in reverter*; Anne the *tenant would rebut*, and bar them of the reverſion *by this collateral warranty of her huſband* William Veſcy, *who was tenant in tail, as deſcending on them as couſins and co-heirs, who were likewiſe couſins and coheirs of the donor*: the court was divided, (viz.) the Ch. Juſtice Vaughan and Archer for the demandants, who held this warranty of the tenant in tail, though it is a *collateral warranty*, will not bar the donor and his heirs of the reverſion. Nelſ. 880. Abr. tit. Formedon, (C) pl. 4. cites Vaugh. 360. Bole v. Horton.

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6. Formedon

6. Formedon in reverter: the tenant demurred to the declaration, for that *no explees are alledged in any donor*, and the books go upon this difference, that where a fee-ſimple is demanded, (as it is always in a formedon in reverter,) there the taking the profits muſt be alledged both in the donor and donee; *but where an eſtate tail* only is demanded, then it is ſufficient to alledge the explees in the donee only. 2 Lutw. 963. Hill. 3 W. & M. Hunlock v. Petre.

(L) Pleadings, Writ and Declaration by Parceners.

1. FORMEDON ſhall be of the ſeiſin of him, who was laſt ſeiſed. Br. Formedon, pl. 5.

But if *one enters into the whole, and has iſſue and dies*, and the *other* ſiſter *dies without iſſue before any entry*, the *iſſue of the other ſhall have*

2. *As* if land *tailed deſcend to two daughters*, and *one enters into the whole, and dies without iſſue*, and the *other has iſſue and dies*; the iſſue ſhall have *two writs* of formedon, the *one of the ſeiſin of his grandfather, as heir to the grandfather of one moiety*, and *ſhall not ſay, that his mother inſimul tenuit*, for ſhe was * not ſeiſed, *and* he ſhall have *another formedon of the other moiety, as heir to his aunt, who inſimul tenuit with his mother*, and yet his mother was never ſeiſed. Per Wiching, quod nota, for it was not denied. Br. Formedon, pl. 5. cites 40 E. 3. 8.

two writs of formedon, if a ſtranger, &c. enters; *or one and the ſame writ, by ſeveral præcipes*; [but in ſuch caſe] *of the one moiety, he ſhall make himſelf heir to his mother, who inſimul tenuit with his aunt*, by reaſon that his mother entered, and was ſeiſed, *and of the other moiety, ſhall make himſelf heir to his grandfather*, becauſe the *laſt ſeiſin* is material here; and his *mother* was not ſeiſed of both moieties in tail, but *was abatre's againſt her ſiſter of one moiety*, and the *inſimul tenuit of the other moiety ſhall not prejudice him*, by judgment. Br. Formedon, pl. 54. cites 43 E. 3. 16.——* Was only an abatreſs. Br. Brief, pl. 508. cites 43 E. 3. 16. 27.

3. *And* it ſeems that he may have *one formedon* of theſe two moieties *by ſeveral præcipes*; and ſo ſee two formedons, by one and the ſame heir, upon one and the ſame gift, by reaſon that he claims by two ſeveral anceſtors ſub dono. Br. Formedon, pl. 5. cites 40 E. 5. 8. and 43 E. 3. 16 and 27. S. P.

4. In formedon the writ was *quod reddat* 20 *acres, which together with other* 20 *acres W. gave to R. and the heirs of his body*, and that after the death of R. and K. one of the daughters of the ſaid R. who them inſimul tenuit with J. another of the daughters of the aforeſaid R. to the aforeſaid demandant, ſon and heir of the aforeſaid K. deſcendere debet, &c. And it was held, that the writ is ill, for it *ought to be the moiety of* 40 *acres* of land, *becauſe* the writ *is which they held in common*; for it ſeems that *before partition, it ſhall be inſimul tenuit* by moieties, and *after partition, of acres which in purpartia tenuit*. But becauſe the tenant had had the view, he could not abate the writ. Br. Formedon, pl. 6. cites 40 E. 3. 35.

5. Formedon, that he render the *moiety of* 30 *acres of land, which D. together with another moiety of* 30 *acres of land, gave*, &c. where the writ ſhould be with the other *moiety of the aforeſaid* 30 *acres* of land, and therefore the writ was *abated*. Br. Brief, 133. cites 5 H. 5. 8.

6. Where land of *fee ſimple, and* land *tailed, deſcend to* 2 *ſiſters,* and they *make partition,* ſo that *one has the fee ſimple* land, *and the other the land tailed,* and *ſhe who has the land tailed aliens* and dies, her iſſue ſhall have formedon, and ſhall recover the whole. per Newton. Br. Formedon, pl. 2. cites 20 H. 6. 2. 13.

And after if *ſhe who has the land in fee ſimple aliens* it and dies, her iſſue ſhall have formedon, and ſhall recover the moiety of the land tailed. Quære of the recovery of the whole. Br. Formedon, pl. 2 cites 20 H. 6. 2. 13 ——— For if the *tenant ſhews the matter of the two ſiſters in the firſt formedon of the whole, they ſhall join,* and one ſhall recover the whole, per Portington, ibid. ——But Brook makes a quære thereof for that the *other ſiſter, who has the land, cannot join* in the formedon; for ſhe has her portion. *But if ſhe had aliened the fee ſimple land alſo, before the iſſue of the other brought the formedon,* then it ſeems that there both may well join.

7. Lands given *to A. in tail, remainder to the right heirs of B.* ——B. has iſſue 2 *daughters* C. and D. donee died without iſſue; demandants as heirs to C. and D. brought *formedon in remainder*; the writ ſhall abate; for it ſhould be brought by the *heirs of the ſurvivor* of the two daughters, becauſe they have the remainder *as purchaſors.* 3 Le. 14. Mich. 8 Eliz. C. B. Lady Stowell v. E. of Hertford.

(M) Plea, by Tenant in Abatement, and at what Time.

1. FORMEDON *is a writ of poſſeſſion, and no writ of right*; for there, though he cannot have another writ, yet *if the tenant can deſtroy the poſſeſſion, it is ſufficient.* Br. Formedon, pl. 31. cites 38 * E. 1. 37.

* This ſeems to be miſprinted in all the editions, and that it ſhould be 38 E. 3. 37. See Br. Jurisdictions Utrum, pl. 4. S. C. and P.

2. Formedon in deſcender, the demandant counted of a *gift* made *to W. and M. and to the heirs of their two bodies*; *and* that *after the death of the aforeſaid W. and M. and K. daughter of the aforeſaid W. and M. and H. ſon and heir of the aforeſaid K. to J. ſon of H. as couſin* and heir of the aforeſaid W. and M. *deſcendere debet,* &c. And the *demand was of the moiety of three parts of an acre* of land, and the tenant demanded judgment of the writ; for the *demandant had brought other formedon againſt him, of the other moiety* of the ſame land there demanded, ſuppoſing that after the death of the aforeſaid W. and M. and K. daughter, &c. and J. ſon of the aforeſaid K. who held together with H. ſon of the aforeſaid K. &c. by which writ he ſuppoſed the ſeiſin of H. and this writ is contrary, judgment of the writ; and it was held no plea by award, *without ſaying that H. was ſeiſed in fact*; for the writ is but a ſuppoſal, which may be falſe, and therefore it ſhall not abate this writ which is better; and alſo the other writ is of the other moiety. Br. Formedon, pl. 5. cites 40 E. 3. 8.

3. Formedon *in deſcender* by J. S. the tenant ſaid that *at another time, demandant brought formedon in remainder againſt him of the ſame tenements, by which he demanded fee ſimple, to which tenant pleaded in bar,* and ſo he prayed judgment of the writ. But per Belk.

S. P. per Fincheden, clearly; *contra if both had been of*

one and the same gift; note the diversity by him, and yet *by the one, he demanded fee simple, and by the other only tail.* Br. Brief, pl. 503. cites S. C.——Br. Estoppel, pl. 225. cites 40 E. 3. 14. 21.

Belk. the formedon in remainder is not more high than this writ is; for the formedon in descender is a writ of right in its nature; and because he did not take the first writ of the same gift which he took now, therefore the writ is good; per Finchden, J. quære. Br. Formedon, pl. 77. cites 40 E. 3. 21.

Arg. cites 8 E. 3. 55. that the writ abated after the view for *fault appearing in the writ* itself, and that in 46 E. 3. writ of cosinage abated after the view, because it appeared upon the writ itself that writ of besaiel lay, and not writ of * cosinage. But that in 40 E. 3. 35, 36. it was held, that after the view, nothing should abate the writ, but *what arose upon the view.* But it was insisted, that then it ought to have been pleaded, and that if it appears not on the record, the court can take no notice of it, though the writ itself, and the return of it, be brought into court; but the greater part of the justices thought that the court might take notice thereof, the writ being returned here, and a record of this court, though not entered upon the roll; and a respondeas ouster was awarded, nisi causa, &c. 3 Lev. 219. Trin. 1 Jac. 2. C. B. Dinghurst v. Batt.

4. If the tenant hath *had the view*, he cannot abate the writ. Br. Formedon, pl. 6. cites 40 E. 3. 35.

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Br. Formedon, pl. 62. S. P. cites 11 H. 6. 22.——

* Viz. of the demandant's own confession, that the estate of his ancestor was by reason of a remainder.

5. Formedon in descender, *the writ was J. N. gave* and this *immediately to his father*, where the *truth was, that he gave to one W. for life*, the *remainder to the ancestor in tail*; by which the *tenant said*, that he *ne dona pas in the manner*, &c. and the *demandant shewed the special matter, and that his father entered*; by which the *tenant, of his * conusance, pleaded to the writ, because mention is not made of the tenant for life*; and yet the writ was awarded good; for it is said, that the one writ and the other is good. Nevertheless Thorp said, that the writ is best, if it makes mention of the tenant for life; but quære in formedon in remainder, for there he shall shew deed. Br. Formedon, pl. 14. cites 44 E. 3. 8.

The Year, Book, 8. a. pl. 7.

6. In formedon, a fine with warranty was pleaded; and, as *to part*, the tenant said, that he himself was *seised at the time of the fine* levied, and *to the rest*, he said *nient comprise*, &c. Br. Fines, pl. 26. cites 46 E. 3. 14.

7. Formedon of a manor, which *the mother of the demandant held in purparty*, &c. the tenant demanded judgment of the writ, because he *did not shew that other land was allotted to the other sister.* Per Markham, this was a good exception in a formedon upon a *insimul tenuit*, but e contra here, for he cannot hold insimul, but with other lands, which Newton and Paston agreed. Br. Formedon, pl. 2. cites 20 * H. 6. 13.

* (20 H. 6. 13. b. 14.)

8. In formedon, the defendant *said, that after the gift he brought assise against the donee, and the seisin and disseisin was found, and he recovered*, judgment si actio. And it was held no plea, unless he says, that the *gift* was *mesne between the disseisin and the recovery*, or shews *how the gift was determined.* Br. Formedon, pl. 3. cites 27 H. 6. 8.

9. In formedon, *last seised* is a good plea, *and so conclude to the writ, judgment of the writ*, and not judgment *if the court will take conusance.* Br. Formedon, pl. 51. cites 38 H. 6. 18.

10. A man ſeiſed of lands in *gavelkind* had iſſue *three daughters, A. B. and C.* and *deviſed* all his lands *to A. in tail*, the *remainder of the one half to B. in tail, the remainder of the other half to C. in tail:* and *if B. died without iſſue*, the *remainder of her moiety to C. and her heirs*; and *if C. died without iſſue*, the remainder of *her moiety to B.* and her heirs; the deviſor died, A. and B. both died: whether C. in the remainder ſhould have one formedon for this land, or ſeveral formedons, was the queſtion? it ſeemed to all, that one formedon lyeth well for all the land; for that it was *by one ſelf-ſame-conveyance*, though the eſtate came by ſeveral deaths; the action was brought by the heir of C. after the death of C. 2 Brownl. 274, 275. 7 Jac. in C. B. Buckmer v. Sawyer. 8 Rep. 86, 87. b. Trin. 7 Jac. Buckmere's caſe.

11. Formedon in the *deſcender againſt A. B. and C.* who *pleaded non tenure*, and upon iſſue thereupon it was *found* ſpecially, *that A. and B. were leſſees for life, remainder to C.* and the queſtion was, whether the three were tenants as ſuppoſed by the writ? and the better opinion was for the demandant, for the tenants *ſhould have pleaded ſeveral tenancy*, and then the demandant might [muſt] maintain his writ. But by this general non tenure, it is *ſufficient, if any be tenant*; and the præcipe may be brought againſt one who is not tenant, as againſt a mortgagor or mortgagee. Brownl. 153. Trin. 14 Jac. Rot. 112. Pit v. Staple.

12. Formedon in remainder, (viz.) there were *three ſiſters*, the *eldeſt had an eſtate tail of a fourth part of* 140 *acres in three vills*, the *remainder to the other two in fee*; the *tenant in tail married the now defendant*, and then *they both joined in a fine ſur cognizance de droit, &c. and* declared the uſes to the huſband and wife, and the heirs of the body of the wife, remainder in fee to the right heirs of the huſband, with warranty againſt them and the heirs of the wife*; *ſhe died* afterwards *without iſſue*, and the other two *ſiſters bring a formedon in remainder againſt the huſband, who pleaded, as to* 100 *acres*, part of the lands in demand, *non tenure, and that ſuch a perſon was tenant*; *and* as *to the reſt, he pleaded this fine with warranty*; as to that part of the tenure the demandant demurred, and as to the reſt, he made a frivolous replication; to which the tenant demurred; and it was objected againſt the plea of *non tenure*, that the demandant ſhould have ſet forth in which of the vills the 100 acres were; beſides, he who pleads *non tenure* in abatement ought to *ſet forth who was tenant die impetrationis brevis originalis*; but adjudged, that the tenant is not obliged to *ſet forth where thoſe acres lie*, to which he pleads *non tenure*; neither is he obliged to ſet forth who was tenant die impetrationis brevis originalis; for it is ſufficient to tell the demandant who was tenant generally, and that he himſelf was not tenant *die impetrationis, &c.* but that *W. R. eodem die*, was tenant, which is certain enough. Nelſ. Abr. 288. Formedon, pl. 4. cites 1 Mod. 181. † Fowle v. Doble. S. C. Cart. 239. Trin. 25 Car. 2. C. B.—241. Mich. 25 Car. 2. C. B. adjudged for the tenant. *[492] † Paſch. 22. Car. 2. C. B.

13. In formedon in deſcender the tenant, *after imparlance, pleaded non tenure*; but upon demurrer it was reſolved by the whole court, that it is not pleadable after general imparlance, though it was objected, that general non tenure of the whole is; but non te-

nure of part is not. 3 Lev. 55. Mich. 33 Car. 2. C. B. Barrow v. Hagget.——cites 5 E. 3. 2. and 41 E. 3. 31.

Lutw. 849. b. to 865.— * This is misprinted, and should be *ſaid that ſix meſſuages*, &c.)

14. Formedon *of the remainder of Etwall cum pertin'*, &c. & *de* 35 *meſſuagiis*, &c. the tenant defendit jus ſuum quando, &c. and * the ſaid ſix meſſuages, parcel of the ſaid tenements in Etwall ſuperius petit' are, and time out of mind have been, parcel of the manor of Etwall aforeſaid; whereupon, for that they are *bis petit'* the tenant petit judicium de brevi; and upon demurrer to this plea, it was adjudged ill, becauſe the ſix meſſuages may be parcel of the manor, over and above the thirty-five meſſuages; for the manor might comprehend fifty meſſuages; it *ſhould have been, that the ſix meſſuages, parcel of the thirty-five meſſuages, are parcel of the manor*, and then they might appear to be bis petita. Nelſ. Abr. 882. Formedon (D.) pl. 2. cites 3 Lev. 67. † Chetham verſus Sleigh.

† Trin. 34 Car. 2. C. B. Lutw. 563. to 974.

15. Formedon in reverter; the *tenant pleads non tenure*; the demandant *replies, and maintains* his writ, *that he is tenant*; and upon demurrer to the replication, it was inſiſted for the tenant, that the demandant cannot maintain this writ, for no damages are to be recovered, becauſe upon ſuch a plea of non tenure he may enter; which is very true, if the plea had been non tenure *with a diſclaimer*, but not where non tenure is pleaded, and no more; for in the laſt caſe, nothing is diſowned, but the freehold, and it is probable he may have a reverſion in fee; and if ſo, then upon the plea of non tenure the demandant cannot lawfully enter; but upon ſuch a plea with a diſclaimer he may, becauſe the tenant hath diſclaimed the whole. Nelſ. Abr. 882. Formedon (D.) pl. 3. cites 3 Lev. 330. Hunlock v. Petre.

* Trin. 4 W. & M. C. B.

(M. 2) Plea by Tenant. In Bar.

1. *IF the donee be impleaded and leſes, and recovers in value upon voucher and has execution, and aliens and dies, or a ſtranger abates*, formedon lies *of the land recovered in value*, for it comes in lieu of the land which was given in tail, and the *writ ſhall be general, and if the tenant pleads ne dona pas*, the *demandant ſhall reply by the ſpecial matter* how other land was given in tail, and loſt, and this land was recovered in value, and conclude, *and ſo dona* [*gave*], and well, and yet this land was not given, but other land. Br. Formedon, pl. 75. cites old Nat. Br.

[493] If the iſſue in tail *aliens the aſſets and dies*, the *iſſue of that iſſue ſhall recover the land*; becauſe the lineal warranty deſcends only to him without aſſets. For neither the pleading the warranty without the aſſets, nor the aſſets without the warranty, is any bar in formedon in deſcender; but had he brought other formedon, he had been barred, and * to had the tail for ever. Co. Litt. 393. b.——* S. P. Obiter. Hob. 40. in caſe of Cowper v. Andrews.——† So it is in all the editions of Brook; but it ſhould be 21 E. 3. 9. pl. 28.

2. In formedon; the *tenant pleaded warranty and aſſets*, the *demandant pleaded riens per deſcent*; if it is *found that he had by deſcent*, he ſhall be barred of all, notwithſtanding that the deſcent be not to the value, &c. quære inde. Br. Formedon, pl. 32. cites † 21 R. 3. 10. per Wilby, Hill, and Shard.

3. If

3. If *tenant in tail of a rent grants it in fee with warranty, and dies, and aſſets deſcend in fee*; if the heir brings formedon of the rent, the warranty and aſſets ſhall be a bar, but if he diſtrains and does not bring formedon, it ſhall be no bar; for a rent cannot be diſcontinued. Br. Formedon, pl. 65. cites 33 E. 3.

4. In ſcire facias, *confirmation with warranty to the tenant for life of the tenant, and aſſets* deſcended *from him who made the warranty having right in tail*, is a good bar to the iſſue in tail, who brought the ſcire facias, to execute the remainder in tail by fine. Br. Formedon, pl. 12. cites 43 E. 3. 9.

5. If a *man gives land in tail, and warrants* the land *to him his heirs and aſſigns*; and *he aliens, and dies without iſſue*, the donor ſhall be barred in formedon in reverter by this warranty. Br. Formedon, pl. 15. cites 46 E. 3. 4.

6. In formedon, the *tenant pleaded a feoffment of the grandfather of the demandant*, whoſe heir he is, *with warranty*, judgment, &c. the *demandant ſaid, that the ſame grandfather gave in tail to his father, and entered upon him, and made the ſcoffment* with warranty immediately, ſo that the warranty *commenced by diſſeiſin*, judgment, &c. by which the tenant took other iſſue; and ſo ſee that collateral warranty, which commences by diſſeiſin, does not bind. Br. Formedon, pl. 16. cites 49 E. 3. 6.

7. In formedon, the *tenant pleaded in bar, that the grandmother of the demandant was ſeiſed in fee, and took to baron J. N. and had iſſue E. mother of the demandant*, and the ſaid *J. N. gave in tail to the ſaid E. and her baron, and after J. N. and his feme died, and the baron of E. died, and ſhe ſurvived and enfeoffed the tenant*, judgment, &c. and a good plea to bar the tail by the beſt opinion; for the ſaid E. was *remitted to the fee ſimple*, which voids the tail. Br. Formedon, pl. 63. cites 11 H. 4. 50.

8. Formedon in reverter *upon a gift in tail to the baron and feme, who died without iſſue*; the *tenant ſaid*, that the *donor enfeoffed the donees in fee*, & non allocatur, without *traverſing* the gift in tail; for it is only argument, &c. Br. Formedon, pl. 1. cites 2 H. 6. 15.

9. *Wherefore* he *ſaid, that after the gift the donor enfeoffed them in fee*, & non allocatur, without *ſaying that the donor was ſeiſed in fee* after the gift, *and ſo ſeiſed enfeoffed* the donees; quod nota; and ſo he did, and the demandant imparled. Br. Formedon, pl. 1. cites 2 H. 6. 15.

10. It was doubted, whether *judgment final againſt tenant in tail after the miſe joined* ſhall be a bar in formedon? Wherefore they took adviſement. Br. Formedon, pl. 56. cites 3 H. 6. 55.

11. In formedon, the *tenant pleaded a deed of the father of the demandant, with warranty and aſſets deſcended in fee* by the ſame father; the *demandant demanded oyer of the deed*, and had it, *and it appeared that* it was an exchange, and that *the father had land in exchange for the land tailed, and died ſeiſed thereof*, after whoſe death, the *demandant did not agree* to the exchange, *nor occupied it*, but utterly diſagreed to the ſame, *abſque hoc, that he had other land deſcended*

But it was admired, why the warranty and aſſets deſcended is not a bar, as well as in other caſes; for

scended to him by the same ancestor, and demanded judgment, &c. and held a good plea in avoidance of the warranty, and yet he confessed the warranty, and the descent in fee simple. Br. Formedon, pl. 40. cites 14 H. 6. 3.

In other cases, the descent only without entry is sufficient * *to bar the demandant*, if he does not enter into the land exchanged, because he has brought the action of formedon; contrary, it seems, if he had entered and taken *assise*, as he might; for an exchange is no discontinuance. Br. Formedon, pl. 40. cites 14 H. 6. 3.

Lineal warranty and assets descended, is a good plea in formedon in the descender; but if there be no warranty, the heir will not be barred. Litt. s. 749.

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12. If a man bring formedon, and the *tenant pleads warranty and assets descended in fee*, by which the demandant is barred, and *after the assets is recovered from him by elder title*, he shall have another formedon, and the first judgment shall not be a bar; for it was no *bar*, but *for a time*, per Markham. Quod nullus negavit. Br. Formedon, pl. 34. cites 19 H. 6. 37.

13. In *formedon of the gift* of J. the demandant is *nonsuited*; he may have other *formedon of the gift of W.* and the first recovery no estoppel. Br. Estoppel, pl. 162. cites 5 E. 4. 7, 8. and 7 E. 4. 19, 20.

The other editions are (9) and the last fol. in the year book is fol. 8. but it is in the long quinto, &c. of E. 4. pag. 9.

14. Formedon in descender of a *gift to the father and mother*; the *tenant said, that before the donor had any thing he himself was seised in fee*, and, being *within age*, *enfeoffed the donor in fee*, who was seised and gave ut supra, *and after*, the tenant *within age re-entered*, *and so* is *seised* in fee *in his remitter*. Br. Formedon, pl. 45. cites 5 E. 4. * 19.

and there the demandant maintained the gift, &c. absque hoc, that the tenant enfeoffed the donor, and the question was, if the traverse should be of the feoffment or of seisin supposed in the tenant within age. And there, pag. 12. it is said, that it seems, that the substance of the bar is the feoffment by the tenant himself, during his nonage, against which the demandant had maintained the gift, and traversed the feoffment over, which as it seems suffices in avoidance of the bar, &c.

15. Where the *issue in tail enters upon the discontinuee, and another ousts him*, he shall not have formedon unless *the discontinuee enters*. And in this case, in pleading, the *tenant shall not say that the heir after the death of his ancestor in tail, entered, and was seised in tail, but* it suffices to say, *that he entered and was seised, after the death of the father*. Br. Formedon, pl. 47. cites 7 E. 4. 19.

But Brook makes a quære of this and says, *it is a new right descended after*. Br. Formedon, pl. 50.—*But* per Cat. the

16. In formedon, the *tenant said that after the gift the demandant and two others were thereof seised, and enfeoffed W. S. whose estate the tenant has*, judgment si actio; and per Brian and Cat. J. *if the feoffment was* made by the demandant *in the life of his father without warranty by dedi, or other warranty*, it shall not be a bar in formedon, no more than a release in the life of the ancestor without warranty. But Trem. J. contra, and that the feoffment without warranty shall be a bar against the feoffor. Br. Formedon, pl. 50. cites 21 E. 4. 81.

plea is good, because *it shall be intended to be after the death of the ancestor*; for if it was in the life of the ancestor, he held it otherwise. But Brooke makes a quære thereof for it was not pleaded whether it was in the life of the ancestor, or after. Br. Formedon, pl. 50. cites 21 E. 4. 81.

17. In

17. In formedon, the tenant may *plead, that a ſtranger has recovered againſt him by ſuch writ, by elder title, by confeſſion of the tenant, and the eſtate of the now demandant meſne between the title of him who recovered, and the judgment, que eſtate of the recoveror the now tenant has*, and if he recovers by formedon in deſcender, he ought to aver that he is yet alive. Br. Judgment, pl. 151. cites 5 H. 7. 40.

18. A *bar in one* formedon in deſcender *is a good bar in any other* formedon in deſcender to be brought afterwards *upon the ſame gift.* Co. Litt. 393. b.

19. In a formedon in the deſcender brought *by A. B. and C. of* lands in *gavel-kind*, the *warranty of their anceſtor was pleaded in bar* againſt them; upon which they were at *iſſue, if aſſets by diſcent?* it was *found* by verdict, *that the father* of the demandants *was ſeiſed in fee*, being of the nature of gavelkind, *and deviſed the ſame to the demandants, being his heir by the cuſtom, and to their heirs equally to be divided* amongſt them; and if the demandants ſhall be accounted in of the lands by diſcent, or deviſe was the queſtion? it was the opinion of the court, that they ſhould be in by the deviſe; for they are now joyntenants, and the ſurvivor ſhall have the whole; whereas if the lands ſhall be holden in law to have deſcended, they ſhould be parceners, and ſo, as it were, tenants in common; and ſo by the opinion of the court, the warranty pleaded with aſſets was no bar. Hughes's Abr. 966. pl. 4. cites Paſch. 30 Eliz. in C. B. Leon. 113. Bear's Caſe. [495]

20. Land was *given to huſband and wife, and* to the *heirs of their two bodies* begotten; the *huſband made a feoffment* in fee, and died, leaving *iſſue a ſon* of that marriage; the *wife died* without making any *entry.* Adjudged, that this feoffment by the huſband made a diſcontinuance of the eſtate tail, which might have been purged by the entry of his mother; but now it cannot be done after her death, therefore his entry cannot be lawful; becauſe he muſt claim as heir of their two bodies; and he is prevented by the feoffment to inherit as heir to his father; and if he ſhould bring a formedon in deſcender, it muſt be, for that the donor gave the lands to the huſband and wife, & hæredibus de corporibus eorum, the huſband and wife, exeuntibus, & quæ poſt mortem prædict' the huſband and wife præfat' B. G. filio & hæredi ipſorum, the huſband and wife, deſcendere debent per formam doni, which cannot be in this caſe, becauſe by the feoffment he cannot inherit as heir to his father. Neſl. Abr. Formedon (A) 878. pl. 6. cites 8 Rep. 71. * Greenly's caſe. Hughes's Abr. 965. pl. 13. cites S. C. * Paſch. 7 Jac.

21. A. made a *feoffment to* the uſe of *himſelf for life*, remainder *to B. in tail; A. died, B. had iſſue a ſon and 2 daughters; B. and his ſon join in a feoffment with warranty and die without iſſue.* The daughters bring a formedon; the tenant pleaded this as a collateral warranty, where in truth it was lineal, and it was held naught; becauſe the warranty was lineal. Brownl. 153. Trin. 16 Jac. Rot. 62. Biſhop v. Coſſen.

(N) Pleadings in Abatement, or Bar by Confeſſing and Avoiding.

1. FORMEDON of the gift of R. the *tenant ſaid, that A. leaſed to R. for life, who gave*, by which *he entered for the alienation, which eſtate the tenant has* judgment, &c. the *demandant ſaid, that after this R. was ſeiſed in fee and gave*; and no plea, without *ſhewing how he came by it after*; by which he *ſaid, that after the death of A. T. was ſeiſed and infeoffed R. who gave*, &c. and the demandant ſaid that R. had nothing of the feoffment of T. priſt; and the others e contra. Br. Confeſs and Avoid, pl. 11. cites 3 H. 4. 17.

(O) Pleadings. In what Caſes there muſt be Profert, or Monſtrans of Deeds.

1. *FORMEDON in remainder*; the defendant muſt ſhew deed, and yet the deed *is not traverſable*. Br. Monſtrans, pl. 48. cites 21 E. 3. 49.

Br. Formedon, pl. 33. cites S. C. ——S. P. ibid. pl. 14. cites 44 E. 3. 8.——Br. Monſtrans, pl. 22. cites 45 E. 3. 28.——S. P. and yet he ſhall not count by the deed, quod nota in e bene, per Brian, in a note. Br. Monſtrans, pl. 110. cites 9 H. 7. 15.——S. P. F. N. B. 219. (C)

2. *But* he need *not*, *till* it be *demanded* by the party, per Finche. Br. Monſtrans, pl. 15. cites 41 E. 3. 23.

3. *Formedon of a rent-charge* againſt tertenant, who ſaid that the land is hors de ſon fee, judgment, if without ſpecialty, &c. & non allocatur, but was compelled to anſwer. And there 'twas agreed that, where the rent had its *commencement before the gift*, he might ſay, that ſuch a one was ſeized and gave, without ſhewing ſpecialty; *contra, if the rent commenced by this gift*, and this was the opinion in ancient time. But it was agreed, that *at this day all is one*, and that he need not ſhew ſpecialty in the one caſe, nor in the other; for if the anceſtor imbezels, or * burns the deed, the heir ſhall not be without remedy, and therefore was compelled to anſwer without ſhewing ſpecialty, quod nota. Br. Monſtrans, pl. 21. cites 45 E. 3. 14, 15.

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* S. P. per Marten. but Cott. contra. Br. Monſtrans, pl. 2. cites 2 H. 6. 14.

4. In formedon *in deſcender*, which is always executed, a man *need not* ſhew deed. Br. Monſtrans, pl. 34. cites 11 H. 4. 39.

Br. Nugation, pl. 4. cites S. C. —Ibid. pl. 10. cites S. C.——Br. Formedon, pl. 23. cites S. C.

Formedon in deſcender upon a gift of king E. 2. and counted of

5. If a *gift in tail* be by the king *by his letters patents* which is *executed*; yet the heir ſhall not have formedon againſt the letters patents, per Marten, clearly. Br. Monſtrans, pl. 2. cites 2 H. 6. 14.

the *gift* of the land *by letters patents*, &c. and per Brian and the beſt opinion, he muſt ſhew the letters patents, notwithſtanding that the *gift was executed*, and after the defendant ſhewed the letters patents, therefore Brook ſays, quære legem. Br. Monſtrans, pl. 112. cites 12 H. 7. 11.

6. In formedon in remainder, the *tenant demanded oyer of the deed*, and the *demandant would not ſhew deed*; the tenant ſhall go * ſine die; and yet if the tenant had anſwered without challenging the deed, it had been good. Br. Formedon, pl. 42. cites 38 H. 6. 19.

* *Orig.* [adieu]

7. Though *iſſue in tail be of a gift of rent in* tail, &c. which can't paſs but by deed, yet *if the gift be executed*, the * heir in tail ſhall have *formedon* without ſhewing deed; for he is *aided by the ſtatute of W.* 2. *cap.* 1. if the deed be burnt or loſt, per Littleton, Choke and Brian J. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

* S. P. Br. Taile and Dones, pl. 26. cites 4 H. 7. 10. per Keble and Fairfax; for the *formedon* is in the right.

8. *So* where it is *by way of defence*. Ibid.

9. Note that the *deed of tail belongs to the heir in tail*, and if the *father breaks it*, yet the heir ſhall have formedon, though it be of * *rent* without ſhewing of the deed; for formedon *is in the right*, but *contra of avowry or aſſiſe for this is in the poſſeſſion*. Br. Formedon, pl. 44 cites 4 H. 7. 10.

* S. P. Br. Monſtrans, pl. 112. cites 12 *H.* 7. 11. per Vavifour. —* S. P. Br. Formedon, pl. 52. cites 12 H. 7. 11. But Brook makes a quere of it.

10. Leaſe for life remainder in tail; tenant for life dies; remainder-man enters and dies; his iſſue ſhall have formedon and declare on an immediate gift, and not ſhew the deed of it; but otherwiſe if it was *to execute* it, per Hales J. Pl. C. 52. in caſe of Wimbiſh v. Talbois.—cites 18 H. 8. 4. Br. Monſtrans, 1.

Pl. C. 57. S. P. per Mountague Ch. J. agreed becauſe all paſſes at one time and by one livery.——But if it was by grant of reverſion, there though he was once ſeiſed, yet it ſhould be otherwiſe; for in the 20 lib. Aſſ. placito ultimo, the difference is taken between *remainder* and *reverſion*. Pl. C. 57. b.——Pl. C. 149.

Former Action.

(A) Pleadings. Good Plea, in what Caſes in general to the bringing a New Action.

1. THE bringing of a *quod permittat* by the anceſtor, is no eſtoppel to the heir to bring *aſſiſe of the ſame common*. Br. Eſtoppel, pl. 188. cites 15 Aſſ. 3.

2. *In aſſiſe by A. and B.* the tenant demanded judgment of the writ; for *at another time A. B. and C. brought aſſiſe, and appeared and made plaint, and* this ſame land was *put in view, and againſt this tenant, and which C. is yet alive not named*; & non allocatur; for if the firſt writ was ill brought, it is reaſon that this writ may be well brought, and alſo it may be that they entered, and C. releaſed to A. and B. and after they are diſſeiſed, and brought the [497]

the aſſiſe, by which the writ was awarded good; and it appeared that *in the firſt writ they were nonſuited.* Br, Brief, pl. 301. cites 31 Aſſ. 14.

3. If a man be barred in *treſpaſs*, yet he may have *appeal of robbery*; quod nota. Br. Eſtoppel, pl. 217. cites 2 R. 3. 14.

Though once a bar in a *perſonal action* is a bar perpetual; that is to be underſtood when it is a *bar to the right.*

4. A *bar* in a *former action wrongly brought* is not any bar in an action rightly brought; as where one delivers goods, and brings *treſpaſs* againſt the bailee for thoſe goods, and he is barred by verdict, or demurrer, yet he may bring *detinue* or *account.* Cro. E. 668. Paſch. 41 Eliz. C. B. Ferrers v. Arden.

But where an executor brought debt on bond as adminiſtrator, he not knowing that he was executor, and had taken adminiſtration, by which the action abated; this was only a *miſconceiving his action*, and is no bar in a new action brought by him as executor. Cro. J. 15. Robinſon v. Robinſon ——See 5 Rep. 32. b. 33. Robinſon's caſe.——6 Rep. 7. a. Ferrer's caſe—The meaning of Ferrer's caſe is that it is a bar *for the ſame individual thing*, per Holt Ch. J. Comb. 167.

5. *But* where a *title* is pleaded in *bar* to a thing demanded, and, by reaſon thereof, the plaintiff is barred upon *demurrer, or verdict*, the intereſt thereby is bound, and the plaintiff barred from bringing a new action, per Walmſley J. Cro. E. 668. Paſch. 41 Eliz. C. B. Ferrers v. Arden.

This caſe is reported Carth. 65 & 67. and ſays, that as to the matter in law, (viz.) the eſtoppel, the court gave no opinion; but judgment was for defendant on another point in pleading.

6. *A. brought treſpaſs againſt B.* for digging and carrying away turf and ſtones; B. pleaded a preſcription, and upon iſſue joined, a *verdict was for B.* afterwards *A. and J. S. bring treſpaſs againſt B.* and declare for digging and carrying away turf and ſtones; B. pleads that he was ſeiſed of a meſſuage or tenement there, and ſo juſtified by a preſcription; plaintiffs in their *replication traverſed the preſcription*, and the defendant *rejoined* by way of eſtoppel, *that A. ſuch a term brought treſpaſs againſt the defendant, wherein defendant pleaded the ſame preſcription, and upon iſſue joined thereupon, it was found by verdict for defendant*, and the record was ſet forth in certain, and *averred*, that it was the *ſame title*, and that this A. and the A. in the other action, are the ſame perſon, and ſo concluded by way of eſtoppel by the verdict. Mich. 1 W. & M. B. R. Incledon v. Burges.

——Show. 27. S. C. reports that the court gave no opinion as to the eſtoppel, but only ſaid, than an eſtoppel upon a verdict goes a great way; and that iſſue in tail ſhall never falſify it; cites 1 Cro. 325. but if *one man is eſtopped, and he joins another with him*; whether this ſhall avoid the eſtoppel is a quære.——Comb. 166. S. C. reports that it being inſiſted by the defendant's counſel, that as to the matter in law, where in perſonal actions the perſon is once barred by verdict, he is for ever concluded, and cited 6 Rep. 7. Ferrer's caſe, to which Holt Ch. J. anſwered, that the meaning of Ferrer's caſe is, that it is a bar *for the ſame individual thing*; but *here is a new cauſe of action.* 13 E. 4. 2, 3, 4. there *one treſpaſs* is a *bar to another* by way of eſtoppel, but that is *for taking a villain*, but that is grounded, perhaps, on the reaſon of the *favour of liberty.* 7 H. 6. 8. In treſpaſs on an *iſſue, whether ſuch a one died ſeiſed*, a *verdict* was a bar to another action of treſpaſs by way of eſtoppel, becauſe there iſſue was joined on a *matter in the realty.* Dolben J. ſaid Ferrer's caſe is not like this; for here is a new cauſe of action, a new treſpaſs; but in Ferrer's caſe, it was another action for the ſame treſpaſs, and the court was entirely againſt what was ſaid by the defendant's counſel.

7. Action ſur caſe for erecting of a *nuſance* 20 February; the defendant pleaded a prior action, brought for erecting a nuſance 20 die Martii, and a recovery thereupon, and avers theſe to be the ſame nuſance and erection. The plaintiff demurred and judgment againſt him;

him; for he may have an action for *continuing of the ſame nuſance*, but can never have a new action for the *ſame erection*. 1 Salk. 10. Mich. 10 W. 3. B. R. Johnſon v. Long.

8. Where a *record of the ſame court* is pleaded in abatement, and the plaintiff demands *oyer* of the record, and it is not given him in convenient time, the *plea* ought not to be received, but the plaintiff may ſign his * judgment; and the rule was, that unleſs the defendant gave oyer of the record the next day, judgment ſhould be for the plaintiff. Carth. 454. Trin. 10 W. 3. B. R. Theobald v. Long. Carth. 517. Hill. 11 W. 3. B. R. Cremer v. Wickett. *[498]

9. *New conſequential damages* ſhall not give a new action in *aſſault* battery and maihem after a former recovery had. 1 Salk. 11. Trin. 13 W. 3. B. R. Fetter v. Beale.

10. The plaintiff *counted upon ſeveral promiſes for work and labour* in the pariſh of St. Mary le Bow, London, the *defendant pleaded* in abatement, that before this action brought the *plaintiff had libelled in the admiralty for the ſame cauſe of action*. Upon demurrer it was inſiſted for the plaintiff, that this was within the rule of SPARRIE's caſe. 5 Rep. 62. that a priority of ſuit, in an inferior court, is no plea to an action brought in any of the courts at Weſtminſter, and the whole court gave judgment againſt the defendant, quod reſpondeat ouſter. Gibb. 313, 314. 5 Geo. 2. C. B. Dudfield v. Warden.

(B) Pleadings. Varying the Places in which, &c. from what they were alledged to be in the former Action.

1. ASSISE *of lands in M.* the *tenant ſaid that* at another time the *plaintiff brought aſſiſe in T. and the ſame land put in view* which is now put in view, *ſuppoſing it in T.* judgment of the writ which now ſuppoſes it in M. and becauſe he did not deny but that M. and T. are diverſe vills, nor alledged judgment to be given in the firſt aſſiſe, nor did he alledge in fact that the land is in T. therefore the plea was not allowed; and ſo it ſeems here, that *record is no eſtoppel, unleſs judgment was given in that writ*, quod nota. Br. Eſtoppel, pl. 137. cites 30 Aſſ. 32.

2. *Aſſiſe*, the *defendant ſaid that at another time the plaintiff brought cui in vita of the ſame lands againſt J. S. which eſtate this tenant has*, judgment if a writ of a baſe nature may be brought; the *plaintiff ſaid that the ſame J. S. diſclaimed in the cui in vita, by which the now plaintiff entred, and was ſeiſed till by the defendant diſſeiſed*, and good maintenance of the writ. Br. Maintenance de Brief, pl. 32. cites 33 Aſſ. 5.

(C) Pleadings;

(C) Pleadings; Againſt the ſame Parties, with a different Charge, as charging the one as Principal, and the other as Acceſſory, and after Vice Verſa.

Br. Peremptory, pl. 85. cites S. C. And it was awarded, that the plaintiff capiatur.

1. APPEAL of *maihem againſt A. as principal, and B. as acceſſory*, the *defendant ſaid, that the plaintiff*, at another time, *brought ſuch appeal againſt B. as principal, and A. as acceſſory*, and appeared to it, and after was nonſuited; judgment, if, &c. by which he took nothing by his writ. Br. Eſtoppel, pl. 143. cites 40. Aſſ. 1.

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Former Suit.

(A) Former Suit in Equity. In what Caſes it is a good Plea.

1. THE defendant pleads, that the plaintiff brought a *former ſuit for the ſame matters, which ſuit is ſtill depending for ought he knows to the contrary.* It was inſiſted for the plaintiff, that this plea was not good, becauſe he does not poſitively aver, that the former ſuit is ſtill depending; and no iſſue can be taken upon his knowledge to the contrary. But the Maſter of the Rolls allowed the plea, becauſe the defendant [plaintiff] ought not to have *ſet it down to be argued*, for by that he *admits that the former ſuit is depending*; but the plea *ought to have been referred* to a maſter, to examine whether there was a former ſuit depending for the ſame matter, or not; and ſaid, that there needs no poſitive averment, that the former ſuit is ſtill depending, for that is examinable by the maſter; and the defendant *never ſwears a plea of a former ſuit depending*, but it is always put in without oath. Vern. 332. Trin. 1685. Urlin v. .....

2. The general rule is, that the party ſhall not be twice vexed for the ſame cauſe of action; but then it muſt appear, that the *court firſt poſſeſſed of the cauſe had juriſdiction*, and nothing ſhall be intended to be within the juriſdiction of an inferior court, but what is *averred* ſo to be. per Eyre Ch. J. Trin. 5 Geo. 2. Gibb. 314. in caſe of Dudfield v. Warden.

Fractions.

(A)

1. THE law will divide the *operations of acts* done, and *place one before another*, though done at one, or ſeveral times; as if tenant for years makes leaſe for life, &c. the law ſays, that leſſee was ſeiſed in fee, and demiſed for life, yet before he made the leaſe for life, he was not ſeiſed in fee, but by making it he became ſeiſed in fee, and gained the reverſion to him, for ſo long as the leaſe ſhall continue; ſo if A. conveys a manor by feoffment, now the manor does not paſs, and yet by attornment of the tenants it paſſes in ſome reſpects from the time of the feoffment, and ſo as to paſſing the manor, the attornment ſhall relate to other time than that in which it was made; ſo that in ſome caſe, the law makes a thing done after another act, as if it had been done before, and other acts done at one time, as done at ſeveral, and joint acts as ſeveral. And. 301. in caſe of Matthew v. Johnſon and Taylor.

2. *Deviſe* was allowed to work by fractions. See Deviſe, ( ) Nurſe v. Yarwouth.

(B) As to * Eſtates. [500]

1. THE *law* * *loves not* fractions of eſtates, nor to divide and multiply tenures; and therefore jointenancies were favoured, per Holt Ch. J. 1 Salk. 392. Hill. 12 W. 3. B. R. in caſe of Fiſher v. Wigg.

* See Eſtate, (J. b) pl. 9.

* 1 Rep. 87. Corbet's caſe.—As to *rent common*, &c. there may be, but not as to land; yet one *parcener*, by feoffment, may enjoy the land one part of the year and the other the other part, becauſe, it is only as to *poſſeſſion*, or taking the profits, but is not ſeverance of the inheritance; per Walmſley J. 1 Rep. 87. Paſch. 41 Eliz. C. B. in Corbet's caſe.—Wms's Rep. 21. per Holt.

2. *Act* of *parliament* may make diviſion of eſtates. 1 Rep. 137. Hill. 31 Eliz. in Chudley's caſe.

3. *Seigniory*, or *rent*, cannot be *ſuſpended in remainder*, and in eſſe for a particular eſtate in poſſeſſion, for then will enſue fraction of eſtates, and particular eſtates will be created without donors or leſſors againſt the rules and maxims of the law. 9 Rep. 134. b. Mich. 9 Jac. in the court of wards, in Aſcough's caſe.

See 1 Rep. 45. b. in Alton-wood's caſe.

4. Nor can they be *ſuſpended* for part, and in eſſe for part, *in reſpect of the land out of which* it is iſſuing. 9 Rep. 134. b. in Aſcough's caſe.

Vent. 277. per Hale. Ch. J. cont. as to the rent; for where the leſſor does not enter wrongfully, there can be no ſuſpenſion or extinguiſhment; and there can be no apportionment againſt the *agreement of the parties*. Mich. 27 Car. 2. B. R. Hodkins v. Robſon and Thornborough.——2 Lev. 143. S. C.

5. Where

5. Where the copyholder has the *nomination of his ſucceſſor*, Coke Ch. J. conceived, he cannot nominate part to one, and part to another, nor divide it into fractions. 2 Brownl. 199. Trin. 10 Jac. C. B. Rowles v. Maſon.

Mo. 894. Mich. 16 Jac. C. B. S. C. Sir Geo. Shirley v. Underhill and Burſey.

6. Advowſon is an *hereditament incorporeal*, and may be divided by fraction, ſo as one ſhall have the nomination, and another the preſentation; and the nomination may be appendant to a manor to one, and the preſentation in common to the other. per Hutton, J. Jo. 25. Hill. 20 Jac. C. B. cites Sir George Shirley's caſe.

This ought to be underſtood if

7. *Eſtates* ſhall *not paſs by* fractions. Arg. 2 Mod. 113. in caſe of Pigot v. the Earl of Saliſbury.

there be no inconvenience the other way, but frequently *to avoid a tort*, or an *inconvenience*, the judges have interpreted eſtates to paſs by fractions. Arg. 2. Jo. 69. Hill. 28 Car. 2. B. R. S. C. cites 12 E. 4. 4. Co. Lit. 42. 26 H. 8. 13. Roll. Eſtate, 854. Clanrickard's caſe.——1 Rep. 76. Bredon's caſe.

(C) As to Time.

1. AN *act of record* will not admit any diviſion *of a day*, but is to be ſaid done the firſt inſtant of the day, Arg. and judgment, accordingly. Paſch. 23 Eliz. Mo. 137. in Shelly's caſe.

Hard. 24. S. C. cited.

2. If the *king's tenant pays his rent upon the day*, the king's ſucceſſor ſhall have it paid over again; though otherwiſe it is in caſe of a common perſon. Mich. 11 Jac. 10 Rep. 127. b. cites 44 E. 3. 3. b.

3. *Aſſumpſit, to pay* 40 *l. by* 5 *s. per month*; where a man brings an action for breach, on the firſt day, it is beſt to count of the damages for the entire debt; for he cannot have a new action; but he muſt not declare that the 40 l. is not paid, nor any part of it; [501] for the 40 l. is not yet due. Cro. J. 505. Mich. 16 Jac. B. R. Beckwith v. Nott.

4. In preſumption of law, when a thing is to be done upon one day, all that *day* is allowed to do it in for the avoiding of fractions in time, which the law admits not of, but in caſe of neceſſity. Per Roll. Ch. J. Sti. 119. Trin. 24 Car. B. R. in caſe of CORNISH v. CONSIE, cites H. 14 Jac. More v. Muſgrave.

5. If a *biſhop collates the ſame day that he dies*, his ſucceſſor ſhall preſent. Arg. Hard. 24.

6. Inſurance for H.'s life; H. died on the laſt day. Per Holt, Ch. J. The law makes no fraction *in a day*; yet, in this caſe, he dying after the commencement, and before the end of the laſt day, the inſurer is liable, becauſe the *inſurance* is *for a year*, and the year is not compleat till the day be over; yet, if A. be *born* on the 3d day of September, and on the 2d day of September, 21 years afterwards, he makes his will, this is a good will; for the law will make no fraction of a day, and by conſequence he was of age. 2 Salk. 625. Trin. 11 W. 3. B. R. at Guildhall. per Holt, Ch. J. in Sir Robert Howard's caſe.

Fraight.

(A) Fraight. How much. In what Caſes.

1. WHERE a ſhip *goes from one port to another, and there unloads*, and then *goes over to another place, but* in her paſſage, *before her ſecond unloading, is loſt*, the owner ſhall not recover for freight, but from the time of the loading to the unloading, and nothing for the ſecond loading; for if a ſhip be loſt before her unloading, no fraight ſhall be paid, but every one muſt bear his part of the loſs; and this is the reaſon that mariners loſe their wages in ſuch caſes. Sid. 236. Hill. 16 & 17 Car. 2. B. R. Anon.

2. If a merchant *put in more goods than were conditioned*, in ſuch caſe the maſter may *take what fraight he pleaſe*. Mal. Lex. Merc. 99. Molloy, 258.

3. If a ſhip be fraighted *by the great*, poſito 200 tons, for the ſum of 600 l. *to be paid at the return*; the ſaid ſum of 600 l. is to be paid, although the ſhip were not of that burthen. Mal. Lex. Merc. 100. Molloy, 260.

4. If the like ſhip of 200 tons be fraight, and the *ſum is not* (either by the great or ton) *expreſſed*; then ſuch fraight as is accuſtomed to be paid in the like voyage is due, and ought to be paid accordingly. Mal. Lex. Merc. 100. Molloy, 257.

5. If the like ſhip of 200 tons be fraighted *by the ton, and full laden, according to their charter-party*, then fraight is to be paid for every ton; otherwiſe but for ſo many ton as the lading in the ſame was. Mal. Lex. Merc. 100. Molloy, 256.

6. If the ſhip of 200 tons be fraighted, and *named to be of that burthen in their covenant*, and, being fraighted by the ton, ſhall be *found to be leſs* in bigneſs, there is no more due to be paid than by the ton, for ſo many as the ſame did carry and brought in goods. Mal. Lex. Merc. 100. Molloy, 257.

7. If the like ſhip be fraighted *for* 200 *tons, or thereabouts*, this addition (or *thereabouts*) is within 5 tons commonly taken and underſtood, as the moiety of the number 10, whereof the whole number is compounded. Mal. Lex. Merc. 100. Molloy, 257.

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8. If the like ſhip be fraighted *by the great, and the burthen* of it is *not expreſſed* in the contract, yet the ſum agreed upon is to be paid, without any cavillation. Mal. Lex. Merc. 100. Molloy, 257.

9. If fraight be agreed upon for the commodities laden, or to be laden, for *a certain price for every pack*, barrel, butt, and pipe, &c. *without any regard had to the burthen of the ſhip*, but to give her the full lading: no man maketh doubt, but that the ſame is to be performed accordingly. Mal. Lex. Merc. 100.

10. If fraight be contracted *for the lading of certain cattle*, or the like, from Dublin to Weſt-Cheſter, if *ſome* of them happen to *die before the* *But* if the fraight be contracted

for the transporting them, if *the ship's arrival* at West-Chester, the whole fraight is become due, as well for the dead as the living. Molloy, 256.

death happens, there ariseth due no more fraight than only for such as are living at the ship's arrival at her port of discharge, and not for the dead. Molloy, 256.——*But* if the cattle or slaves are sent aboard, and *no agreement* is made, *either for lading or transporting* them, *but generally*, then fraight shall be paid, as well for the dead as the living. Molloy, 256.

11. If fraight be contracted for the *transporting of women*, and they happen in the voyage to be *delivered of children on ship-board*, no fraight becomes due for the infants. Molloy, 256.

12. If goods are sent on board *generally*, the freight must be according to freight for the like accustomed voyages. Molloy, 257.

13. If *goods* are *brought* into a ship *secretly against the master's knowledge*, the same may be subjected to what freight the master thinks fitting. Molloy, 258.

(B) Fraight. Due. In what Cases.

1. *COVENANT* was made by the merchant with a master of a ship, viz. *that if he would bring his freight to such a port*, then *he would pay him such a sum*; master brings action, and shews that *part* of the goods *were taken* away *by pirates*, *and* that *the residue* of the goods *were brought to the place appointed*, and there unladed, and that the merchant hath not paid, and so the covenant broken. And the question was, whether the merchant should pay the money agreed for, since all the merchandizes were not brought to the place appointed? and the court was of opinion, that he ought not to pay the money, because the agreement was not by him performed. Brownl. 21. Trin. 9 Jac. Bright v. Cowper.

* Roll. R. 312. S. C. takes no notice of the not mentioning any time. Neither does 3 Bulf. 152. 153. S. C. but only that Coke Ch. J. said, that if one assumes to pay another so much within a year, but no certain time limited when this shall be, he ought here to give *notice of the time* when it shall be, that so he may then attend it.——Molloy, 253. S. C. according to Jenk. 324. pl. 39.

2. A. contracts with B. and assumes to him *to deliver* to him 100 *quarters of barley on ship-board* in such a port, viz. *at Barton Haven in com' Ebor.* and does *not mention at what time it is to be carried thither*, *&c.* A. [B.] assumes to B. [A.] to carry it, and to be at this port with it, and B. [A.] agrees to pay so much for [the fraight of] the said quarters of barley. A. [B.] arrives with his boat there. A. is bound to seek B. at the said haven, and to deliver to him the said 100 quarters as aforesaid. A. does not perform this, although B. has performed his promise, and was there ready to receive it. B. brings an action on this assumpsit, and it well lies. The place in this case is certain, the time uncertain; the law gives convenient time. And in this case, B. after the said agreement came to the port and staid there a convenient time; and A. did not come, &c. Jenk. 324. pl. 39. cites Mich. 13 Jac. Atkinson v. Buckle.

[503] 3. Fraight is the *mother of wages*, and wherever fraight is due, wages are. If a *ship is lost before it comes to a delivering port*, no fraight nor wages is due; if lost *afterwards*, it is due at the last delivering

livering port. If *advance money* be paid before in part of fraight, and named ſo in the charter party, though the ſhip be loſt before it comes to a delivering port, yet wages are due according to the proportion of the fraight paid before; for the fraighters cannot have their money. Ruled per Saunders Ch. J. at Guildhall. 2 Show. 283. Hill. 34 and 35 Car. 2. Anon.

4. If the *ſhip in her voyage become unable without the maſter's fault, or* that the maſter or ſhip be *arreſted by authority* of the magiſtrates in her way; the maſter may either mend his ſhip or fraight another. * But in caſe the *merchant agree not thereunto*, then the maſter ſhall at leaſt recover his fraight, ſo far as he hath deſerved it. For otherwiſe, (except the *merchant conſent, or* † *neceſſity conſtrain* the maſter, *to put the goods into another ſhip* worſe than his own) the maſter is herein bound to all loſſes and damages, except both ſhips periſh in that voyage, and that no fault or fraud be found in the maſter. Mal. Lex Merc. 98.

Molloy, 254.——
* Molloy, 255.——
† If there be extreme neceſſity, as that the *ſhip is in a ſinking condition, and an empty ſhip is paſſing by*, or at hand, but then it

he may tranſlate the goods; and if that ſhip ſink or periſhes, he is there excuſed: muſt be apparent that that ſhip *ſeemed probable and ſufficient*. Molloy, 255.

5. If a maſter ſet forth his ſhip for *to take in a certain charge* or lading, and then *takes in* any *more*, eſpecially *of other men*, he is to loſe all his whole fraight; for by other men's lading, he may endanger his maſter's goods divers ways. Mal. Lex Merc. 99.

Molloy, 258.

4. If a ſhip (being fraighted *by the great for a ſum certain)* happen to be *caſt away*, there is nothing due for fraight: *but* if the ſhip be fraighted *by the tun*, or pieces of commodities and is *caſt away, and ſome goods are ſaved*, then it is made queſtionable, whether any fraight be due for the goods ſaved *pro rata*. Mal. Lex Merc. 100.

Molloy, 260. S. P. and in Marg. ſays, that whenever ſuch misfortune happens, the enſured commonly *tranſfer thoſe goods over to the aſſurers*, who take them towards ſatisfaction of what they pay by virtue of their ſubſcriptions.

7. If *goods* are *fully laded aboard, and the ſhip hath broke ground*, the *merchant*, on conſideration afterwards, reſolves not on the adventure, but *will unlade again*; by the law marine, the freight is due. Molloy, 254.

8. If it be *agreed*, that the maſter *ſhall ſail from London to Leghorn in two months*, and fraight accordingly is agreed on, if he *begins the voyage within the two months*, though he does not arrive at Leghorn within the time, yet the fraight is become due. Molloy, 255.

9. If fraight be taken for 100 *tuns of wine*, and 20 *of them leak out*, ſo that there is not above 8 inches from the buge upwards, yet the fraight become due: one reaſon is, becauſe from that gage the king becomes entitled to cuſtom; but if they be under 8 inches, by ſome, it is conceived to be then in the election of the fraighters to fling them up to the maſter for fraight, and the merchant is diſcharged. But moſt conceive otherwiſe; for if all had leaked out, (if there was no fault in the maſter) there is no reaſon the ſhip ſhould loſe her fraight; for the fraight ariſes from the tonnage taken, and if the leakage was *occaſioned through ſtorm*, the ſame, perhaps. may come into an average. Beſides in Bourdeaux, the maſter

ſtows not the goods, but particular officers appointed for that purpoſe, quod nota. Perhaps a *ſpecial convention* may alter the caſe. Molloy, 259.

10. A ſhip in her voyage happens to be *taken by an enemy*, and afterwards in battle is *retaken* by another ſhip in amity, *and reſtitution is made, and* ſhe *proceeds on*, in *her voyage*; the contract is not determined, though the taking by the enemy diveſted the property out of the owners, yet by the law of war, that poſſeſſion is defeaſible, and being recovered in battle afterwards, the owners become reinveſted: ſo the contract, by fiction of law, becomes as if ſhe never had been taken, and ſo the entire fraight becomes due. Molloy, 259.

[504] (B. 2) Fraight. Decreed in Equity.

1. MONIES agreed to be paid for the fraight of a ſhip were decreed to be paid, though the ſhip *did not arrive at the delivering port*, ſhe being unladed at another port, and *fraudulently cauſed by* one of the fraighters, (and who was likewiſe *a part-owner*) *to be condemned* there; but for the *value of the ſhip*, the plaintiffs could not be relieved in this court but at law. Mich. 26 Car. 2. Fin. R. 149. Norton & al. v. Barnard, Serle, & al.

2. A. was owner, and B. maſter of a ſhip; C. entered into a charter-party, by which A. agreed *that the ſhip ſhould ſail to New-England to take in fiſh* on the account of C. *and thence to Barcelona, and there to deliver the fiſh.* And *C. covenanted with A. to pay* the fraight *on delivery* of the fiſh. The ſhip arrived at Barcelona, and the *fiſh are delivered to D.* and *B. demanded the fraight of D.* and *D. demanded a deduction* out of the fraight *for* 170 *kintals of fiſh wanting*, as D. pretended, of what was to be delivered, and for damage of part of what was delivered. Croſs ſuits were commenced between B. and D. in the courts at Barcelona, by which means, the *fraight being ordered to be brought into court*, and conſideration to be had for damages for D. and by D.'s appealing after to a ſuperior court there, *B. finding his fraight not likely to be got out of court in ſome years, came away without any fraight for want of money.* Then *A. ſues C. on his charter-party here* for his fraight. C. brings his bill to ſtop the proceedings here, though the ſuit was not for the penalty, but only to recover damages. Ld. Chancellor, taking notice that the cauſe was not fully determined at Barcelona, becauſe the damages were not fully aſcertained, ordered that A. ſhould proceed to trial againſt C. upon his covenants, and therein give in evidence the non-payment of his fraight, and what damages he had thereby, and that C. might give evidence in mitigation of the damage. Mich. 33 Car. 2. 2 Chan. Caſes, 74. Newland v. Horſeman.

3. Though a *charter-party* is *worded ſo that no fraight can be recovered at law* upon it, yet they may be relieved in equity. Hill. 1699. 2 Vern. 210. Edwin v. E. India Company.

4. *As,*

4. *As*, A. and B. were part-owners of a ſhip, of which C. was maſter, and A. and B. by charter-party, dated 20 Feb. 1652, let her to fraight to the E. I. Company, and agreed to fit her up with all neceſſaries, ſo as ſhe might be ready to ſail by 10th of March then following, and ſhe was to go from port to port, *and to any port within the limits of the company's charter, as they ſhould direct, but to be diſpatched back for England on or before the 24th of January* 1684, *or ſo ſoon after as to ſave her moorſoon for England that year*; *or in default* of her being diſpatched within the time, *the owners were to pay four months demurrage*, at 7 l. 10 s. a day for her moorſoon ſo loſt, and her ſtay in India after the 20th January 1684. And there was this further clauſe, that the *company might detain the ſhip* in their imployment in trade or warfare, *for any longer time not exceeding* 12 *months*, after the 20th January 1684, *after the rate of* 7 l. 10 s. 6 d. a day demurrage, *untill the ſhip be diſpatched from the laſt lading port, or expiration of* 12 *months, which ſhall firſt happen*; *but after the* 12 *months expired, ſhe is to return to England, and the company not to be liable for any further demurrage, or any damage* that may accrue *by her detention after*. The company covenant *to pay fraight on the ſhip's arrival into England, for* 301 *tun, and demurrage from* 20*th January* 1684, *until ſhe be diſpatched for the ſpace of* 12 *months after the ſaid* 20*th January* 1684. And it was thereby provided, *that until ſix days after the ſhip's return to the port of London, and making a full diſcharge of all her lading the company are not to pay any of the ſums* of money agreed on for fraight or demurrage or for detaining her in India; *it being the intent of the parties, that if the ſhip ſhould be loſt* either in her outward or homeward bound voyage, *nothing ſhould be paid by the company for demurrage.*——The [505] ſhip ſet ſail according to the charter-party, and arrived in India, and was employed by the company in trading from port to port for one year and upwards. She arrived in India 23 November 1684, and was to enter into demurrage in four months after, which was the 23 March 1684, and the 12 months after (during which time the company by their charter-party might detain her) ended 23 March 1685. But the ſhip *was employed in the company's ſervice, ſo that ſhe did not arrive at Surat till* 1686, *and thence was ordered to Bombay*, where ſhe having been ſo long detained in thoſe ſeas, was ſurveyed, and *found not ſufficient for a voyage to England*, and on Sept. 24, 1686, *the ſeamen were diſcharged, and the ſhip left there.* The company refuſed to pay any thing for the fraight or demurrage, becauſe by the expreſs proviſion of the charter-party, they were not to pay till ſix days after the ſhip's arrival in England, and diſcharged of her lading. And if they were to pay any thing, yet they were to be charged with demurrage until March 23, 1685, only, and no longer, and ſo that it is provided by the charter-party, and refuſed likewiſe to account for the value of the ſhip, or ſhew how they had diſpoſed of her. The court held that though the *charter party was ſo penned, that nothing could be recovered at law*; yet the plaintiff had a juſt demand, and *ought to be relieved in equity*; and decreed the company to account for what they made of the ſhip, that they ſhould pay demurrage according to the rate mentioned in the

charter-party, and ſhould alſo be charged in reſpect of the fraight. But as to the quantum of the fraight, the court would further conſider of it, in regard, that by the charter-party, there are *ſeveral rates agreed on to be paid for the homeward bound cargo of the ſeveral ſorts of goods*, viz. for callicoes, &c. 21 l. a ton; for ſalt petre 18 *l.* a ton; for iron, copper, &c. 6 *l.* a ton; and therefore, before final judgment, would be informed what quantities of theſe reſpective commodities were *uſually brought home on ſuch a voyage*, and how much in proportion to each other. Hill. 1690. 2 Vern. 210. Edwin & al. v. the Eaſt India Company.

5. Fraight was *agreed* to be paid, not for the goods exported, but *only for goods imported*. No goods were provided by the factor abroad, ſo that the ſhip *returned empty*. The court decreed the payment of fraight, cited per Cur. Hill. 1690. 2 Vern. 212. as the caſe of Weſtland v. Robinſon.

(C) Who liable for Fraight or Loſſes.

1. IF a merchant in Ireland *conſign* goods to a merchant in London, and the *maſter ſigns a bill of lading*, the merchant here ſhall be liable for the fraight by the cuſtom of merchants, and held good. 2 Show. 443. Mich. 1 Jac. 2. B. R. Roberts v. Holt.

Molloy, 257.—— S. P. per. Nottingham C. Tr. 32 Car. 2. 2 Ch. Caſes, 36. Anon. ——The part-owners refuſing, applied to the admiralty for *ſecurity to be given* by the fraighters, and a prohibition denied in B. R. Gibb. 197. Hill. 4 Geo. 2. B. R. Dimmock v. Chandler.

2. Three part-owners of a ſhip, one refuſed to fit out the ſhip to ſea, and the *others fit out without his conſent, and the ſhip is loſt in the voyage*. Per Ld. North; the loſs of the ſhip ſhall be equally born by all three. For he that refuſed would have been intitled to one part of the fraight, and ſhould have had an account here of the profits; but if the other part-owners had *applied to the court of admiralty*, as regularly they ſhould have done, that court would have made an order, that on one part-owner refuſing to navigate the ſhip, the other two ſhould have had liberty to do it alone, and ſhould not have been *accountable* to the other part-owner, that refuſed to join, for any of the profits; and there, in caſe the ſhip had been loſt, the whole loſs muſt have reſted on thoſe two that ſet out the ſhip, but in the preſent caſe, the third perſon, that refuſed to join with the other two, would have been intitled to a ſhare of the profits of the voyage, if any had been made by the ſhip, and ſo ought to bear his proportion of the loſs. Hill. 1684. Vern. R. 297. Strelly v. Winſon.

[506] But where this is occaſioned by taking in more goods, eſpecially of other men

3. Where *part* of a fraight of a ſhip is *flung over board for ſaving the reſt*, the remainder ſhall be *contributory* to the loſs. But where part is *carried to land* and ſaved, that ſhall not be contributory to the loſs of the reſt being *taken by an enemy* for fear of whom the other was carried to land. Parl. Caſes, 18. Sheppard v. Wright——als. Dormer v. Wright.

than agreed for, it ſhall not be made good by contribution or average, but by the maſter's own purſe. For if he *overburthen* a ſhip above the true mark of lading, he ſhall pay a fine. Mal. Lex Merc. 99.—Molloy, 258.

(D) Who

(D) Who liable. How far.

1. THE charter-party values the ſhip at a certain rate, and you ſhall not oblige the *owner* further, and that only with relation to the fraight, not to the *value* of the ſhip. Per Finch. C. Mich. 29 Car. 2. 2 Chan. Caſes, 238. Anon.

2. Where an action is brought for fraight and *damages laid to double the ſum* of the penalty of the charter-party; execution ſhall not go beyond that penalty, though more ſhould be recovered in damages. Mich. 31 Car. 2. Fin. R. 435. Betſworth v. Clerk, Archer and al.

(E) Who liable. At what Time.

1. BY the courſe of merchants the *receiver is to pay* fraight on the receipt of the goods. Mich. 33 Car. 2. 2 Chan. Caſes, 75. in caſe of Newland v. Horſeman.

2. If a ſhip be *fraighted out and in*, there ariſes due for fraight nothing till the *whole voyage* be *performed*, ſo that if the ſhip die, or is caſt away coming home, the fraight outwards as well as inwards becomes loſt. Molloy, 257.

(F) Pleadings

1. INDENTURE of *charter party dated* 8 *Sept.* 38 *Eliz.* made between A. the plaintiff, and B. A. having *hired* of B. *a ſhip* for a voyage *to Dantzic for corn*; upon taking the ſhip, it was agreed between them, that the ſhip ſhould be laden with corn to Dantzick, and to ſail to Leghorn. Now by the ſaid indenture, upon conſideration *A.* had *agreed that B. ſhould have the moiety* of the corn, *quod tunc fuit, or afterwards ſhould be laden* in the ſhip in the ſaid voyage, *B. promiſed to pay the moiety of the money for the ſaid corn, quod tunc fuit, or afterwards ſhould be laden*, &c. And allegeth in facto, that upon the 9*th October*, 38 *Eliz. the ſhip was laden* with 60 laſtes of corn, and for non performance of this covenant brought the action. *B. pleaded* that the *deed was ſealed and delivered* the 28*th October*, 8 *Eliz.* et *quod ad tunc vel poſtea*, there *was not any corn laden there*, and *traverſes the delivery* thereof 9 *October, or* at any time *afterwards before the* 28*th October*, 38 Eliz. And it was thereupon demurred, (the truth is, the corn was caſt away between the 9th and 28th of October). Reſolved by all the court, that in regard, he declares upon a deed dated the 9th October, 38 Eliz. it ſhall be always *intended to be delivered*, and have his eſſence *at that time*, and at no other; and if he would afterwards confeſs it to be delivered at any other time, it is a departure from his declaration, Molloy, 252. f. 6

‡ 5 H. 7. 27. a.

as ‡ 5 H. 27. primo Eliz. D. 167. 1 H. 6. 4. and 5 Rep. fol. 1. And the words of the deed, that he ſhould pay for the corn then laden, or afterwards to be laden therein: this * word *tunc*, is *referred to* the time of the eſſence of the deed by the *delivery*, *and not to the date*; for if it were delivered 10 months after the date, he ſhould not have any benefit of the corn laden, and ſpent or ſold before the time of the delivery, therefore he ſhall not be charged with it for the time before the delivery, wherefore the plea and the traverſe are good. And it was adjudged for the defendant. Cro. J. 263, 264. Mich. 8 Jac. B. R. Offley v. St. Baptiſt Hicks.

2. A. aſſumed to B. for a valuable conſideration to *go ſuch a voyage* in ſuch a ſhip *before Auguſt following*. B. brings aſſumpſit and alleges a breach in the *non performance*. A. pleaded that before any breach, B. on the *4th April*, at ſuch a place, *exoneravit eum of the ſaid promiſe*. And upon demurrer, it was adjudged a good diſcharge; for as the action was grounded on a parol promiſe, it may be diſcharged by parol. Cro. C. 383. Mich. 10 Car. B. R. Langden v. Stokes.

Poph. 161. S. C.—— Palm. 397. Paſch. 21 Car. 1. B. R. S. C.

3. A. the maſter of a ſhip, covenanted with B. a merchant, *to go with his fraight the firſt fair wind*, and B. covenanted to pay ſo much for the fraight. A. brought action of covenant for his wages, and alleged that he had performed his voyage, B. *traverſed that he did not go with the firſt fair wind*. And upon demurrer, it was held, that the traverſe was not good; for it is only a circumſtance, and nothing is traverſable, but what is material. See Lat. 12. 49. Conſtable v. Clobery.

At firſt the court was divided, (viz.) Roll. Ch. J. and Aſk. againſt Jerman and Nicholas, but afterwards Nicholas changed his opinion, and it was adjudged for the plaintiff. Niſi cauſa. Sti. 186. Hill. 1649, B. R. S. C.

4. W. *was to raiſe* 500 *ſoldiers*, *and to bring them to ſuch a port*, and *C. was to find ſhipping*, for which he ſued upon the covenant though the other had not raiſed the ſoldiers; for that can be only alledged in mitigation of damages, and is no excuſe for the defendant; and adjudged that this was not a condition precedent, but diſtinct and *mutual covenants*, upon which ſeveral actions might be brought. Arg. 2 Mod. 75. cites Sti. 186. Ware v. Chappel.

5. In covenant, the plaintiff declared that he *covenanted* to ſail with a ſhip to D. and there *to take* 280 *men* of the defendant, and to carry them to J. and *defendant covenanted to have the* 280 *men ready* there, and to pay for the fraight 5 *l.* for each man; and that *defendant had not the* 280 *men* ready, *but only* 180. That the plaintiff took and carried them, but that defendant hath not paid him for them. Defendant *pleads* that he had the 280 *men ready and tendered them* to the plaintiff, but that he would not receive them: *but* the defendant ſaid *nothing* in his plea *as to the carriage of the* 180 men, *nor as to the non payment* of the fraight for them. And upon demurrer, the plaintiff had judgment, becauſe it was not a plea to the whole declaration, but only as to the carriage. Lev. 16. Hill. 12 and 13 Car. 2. B. R. Tompſon v. Noel.

S. P. 2. Jo. 216. Shower v. Cudmore.

6. A maſter of a ſhip *covenanted with A. to ſail to M.* and to have mariners ready to re-lade the ſhip, and then to return with the firſt fair

fair wind to L. and deliver the goods. *A. covenanted to pay ſo much* for the fraight and demurrage. Upon an action brought by the maſter for the freight, defendant *pleads that the ſhip did not return directly* to L. but *made ſeveral deviations, by which the goods were ſpoiled.* But upon demurrer, the plaintiff had judgment. For the *covenants are mutual*, and reciprocal, and each party may have his action againſt the other, but one is not pleadable in bar of the other. 3 Lev. 41. Trin. 33 Car. 2. C. B. Cole v. Shallet.

7. The maſter of a ſhip covenants *that the ſhip ſhall be* well *furniſhed with men*, and the fraightors covenant that the ſhip ſhall return in 12 months; it is a good plea that the ſhip was *not ſufficiently provided* with men. Show. 334. Mich. 3 W. & M. B. R. Wynne v. Fellowes.

Franchiſes. [508]

(A) What a Franchiſe, or Liberty is; And how it may be.

1. FRANCHISE *is* royal privilege in the hands of a ſubject Fin. 38.

2. At niſi prius at *Exeter, charter was ſhewn for the vill, that of iſſue ariſing within their vill, the inqueſt ſhall be taken by denizens inhabitants only*, and *not by foreigners*, and prayed allowance, by which the foreigners were ouſted, and was taken all of the denizens. Br. Franchiſes, pl. 17. cites 29 Aſſ. 15.

3. Franchiſes cannot be divided, if they are entire franchiſes, as to have goods of felons, outlaws, &c. or waifs, and ſtrayes, &c. and therefore if they deſcend to two *coparceners*, no partition can be made of them. Godb. 17. Paſch. 25 Eliz. C. B. Lord Mountjoy v. Earl of Huntington.

4. Every franchiſe, liberty, or privilege, *either lies in point of charter*, and cannot be granted by preſcription, *as bona & catalla felonum, &c. or* lies *in preſcription* on uſage in pais, without the aid of any charter, *as wreck, waif, ſtraies*, &c. 9 Rep. 27. b. in a nota of the reporter's in the caſe of the abbot of Strata Marcella.

5. Franchiſes which lie *in point of charter*, are *either before time of memory, or within time of memory*; (viz. from the time of R. 1.) if before time of memory, either it was *by ſpecial words*, which ſeldom or never was done, *or by general, ancient, obſcure, ambiguous, and obſolete words*; and whether by the one or the other, yet becauſe they were made time out of mind, and ſo are not any record pleadable of themſelves, they ought to be aided by ſome other matter of record within time of memory, as allowance * before juſtices in eyre, or

* 2 Inſt. 281.

or of B R. or C. B or barons of the exchequer, or by confirmation by the king's charter of record, within time of memory, and ſhall be allowed but for ſuch part only of the grant, as had been ſo allowed or confirmed, though all be in one and the ſame patent; and ſuch ambiguous, &c. grant, ſhall be † conſtrued as the law was taken, when ſuch charter was made. 9 Rep. 27. b. 28. a. in a nota by the reporter, in the caſe of the abbot of Strata Marcella.

† 2 Inſt. 282.

6. Franchiſe *tenere placita is* power to hold plea of matters within ſuch a precinct, but does *not exclude any other juriſdiction*, nor entitle the lord to claim conuſance. per Holt Ch. J. 12 Mod. 645. Hill. 13 W. 3. B. R. in caſe of Crone v. Smith.

See Preſcription.

(A. 2) How they may be by Preſcription or Appendant, &c. And claimed How; And Allowance thereof.

Nor he who had liberties in groſs by preſcription,

1. IF the *king grants liberties to J. S.* he cannot grant them over. Br. Franchiſes, pl. 38. cites 6 E. 2.

as *hundred*, &c. cannot grant them over. Br. Franchiſes, pl. 38. cites 6 E. 2.

[509] 2. In account, the *defendant ſhall not plead that the matter aroſe in a franchiſe*, which has conuſance of pleas, *but the bailiffs ought to demand it*; for otherwiſe it ſhall not be granted. Br. Franchiſes, pl. 11. cites 39 E. 3. 17.

3. If a patent grants tenere placita *before his ſteward*, and *he has not any ſteward*, it is good; for he may make a ſteward; but it ſeems that he *ought to have court before*. Br. Franchiſes, pl. 4. cites 7 H. 4. 5.

4. If a man has uſed *by preſcription to hold plea by writ of right-cloſe*, and *has alſo a charter of the king of conuſance of pleas, and accepts the franchiſe in court of record*, by the charter, he loſes the advantage of the preſcription to hold plea by writ of right; per Gaſcoigne. Br. Franchiſe, pl. 6. cites 8 H. 4. 19.——But 21 H. 7. 5. contra by three juſtices. Ibid.

5. Men have *ſeveral liberties* in England, which *never were allowed in eyre*; per Thirn. But it ſeems, that they are *thoſe which never were ſeized in any eyre*. Br. Franchiſes, pl. 7. cites 11 H. 4. 16.

6. In recordare, it was agreed, that where a man claims *cuſtom to have a fine for alienation* of his tenant, it ſhall not be allowed, without ſhewing allowance in eyre or elſewhere; becauſe it *is againſt common right*. Br. Franchiſes, pl. 8. cites 14 H. 4. 3.

7. Note, that a *corporation*, who *appoint a general attorney for them in C. B.* &c. may, by the ſaid attorney, challenge liberties. Br. Corporations, pl. 36. cites 4 H. 6. 6.

8. Franchiſes, *which lie in point of charter*, may be preſcribed for, if the party has an allowance in eyre, which is ſuch poſſeſſion as the ſtatute 18 E. 1. intends, 9 Rep. 29. in caſe of the Abbot of Strata

STRATA MARCELLA, in a nota of the reporter there; cites 18 H. 6. tit. Preſcription, 45. and ſays, it ſtands upon great reaſon; for that the *charter might be made before the conqueſt*, and ſo anciently, that the charter itſelf, and every inrollment of it, might be utterly periſhed and conſumed.

9. If conuſance of pleas, or other franchiſes, are allowed, it *binds the king till it be reverſed.* By all the juſtices. Br. Franchiſes, pl. 32. cites 13 E. 4. 5.

10. Note, that allowance of franchiſes *in quo warranto, or in eyre, ſhall conclude the king*; for this is the ſuit of the king to try franchiſes. Br. Franchiſes, pl. 40. cites 10 H. 7. 13.

Contra of allowance *in C. B. or other court.*

Br. Franchiſes, pl. 40. cites 10 H. 7. 13.

11. A patent of *grant of conuſance of pleas*, which is *before time of memory*, viz. in the time of king H. 2. ſhall not be allowed at this day, if it has not been allowed after in eyre. Br. Franchiſes, pl. 13. cites 21 H. 7. 29. per tot. Cur.

And if it be *granted in D. and C. and has been allowed in D. and not in C.*

it ſhall not now be allowed in C. though it be one entire patent. Br. Franchiſes, pl. 13. cites 21 H. 7. 29.

(B) Power and Privilege; of * Bailiffs of Franchiſes, and in what Caſes puniſhed.

* See Return, (R. 2) Treſpaſs, (G. a. 3) pl. 21.

1. WHERE *præcipe* quod reddat is brought *of land, parcel in guildable, and parcel in franchiſe*, the writ ſhall abate, if the franchiſe has conuſance of pleas; contra, if the franchiſe has only returna brevium. Per Gaſcoigne & Hulſ. Br. Franchiſes, pl. 27. cites 8 H. 4. 7.

So where *aſſiſe* is brought, &c. Br. Brief, pl. 114. cites S. C.——

S. P. granted, per Cur. Arg. Ibid. pl. 138. cites 38 E. 3. 16.

2. If a man has a leet, and may enquire of felony, and has ſuſpected perſons, he *cannot deliver them*; but the juſtices of delivery ſhall do it. per Cur. Br. Franchiſes, pl. 5. cites 8 H. 4. 18. [510]

3. In quare impedit, it was granted, that where the *ſheriff does execution in franchiſe*, it is good; for he is immediate officer to the court; contra, where bailiff [of a franchiſe] does execution in the guildable; and the *lord* of the franchiſe, in the firſt caſe, *ſhall have his remedy for the breaking of the franchiſe.* Br. Executions, pl. 32. cites 11 H. 4. 7. 9.

4. Note, for law that thoſe who have *liberties of infangthief*, cannot uſe *gaol delivery, nor give judgment of death*; and if they do, it is miſpriſion, and they ſhall make a great fine to the king. Br. Franchiſes, pl. 33. cites 2 R. 3. 9.

5. By grant of *conuſance of pleas*, the *franchiſe ſhall make the like proceſs and execution as is at common law*; for this belongs to the conuſance of pleas. Br. Franchiſes, pl. 39.

6. Per Glynn Ch. J. Mich. 1658; if one be arreſted *by the ſheriff* of the county within a liberty, without a *non omittas*, yet the arreſt

reſt is good; for the ſheriff is ſheriff of the whole county, but the bailiff of the liberty may have his *action* againſt the ſheriff, for entering of his liberty; but upon a *quo minus*, a ſheriff may enter any liberty, and execute it impune. R. S. L. 116. cites Pract. Reg. 72.

7. The ſheriff, upon a *non omittas*, *capias utlagatum*, or *quo minus*, may enter and make an *arreſt* in any franchiſe. L. P. R. 635.

8. The *authority* of bailiffs of a liberty, and *in what caſes* the *ſheriff may intermeddle*, and where he muſt direct his warrant to the bailiff of the liberty; and in what manner the *proceſs out of the palace court* muſt be executed, and to whom it muſt be directed. See Skin. 413 to 418. the reporter's argument. Hill. 5 W. & M. B. R. in the caſe of WENTWORTH v. BROADWATER, for executing the proceſs of the palace court, within the liberty of the Savoy.

(C) Extinguiſhed or loſt.

1. THE *ſheriff wrote* his mandate *to the bailiff, upon a venire facias*, and the *bailiff was the defendant's ſervant, and returned the lands of the plaintiff and defendant*, by which *non omittas iſſued*, and the lord loſt his franchiſe *for the time*, quod nota. Br. Franchiſe, pl. 29. cites 38 E. 3. 25.

Br. Juriſdiction, pl. 17. cites S. C.

2. Unity of poſſeſſion in the king of a *manor*, which is *within the cinque ports*, which *came to the king by eſcheat, as parcel of his manor of E.* was not an extinguiſhment of the liberty, nor did this make it guildable; and therefore it ſeems, that *it is a cuſtom which goes with the land*, as gavelkind, &c. and not with the ſeigniory. Br. Franchiſes, pl. 3. cites 49 E. 3. 24.

3. It was agreed, that where three are *bailiffs of a vill*, and they *have liberties* by grant of the king, and after the *king alters their corporation* into ſheriffs, yet they ſhall enjoy their firſt liberties. Quod nota. Br. Franchiſes, pl. 12. cites 14 H. 6. 12.

4. Where the *inheritance of the crown was given to king H. 7. and the heirs of his body, with all pre-eminences and prerogatives*, yet it did not extend to the franchiſes and liberties of other men; by all the juſtices. Br. Franchiſes, pl. 20. cites 1 H. 7. 12.

5. If a *vill be incorporated* by the king before time of memory, and the *franchiſe never was uſed within time of memory*, they have loſt their franchiſe. Br. Franchiſes, pl. 10. cites 14 H. 7. 1. per Vaviſor.

6. Ancient franchiſes are by forfeiture *extinct in the crown*, but new franchiſes are not ſo. The dutchy of Lancaſter being forfeited for treaſon, is not extinct, being a *new creation*. Jenk. 160. pl. 3.

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(D) Reſtrained.

(D) Reſtrained.

1. WHERE the *king is party*, the *venire facias ſhall make mention of non omittas*; for where the king is party, the ſheriff ſhall not write to the bailiff of the franchiſe, but ſhall ſerve the proceſs himſelf. Br. Franchiſes, pl. 18. cites 41 Aſſ. 17. per Knivet, Ch. J. S. P. per Grene. Br. Franchiſes, pl. 31. cites 38 Aſſ. 19. And that the franchiſe ſhould not hold place. *But* if this clauſe, *licet fuerimus pars*, be in the charter, then it ſeems it is otherwiſe.

2. No franchiſe ſhall be allowed in any caſe, where the franchiſe doth *fail to adminiſter juſtice* within the franchiſe; but if there be ſuch a failer, this court by their authority may intermeddle (notwithſtanding the privileges of the franchiſe) to compel them to do juſtice (Mich. 22 Car. B. R.) For privileges are not granted to protect men in neglecting to do right, or to do wrong; and this court is the ſuperintendent court of the nation to ſee juſtice equally diſtributed to all perſons. L. P. R, 635.

(E) Forfeited.

1. A man has franchiſe, and *uſes more than he ought*; this is a forfeiture but if he *uſes leſs*; this is finable; for the one is miſ-uſer and the other non-uſer. Br. Franchiſes, pl. 37. cites the time of E. 1. Itin. Not.

2. If a *man has ſeveral franchiſes*, and the *one does not depend upon the other*, if he *miſuſes any*, he ſhall not forfeit all, but only thoſe which are miſuſed. Br. Franchiſes, pl. 14. cites 22 Aſſ. 34. per Thorp. *But if the one depends upon the other* there if he miſ-uſes the one, all ſhall be ſeiſed and forfeited to the king. Br. Franchiſes, pl. 14. cites 22 Aſſ. 34.——S. P. Fin. 38.

3. *And* if a *man has franchiſe and uſes it well*; there *if he makes purpreſture upon the king*, he forfeits nothing but that which is taken in; per Bank. Br. Ibid. *As* where he has *market to hold every week on the Friday*, and he *holds it the Friday and the Monday*, in this caſe nothing ſhall be forfeited but that which he has purpriſed. Br. Franchiſe, pl. 14. cites 22 Aſſ. 34.——*But* he who has *fair to hold 2 days, and holds it 3 days*, he forfeits the whole fair. Ibid.——*So* where a man has *market to hold the Saturday, and he holds it another day*, the market ſhall be forfeited, and he ſhall make fine for the miſ-uſing, per Bank, quod nota, double puniſhment, quia non negatur. Br. ibid.——Fin. 38.

4. If a man has *gaol delivery* by liberty, and *holds men in priſon, becauſe he will not be at the charge to have deliverance*, this is a forfeiture of his liberty. Br. Forfeiture de terres, pl. 93. cites 8. H. 4. 18. Br. Franchiſes, pl. 5. cites S. C. —If he who has gaol keeps *priſoners acquitted, who had paid their fees*, the king * ſhall re-ſeiſe for ever for the miſ-uſer. Br. Franchiſes, pl. 26. cites 20 E. 4. 5.——* *Orig.* (reſceivera.)

5. Error ſued to the bailiff of Reading, and *at the pluries*, the *bailiffs came and prayed another day, and had one*, &c. *by aſſent of the party*, and *at the day did not return the record, but came and prayed another day*, and the *other party would not aſſent*; and per Vaviſor the franchiſe ſhall be re-ſeiſed. Br. Franchiſes, pl. 26. cites 20 E. 4. 5.

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6. For if the *warden of the Fleet be commanded to bring in his priſoner, and does not*, the office ſhall be ſeiſed, and this *where he is commanded by the court*; contra where he is commanded by proceſs, per Vaviſor. Br. Franchiſes, pl. 26. cites 20 E. 4. 5.

S. P. Br. Forfeiture de terres, pl. 115. cites 20 E. 4. 6. per Pigot.—See Show. 276. Mich. 3 W. & M. in caſe of the King v. the Mayor of London.

7. If a *lord refuſes to do a thing according to his franchiſe, or does contrary* to his franchiſe, *or miſ-uſes it by himſelf by his bailiff or deputy*, or *non-uſes* the franchiſe, the franchiſe ſhall be reſeiſed, per Huſſey. Br. Franchiſes, pl. 26. cites 20 E. 4. 5.

S. P. Br. Forfeiture de terres, pl. 115. cites 20 E. 4. 6. per Pigot.

8. *And all lords who have franchiſe ſhall be attendant upon the juſtices of aſſiſe* in perſon, or by their bailiffs, and otherwiſe they forfeit their franchiſes for this nonfeaſance, per Pigot. Br. ibid.

But if he *claims one day by the patent, and another by preſcription*, which is found falſe in the preſcription, yet he ſhall not forfeit his patent. Br. Franchiſes, pl. 22. cites 2 H. 7. 11. per Brian.——*And market* ſhall not be forfeited *by non-uſer, unleſs of a thing which of neceſſity ought to be done* as of clerk of the market, &c. For there non-uſer is a forfeiture. Ibid.——Fin. 38.

9. If the king grants to one a *fair for one day in the year*, and he *holds fair two days*, and *claims this in the Exchequer upon proceſs*, he forfeits all his franchiſe. Br. Franchiſes, pl. 22. cites 2 H. 7. 11. per Brian.

10. If the *under-gaoler* often ſuffers priſoners, viz. 2 or 3 times, to eſcape, it is a *forfeiture* of liberties. Savil. 15. pl. 40. Paſch. 22 Eliz. Sir John Arundell's caſe.

11. Franchiſe ſhall be ſeiſed if it be *claimed by any but by him that has the freehold*. Yelv. 191. Mich. 8 Jac. B. R. in caſe of the King v. Stafferton, cites Cro.

12. Quo warranto was brought againſt the mayor and burgeſſes of Wiggan in Lancaſhire, for uſing of certain liberties, viz. fairs, markets, and courts, and at the day of the return of the writ they *do not appear*; and it was agreed, per totam Cur. that if they do not ſhew good cauſe in excuſe of their default, then their liberties ſhall be *ſeiſed into the king's hands* according to the book of 15 E. 4. and * Brigg's caſe. 2 Roll. R. 92. Trin. 17 Jac. B. R. the caſe of Mayor and Burgeſſes of Wiggan.

* 2 Roll. R. 46. Trin. 14 Jac. B. R.

13. *In a court leet* of a manor *in a foreſt* the *want of an able ſteward*, is a cauſe of ſeizure, and *ſo* is the not having officers and things for the execution of juſtice, as *conſtables, aletaſters*, &c. and *pillory, ſtocks*, and *cuckingſtool*, &c. *ſo* likewiſe for *puniſhing bakers more than three times, and not ſetting them on the pillory*, all theſe are cauſes of ſeizure, till payment of a fine for the abuſe and replevin of the franchiſe, by Noy. 8 Car. 1. Jo. 283. Totterſall's caſe.

14. One

14. One claimed waifs and ſtrays within his manor in a foreſt; by Noy, theſe franchiſes may be ſeiſed, till they be replevied, if there had been no allowance in the laſt eyre. 8 Car. 1. Jo. 285. Englefield's caſe.

15. A judge *ignorantly condemns* a man to death *for felony*, when it is not felony, in a manor court which has the franchiſe of infangthief; for this offence the judge ſhall be *fined and impriſoned, and loſe his office*, and the lord ſhall loſe his franchiſe. Theſe points were reſolved in the Star Chamber, upon an aſſembly of all the judges there, by the command of king Ric. 3. Jenk. 162. pl. 7.

16. The conſtant practiſe of inferior courts to *iſſue* precepts of *capias without ſummons*, I think, is ſuch an *abuſe* of their franchiſe, that peradventure, this ſhall be a *forfeiture* of it; I know no other method to remedy it; per Powell J. 2 Lutw. 1570. Mich. 4 & 5 W. & M. in caſe of Gwynn v. Poole.

17. All franchiſes are granted on condition, that they ſhall be *duly executed according to the grant*, and if they neglect to perform the terms, the patents may be repealed by *ſcire facias*. 12 Mod. 271. Hill. 11 W. 3. in caſe of the city of London v. Vanacre.

(F) Diſputes between them and the Sheriff. [513]

1. IF *bailiff* of fee, or bailiff *of a franchiſe returns a pannel to the ſheriff*, and *he returns other pannel of himſelf*, this ſhall not be ouſted at the prayer of the bailiff, but they ſhall have their action againſt the ſheriff. Br. Action ſur le caſe, pl. 83. cites 30 Aſſ. 5.

2. If the *ſheriff makes execution in the franchiſe this is good*; for he is officer immediate to the Banks; but if *bailiff of the franchiſe does ſo in the guildable, this is error*, and this by Hill and Norton, quod non contradicitur. Br. Office & Off. pl. 35. cites 11 H. 4. 9.

3. *Sheriff enters* into ſuch liberty, and the grant is ſhewn to him; if he *makes execution* it is good, but lord of the franchiſe ſhall have action on the caſe againſt him. Arg. Roll. R. 119. Hill. 12 Jac. B. R. Derby (vill) v. Foxley.

Arg. Hard. 12. admitted, becauſe the court takes no notice of franchiſes, and the ſheriff is the officer to the court, notwithſtanding the franchiſe and the lord of the franchiſe is but a ſubordinate miniſter to the ſheriff. Mich. 1655. in the Exchequer in the caſe of Newman v. Phillips.

(G) Pleadings, &c.

1. WHERE proceſs is *re-ſummoned out of the franchiſe to the bank*, there the tenant need not to *ſave the default* which was made in the franchiſe, per Cur. For there nothing ſhall be of record in the bank but the original only, and not the meſne acts which were done in the franchiſe. Br. Franchiſes, pl. 28. cites 2 H. 4. 8.

2. *Treſpaſs*

Br. Brief. pl. 22. cites S. C.

2. *Treſpaſs of taking beaſts in the county of Northumberland, and chaſing to N.* where N. was *in the biſhoprick of Durham*, and this pleaded, and yet the defendant was compelled to anſwer, and the reaſon ſeems to be inaſmuch as *communis lex eſt magis digna.* Br. Juriſdiction, pl. 22. cites 2 H. 4. 25.

3. Upon iſſue joined, one came for the mayor and bailiffs of Oxford, and *ſhewed a charter that they of Oxford ſhall not be impannelled with foreigners*, and prayed allowance; per Cur. the mayor and bailiffs cannot plead it, but the men impannelled ſhall ſay it upon their appearance; by which the juror who appeared pleaded it, but the juror may relinquiſh the advantage of it if he will, and ſo he did. Br. Franchiſes, pl. 30. cites 4 H. 6. 6.

4. Though the charter, or *letters patents are loſt*, yet the *exemplification*, or conſtat of the roll may be ſhewed forth, by the ſtatutes of 3 E. 6. and 13 Eliz. And when any claimed before the juſtices in eyre, any franchiſes by an *ancient charter*, though it had expreſs words for the franchiſes claimed, or if the words were general, and a *continual poſſeſſion pleaded of the franchiſes claimed*, or if the claim was by old and obſcure words, and the party in pleading expounding them to the court and averring continual poſſeſſion according to the old expoſition, the *entry was* always *inquiratur ſuper poſſeſſionem & uſum, &c.* 2 Inſt. 282. where Ld Coke ſays, he had obſerved as above in divers records of eyres according to that old rule.

5. The difference between an *avowry and a quo warranto*, is, that in an avowry the avowant is not compelled to *ſhew his title to* his franchiſe, but only to ſay generally, that he hath ſuch a franchiſe; but in a quo warranto he muſt ſhew it particularly. 9 Rep. 29. b. in a note of the reporter there, in the caſe of the abbot of Strata Marcella.———cites 8 Ed. 3. 10. b. 11.

6. If the party has continued poſſeſſion tortiouſly, the judgment is that he ſhall be *ouſted*; but if he had once a title and loſt it, the *judgment* ſhall be that the liberty ſhall be *ſeized.* Yelv. 192. cites 15 E. 4. 7. Mich. 8 Jac. B. R. in caſe of the King v. Staverton.

[514]

7. When any thing is ſhewed to be done within a liberty, or a franchiſe, it is not neceſſary to *ſhew within what county*, that liberty, or franchiſe *doth lie*; for the franchiſe hath no relation to the county. L. P. R. 635. cites Trin. 23 Car. 1. B. R.

8. *Caſe by bailiff* of a liberty, that has the execution and return of writs, againſt one for *entring his liberty*, and executing a fi. fa. is good *without ſhewing by what right* he claimed the liberty. Show. 17. Paſch. 1 W. & M. B. R. Cary v. Bacchus, als. Matthews.

9. In ſome caſes you cannot ſet up a franchiſe, though you have *letters patents* for it; as if I have a *ferry*, I will bring an action againſt you for ſetting up another; becauſe I muſt keep up mine for the good of the publick, which would be hard upon me if you get all the profit. But otherwiſe it is where the *publick is not concerned*; per Holt. Ch. J. and judgment acc. Holt's Rep. 20. Hill. 5 Annæ, in caſe of Keeble v. Hickeringil.

Frank-

* Frankalmoigne.

* See Co. Litt. tit. Frankalmoign. 93. b. to 100. b.

(A)

1. *FRANKALMOIGNE is not any ſervice.* Br. Aid del Roy, pl. 13. cites 35 H. 6. 56.

2. 12 *Car.* 2. 24. § 7. enacts, that this act *ſhall not take away tenures in frankalmoigne, nor ſubject them to greater ſervices.*

Fraternity.

(A)

1. GUILD or fraternity *cannot be made, unleſs by ſpecial incorporation.* Per Littleton, juſtice. Br. Corporations, pl. 60. cites 20 E. 4. 2.

2. Fraternity *is* ſome people of a place united together in reſpect of a miſtery and buſineſs inio a company, and their laws and ordinances cannot bind ſtrangers, for they have not a local power or government. 1 Salk. 193. Hill. 2 Annæ, B. R. Cuddon v. Eaſtwick.

3. Corporation *may make* a fraternity. per Cur. 1 Salk. 193. Hill. 2 Annæ, B. R. Cuddon v. Eaſtwick.

Fraud. [515]

(A) Fraud. [*To prevent Forfeiture to the King, or Lord for Crimes.*]

See (C) pl. 1. Marg. Paunceſoot v. Blount.

[1. IF a man make *feoffment* of his land *to the uſe of his ſon*, being *an infant*, and *not upon communication of marriage*, and then that is to ſay *ten days after commits treaſon*, of which he is afterwards attainted, this land ſhall be forfeited to the king; for the feoffment,

ment, ſhall be adjudged fraudulent, and void againſt the king. H. 8 Jac. in the Exchequer. per Cur.]

[2. *But if* this feoffment was *made in performance of an agreement made a year before*, by which it was agreed, that the feoffor ſhould make ſuch conveyance, &c. and the feme of the feoffor being inheritor, ſhould make ſuch conveyance of the land, which was alſo done accordingly, in this caſe this feoffment ſhall not be adjudged fraudulent againſt the king. H. 8 Jac. in the Exchequer, per Cur.]

[3. If a man *alien* land, *to the intent that it ſhall not be forfeited, and after does felony*, this land ſhall be forfeited. P. 48 E. 3. B. R. Rot. 1.]

(A 2.) Fraud. What is in general.

1. QUOD *alias bonum & juſtum eſt, ſi per vim vel fraudem petatur, malum & injuſtum efficitur.* 3 Rep. 78. Hill. 44 Eliz. in chancery in Farmor's caſe.

It is not conſiſtent with common ſenſe,

2. Fraud ought to be fraud at the beginning; for *ſubſequent fraud*, will not make a conveyance to be fraudulent. 2 Bulſ. 226. Paſch. 12 Jac. Stone v. Grabham.

that a preſent agreement, not then fraudulent, ſhould be varied, and *become fraudulent by future accidents*; per Raymond and Gilbert commiſſioners, and they ſaid, it muſt be conſidered as it is in itſelf, without regard to any thing extrinſick. Sel. Ch. Caſes in Ld. King's time. 6. Paſch. 11 Geo. 1. in caſe of Dews v. Brand—See (A. 3) pl. 4.

3. Where *recovery* is upon *legal cauſe*, it cannot be ſaid covinous, though it was on *conſent*, and to the intent to prevent another of his debt. Jo. 92. Hill. 1 Car. B. R. in caſe of Veale v. Gateſdon.

4. A merchant *imports* 9 *tons and a half of wine*, he ſhall pay *priſage* notwithſtanding; for it is fraud apparent. Hard. 56. Paſch. 1656. in the Exchequer Att. Gen. v. Shirt.

5. A. on his *marriage with B. a Dutchwoman in Holland, agrees to leave a compleat maintenance* for her and her children, but *not expreſſing what.*—A. afterwards aſſigns bonds to truſtees, and gives a letter of attorney to receive the money. By the *cuſtom in Holland*, ſuch agreement between baron and feme, and ſuch aſſignment of bonds are good, and therefore are to be allowed here. Per Ld. K. Finch. Trin. 26 Car. 3. 1 Chan. Caſes, 232. Aſhcomb's caſe.

6. A. indebted to B. *aſſigns lands by way of truſt, to pay* B. 750 *l.* A. confeſſes *judgment to C.*——*B. receives, and pays to A.* the profits, to the amount of 800 *l.*——B. had no notice of the judgment, nor was there any extent on the judgment. Ld K. decreed
[516] an account, and the 800 *l.* not to be allowed otherwiſe than as to go in ſatisfaction of B.'s debt. Mich. 27 Car. 2. 2 Chan. Caſes, 207. Miller v. Stephens.

7. A. and B. make *croſs-ſettlements of their eſtates*; A.'s eſtate was of moſt value, and he conveyed it by bargain and ſale inrolled.—B. ſettled his by covenant to ſtand ſeiſed. Afterwards A. propoſed to ſell part of his eſtate, and B. negotiated to the ſale. A. by will, deviſed

viſed his eſtate to a relation, and died. The court held the *inequalities of value*, and alſo *of aſſurance*, and B.'s negotiating the ſale as *badges* of fraud, and decreed A.'s eſtate to the deviſee. 33 Car. 2. 2 Ch. R. 221. King v. Hele.

(A. 3) Fraudulent Conveyance.

1. AN abſolute conveyance, and a *continuance in poſſeſſion* afterwards ſhall be adjudged in law fraudulent. per Coke, Ch. J. 2 Bulſ. 226. Paſch. 12 Jac. Stone v. Grubham. 2 Vern. R. 262. S. P. P. 1692. in caſe of Hungerford v. Earle.—5 Rep. 60. b. Mich. 32 & 33 Eliz. B. R. Gooch's caſe.—— Mo. 638. Paſch. 44 Eliz. in the Star Chamber. Chamberlain v. Twyne. Sir Ed. Northey ſaid, it had been ruled forty times in his experience, at Guildhall, that if a man *ſells goods*, and continues in poſſeſſion as viſible owner, it is fraudulent, and void as to the creditors, and that it has always been ſo held. Hill. 1709. Ch. Prec. 287. in caſe of Bucknal v. Royſton.———Mich. 28 Car. 2. Fin. R. 271. Oakover v. Pettus.

2. If A. aſſigns a leaſe to B. and the leaſe *continues in the cuſtody* of A. it is fraudulent; otherwiſe not. 2 Bulſ. 226. Paſch. 12 Jac. Stone v. Grubham.

3. A conveyance cannot be fraudulent *againſt articles*, unleſs another conveyance be executed in a legal courſe. Arg. Hill. 23 & 24 Car. Chan. Caſes, 217. Holford v. Holford.

4. A deed not at firſt fraudulent, may *afterwards become ſo*, by being *concealed*, or *not purſued*; by which means creditors are drawn in to lend the money. Per Hutchins commiſſioner. Paſch. 1692. 2 Vern. R. 262. in caſe of Hungerford v. Earle. See (A. 2.) pl. 2.

(B) Fraudulent Conveyances *of* * *Lands* ſet aſide.

* Voucher (N. b) pl. 1, 2.

1. IN formedon, tenant pleads non tenure, and it was found by verdict, that *before the writ, the tenant enfeoffed ſeveral perſons*, with intent to defraud ſuch as had cauſe of action for the ſame lands; and yet *he took the profits*. This verdict was adjudged for the demandant; for the feoffment was void againſt him by the 13 Eliz. 5. Cro. E. 233. Paſch. 33 Eliz. C. B. Leonard v. Bacon. Savil 126. S. C. by name of White v. Bacon.

2. Feoffment on condition to be void on payment of 100 *l.* in a year to the heirs, executors, &c. of B. within a year after the death of B.—B. dies inteſtate.—C. takes adminiſtration, and grants *letter of attorney irrevocable* to D. (to whom B. had aſſigned the eſtate) to receive the 100 *l.* to his own uſe if it ſhall be paid. (Note, C. was heir as well as adminiſtrator.)—Afterwards by agreement between the feoffor and C. feoffor was to *pay the whole money in ſhew, but to be repaid a third part inſtanter*. This was not a ſufficient performance of the condition, becauſe of the covin. Mo. 708. Hill. 37 Eliz. B. R. Goodall v. Wiatt. Jenk. 261.

3. *Fine by covin* ſhall not bind. Hilſ. 44 Eliz. in Chancery. 3 Rep. 77. b. Farmer's caſe, al. Fermor's caſe.

Lane 48. cites Sir Walter Raleigh's caſe.

4. The earle of L. *purchaſed* a manor *in his daughter's name*, and afterwards kept the courts, and made leaſes in his own name, and always took the profits, and then ſold it to Sir S. Mountague; though the daughter never queſtioned it in the life of her father, yet it was held in B. R. that unleſs there be ſome fraud diſcovered, it is not within the 27 Eliz. though there be many badges of fraud, cited Cro. Car. 550. 10 Car. Lady Gorge's caſe.

5. *Fine paſſed by circumvention*, was decreed not to extinguiſh a rent charge, but relief againſt the circumventer. Hill. 27 & 28 Car. 2. 1 Chan. Caſes 273. . . . v. Hawkes.

6. If a contingent remainder be deſtroyed by a legal conveyance, and that *conveyance is obtained by fraud*, equity will relieve againſt it, Hill. 1686. Vern. 443. Engleſield v. Engleſield.

(C) Fraudulent Conveyances of Goods ſet aſide.

P. was indicted of *recuſancy*, for not *coming to divine ſervice.*

1. 3 *H.* 7. *cap.* 4. enacts that, *all deeds of gift, of goods and chattels, made in truſt to the uſe of the grantor, to defraud creditors, ſhall be void.*

Upon this he makes a *gift of all his leaſes and goods*, coloured under *feigned conſiderations*, and flies beyond ſea, in order *to defraud the queen* thereby, of what might accrue to her by his recuſancy, or *his flight*. Afterwards he was outlawed on the ſame indictment. This caſe ſeemed to ſome within this ſtatute, becauſe though the *preamble* ſpeaks only of *creditors*, yet the body of the act is general, that all gifts of goods and chattels, made in truſt to the uſe of grantor, are void. This is only with regard to *ſtrangers who would be prejudiced* by ſuch gift: but is ſtill good to bind the parties themſelves. But adjudged, that 13 *Eliz.* 5. extends to this caſe. 3 Rep. 82. cited in Twine's caſe, as Mich. 35 and 36 Eliz. in the Exchequer Chamber, the cauſe of Pauncefoot v. Blunt.

A feme has a *term, as adminiſtratrix* to A. her firſt baron, and marries B. who, being indebted by contract to C. *granted* the term *to C. to the uſe of B. and his wife for their lives, and after to the uſe of C.*—C ſues and gets judgment. Per Cur' this grant is not to avoid creditors; for the term being in right of the feme, as adminiſtratrix, if it had ſo continued in the hands of B and had never been granted, it was not extendible for the debt of B. and fraud ſhall not be intended, unleſs it be *expreſſly found*, and this grant is out of this ſtatute, and all the ſtatutes of frauds. Cro. E. 291. Ridler v. Punter.

Leſſee for years, after judgment againſt him, aliens his *term*. After the year, the plaintiff ſues out a *ſcire facias*, and *has execution*. The term is not liable, if the *aſſignment* was made *bona fide*, Godb. 161. Paſch. 8 Jac. C. B. Wilſon v. Wormal.

3 Rep. 81. Twine's caſe.—Mo. 638. Paſch. 44 Eliz. Chamberlain v. Twyne.

2. A *general deed of gift of all his goods* is ſuſpicious to be done upon fraud to deceive creditors. Bacon's Uſe of the Law, 62.

Cro. E. 445.

3. If a man that is *debtor* make a *deed of gift* of all his goods to protract the taking of them in execution for his debts; this deed of gift is void againſt thoſe to whom he was indebted; but againſt himſelf, his own executors, or adminiſtrators, or any man to whom he ſhall after ſell or convey them it is good. Bacon's Uſe of the Law, 62.

Stat. 29 Car. 2, 3.

4. By *ſale*, any man may convey his goods to another, and though he fear execution for debts, yet he may ſell them *out-right* for money at any time before the execution ſerved, ſo that there be *no reſervation of truſt* between them, [as that] paying the money, he ſhall have the goods again; for that truſt proves a fraud to prevent the execution. Bacon's Uſe of the Law, 62.

5. A.

5. A. makes a *deed of gift* of all his valuable goods to B. (who was his *ſecond wife, the firſt then living*) and makes B. executrix, and dies.—B. refuſes the probat, by which the ordinary granted adminiſtration to C.—C. has no aſſets, and if action be brought againſt B. ſhe will plead, that there is an adminiſtrator.—Per 3 J.——B. is chargeable as executrix de ſon tort. Dal. 94. pl. 16. 15 Eliz. The gift is void by the common law, and alſo by 13 Eliz. 5. and ſo the *creditor* may bring debt againſt B. as executor, de ſon tort, and that ſuch gift is void by the common law. Per Dyer, Ch. J. 2 Le. 223. Stamford's caſe. S. C.——3 Le. 57. S. P.—Brownl. 112. * Hawes v. Leader, S. P.————So if C. grants the goods to B. 3 Le. 57. Mich. 15 Eliz. C. B. Anon.—* Vid. (I)

6. *Sale* of inteſtates goods *by firſt adminiſtrator*, whoſe adminiſtration is repealed upon citation, and granted to next of kin by averment of covin, may be avoided. Mo. 396. Hill. 37 Eliz. Wilſon v. Pateman. [518] S. P. that it ſhall void by 13 Eliz. 5. *as to creditors but not againſt ſecond adminiſtrator.* 6 Rep. 18. b. Packman's caſe.

7. Wife was made *executrix*, and made gift of the goods before marriage, and yet *retains* them in her poſſeſſion, and *takes to baron the defendant*; the wife dies; baron has in his hands ſo much goods now, as will ſuffice to pay the creditors their debts. Judgment pro quer. For the defendant has confeſſed himſelf executor, by the plea of fully adminiſtred, and ſo is chargeable; becauſe the property of the goods does not paſs out of the wife by the grant, being made by fraud, as aforeſaid, by the ſtatute 13 Eliz. 5. Mo. 396. Hill. 37 Eliz. Watſon's caſe. Cro. E. 405. Wilcox v. Watſon. S C.

8. Goods made over by A. to his daughter, after judgment had againſt him, *revocable* on tender of five ſhillings; A. died; the daughter being 16 years old, by deed authorizes B. to take the goods to her uſe, and diſpoſe of them accordingly; and after willeth one C. to be aſſiſtant to the ſaid B. in diſpoſal of the goods to her uſe. C. afterwards by appointment of the daughter and B. ſells the goods for 250 *l.* which is paid to B. —— B. takes letters of adminiſtration.—Agreed, that B. had aſſets; and——that the grant of the ſaid goods was void, by the ſtatute of 13 El. 5. 2 And. 172. Trin. 43 Eliz. Bithel v. Stanhop. Ow. 132. S. C.——Cro. E. 810. S. C. reports, that B. intermeddled after the father's death, with the goods, and afterwards the *daughter* by this gift, *took the goods*, and then *adminiſtration was granted to B.* Adjudged, that this gift is in itſelf fraudulent, as appears by the condition, and the *covin expreſsly found by the jury*, and then *it is utterly void againſt the creditors, by* 13 *Eliz.* and the *inteſtate died poſſeſſed of them*; and when the donee afterwards took them, it was a *treſpaſs againſt the adminiſtrator*, for which he has his remedy; and they are always *aſſets* in his hands, and he is chargeable for them as executor de ſon tort, by his intermeddling before adminiſtration granted; and *by law they remained always in his poſſeſſion.*

9. A. indebted to three perſons, has goods to ſatisfy but one of them, and after ſuit commenced by one, or *after notice of ſuit to be commenced*, or arreſt made, makes *gift* of all his goods *to another creditor*, in ſatisfaction of his debt.—This is fraudulent againſt him who ſo has commenced his ſuit, or made the arreſt for his debt; per Popham, Ch. J. and And. Ch. J. Mo. 639. Paſch. 44 Eliz. in the Star Chamber, Chamberlaine v. Twyne, & al. 3 Rep. 80. b. S. C. by the name of Twyne's caſe

10. If A. *gives goods to B.* with intent to defraud C. though *B. knows not of the fraud*, yet the gift, as to him, is void; per Altham, J.

Lane 102. cites 34 E. 1. . . . tit. Warranty acc.—And 6 Rep. 72. [Paſch. 5 Jac. C. B.] Burrel's caſe.

11. A. is indebted to B. and makes C. his executor, and dies.—C. promiſes B. upon good conſideration, that if he can diſcover any goods, parcel of the eſtate of the teſtator at the time of his death, then B. ſhall have the goods in ſatisfaction: the queſtion was, whether a *leaſe for years, conveyed to a ſtranger by the teſtator in his life, to the intent to defraud his creditors*, ſhould be in law ſaid to be parcel of his eſtate at the time of his death? and the whole court reſolved that it was; for though the ſale bound himſelf, yet it was void againſt the creditors. Trin. 18 Jac. B. R. 2 Roll. R. 173. Anon.

Hill. 8 Jac. B. R. Cro. J. 271. Hawes v. Leader, S. P.

12. An *executor* or adminiſtrator ſhall not avoid a fraudulent *bill of ſale* as executor or adminiſtrator, but when he is a principal creditor. Cumb. 348. per Holt. Mich. 7 W. 3. B. R. Orlabar v. Harwarr.

[519] (D) Where Conveyances ſhall be * Good in Part and fraudulent in Part.

* See (S) Jaſon v. Gervois.

1. A. In conſideration that his ſon ſhall marry the daughter of B. covenants to ſtand ſeiſed to the uſe of his ſon for life, and after *to the uſe of other his ſons in reverſion or remainder*; theſe uſes, thus limited in remainder, are fraudulent againſt a purchaſor, though the firſt be upon good conſideration, viz. upon marriage. Lane, 22. Anon.

Sti. 428. Anon.—Hard. 353. per Rainsford, J.

2. A deed may be fraudulent *as to A. and good as to B.* Chan. Caſes 244. Mich. 26 & 27 Car. 2. Bellingham v. Lowther.

(E) Fraud at Common Law.

1. WHERE no *former intereſt* of the party is *wronged*, there no fraudulent conveyance was void at common law. Arg. Lane, 105.

2. Holt, Ch. J. ſaid, that there was a fraud at common law, as in caſe where a *perſon in priſon, and afterwards executed for robbery, made a bill of ſale of ſeveral goods, with intent to make proviſion for his ſon*; and that no countenance ought to be given to ſuch a contrivance as this, where a man has gained a conſiderable eſtate by robbery, and when he is detected, that he ſhould give it to his ſon; and the plaintiff was nonſuited accordingly. Skin. 357. Trin. 5 W. & M. at Guildhall. Jones v. Aſhurſt.

(F) Frauds *as to Creditors.* Caſes in Law and Equity upon the ſeveral Statutes.

50 *Ed.* 3. 6. *FRAUDULENT aſſurance of lands or goods, to deceive creditors, ſhall be void, and the creditors ſhall have execution thereof, as if no ſuch gift had been made.* This act extends only in relief of creditors and to ſuch debtors only, as *make to ſanctuaries*, or other *privileged places*. cited 3 Rep. 82. in Twyne's caſe, as Mich. 35 & 36 Eliz. in the Exchequer Chamber, Pauncefoot v. Blunt.

2. A man made *a gift of his goods* with intent to defraud his creditors, and yet *continued the poſſeſſion of them*, and *took ſanctuary*, and died there; now his executors, having the goods, were charged towards the creditors. Cary's Rep. 25. cites 16 E. 4. 9. Br. Conſcience, &c. pl. 19. cites S. C.

3. 13 *Eliz. cap.* 5. *ſ.* 2. enacts, that *all fraudulent conveyances of lands, tenements, hereditaments, goods or chattels, and all ſuch bonds, ſuits, judgments, and executions, made to avoid the debt or duty of others, ſhall (as againſt the party only whoſe debt or duty is ſo endeavoured to be avoided, their heirs, ſucceſſors, executors, or aſſigns) be utterly void, any pretence, feigned conſideration, or, &c. notwithſtanding.*

By *S.* 4. *common recoveries had againſt tenants of the freehold ſhall be good, notwithſtanding this act*; *and ſo ſhall all eſtates made for the procuring of a voucher in* formedon; *neither ſhall this act extend to grants made* bona fide, *and upon good conſideration to perſons not privy to ſuch colluſion.*

4. A ſeiſed of land, as *heir to his father*, covenants for *natural affection to ſtand ſeiſed* to the *uſe of himſelf* for life, remainder to his *firſt ſon in tail*, &c. remainder to *himſelf in fee*, with a *power* to make *leaſes*, and to *revoke the uſes*, he having notice at the ſame time, *of a bond entered into by his father* to B. Afterwards B. brings *debt* upon this bond againſt A. as heir; it was held that this conveyance *by the heir* ſhall be *fraudulent* againſt B. as a conveyance *by the father* who is the *principal debtor*. Cro. E. 350. Mich. 36 & 37 Eliz. C. B. Apharry v. Bodingham. [520]

5. If a debtor will *collude* with ſome of his friends *in fraud of his creditors*, and the *friend break truſt with him*, this court will not puniſh the breach; yet GREEN and COTTEREL's caſe to the contrary. (Fraus non eſt fallere fallentem) but two doctors and I took order in ſuch a caſe, between WOODFORD and MULTON. Mich. 42 & 43 Eliz. by our report that the *goods, ſo conveyed* in fraud, ſhould be *transferred to* the benefit of *the creditors*. Cary's Rep. 18.

6. Good conſideration is not ſufficient, unleſs it be made *bona fide* too; and no deed ſhall be deemed to be made bona fide within the proviſo of 13 Eliz. 5. which is accompanied with any truſt; as if A. be indebted to B. C. D. E. and F. in 20 l. each, and has goods worth 20 l. and makes a *gift of his goods to one of his creditors*, in ſatisfaction of his debt, but in truſt, that the donee ſhall favour him, or permit him, or any other to poſſeſs them, and to pay the debt when he is able; this is not bona fide. 3 Rep. 81. Paſch. 44 Eliz. in the Star Chamber, in Twyne's caſe.

7. It is the advice of Lord Coke, that when any *gift* ſhall be made *in ſatisfaction of a debt*, by one who is indebted to others alſo; 1. That it be done *publicly*, and before the neighbours, and not privately; for ſecrecy is a badge of fraud. 2. That the goods and chattels be *appraiſed* by honeſt people, to the true value, and take a gift in particular in ſatisfaction of the debt. 3. Immediately after the gift, to *take the poſſeſſion* of them; for continuance in poſſeſſion of the donor, is a mark of truſt. 3 Rep. 81. Paſch. 44 Eliz. in the Star Chamber, in Twyne's caſe.

Cro. J. 270, 271. HAWES v. LEADER. S. C. Brownl. 112. S. C.

8. A. *in conſideration of* 20 *l.* makes a *bill of ſale* to B. of all his goods mentioned *in a ſchedule*, and gives poſſeſſion by a platter, and *A. covenants that the goods ſhall remain in his houſe as before*, but *to be taken away by B. on demand*, and that A. and his executors, &c. ſhall keep them ſafely, and quietly deliver them, &c. A. 4 years after dies inteſtate, and his adminiſtrator refuſes to deliver the goods. It was adjudged, that if this deed was fraudulent, yet it was void only againſt creditors, and *not void againſt the* * *party*, his executors or adminiſtrators; and where the executor pretended, that it would be a devaſtavit in him to deliver the goods to A. this is not ſo; for if the deed was fraudulent, they are liable in B.'s hands, as executor de ſon tort; but if any of the *creditors had recovered, and had taken the goods in execution* for the value, and the adminiſtrator had pleaded this, it might be a good plea by him. Yelv. 196. Hill. 8 Jac. B. R. Hawes v. Loader.

* Arg. Le. 308. in caſe of Carter v. Claypole.

9. If A. make a *deed of gift*, and the *conſideration* be *future*, the donor's *continuance in poſſeſſion* is not fraudulent, unleſs it be expreſsly *proved*, that it was made upon fraud, to deceive the creditors; and ſo Coke, Ch. J. directed the jury. Roll. R. 3. Paſch. 12 Jac. B. R. Stone v. Grubham.

10. *Leaſe for years*, *conveyed* to a ſtranger by teſtator in his life fraudulently, viz. to the intent *to defraud his creditors*, is parcel of *teſtator's* eſtate at the time of his death, ſo as to be anſwerable to creditors. 2 Roll. R. 173. Trin. 18 Jac. B. R. Anon.

2 Roll. R. 493. Hill. 22 Jac. 1. S. C. debated by the name of Turbervil v. Tipper.

11. In *treſpaſs for goods taken* againſt a *bailiff*; defendant juſtifies as officer of a court baron, &c. and pleads, that the *plaintiff claimed under colour of a fraudulent gift*; and held a good plea, by two J. though he is not a creditor; for if a bailiff ſhall not be *aided by* 13 *Eliz.* 5. becauſe he is not a creditor, *no meſne proceſs* could be executed; and when a ſtatute gives the *principal*, it gives all the *accidents*. Lat. 222. Sir Ambroſe Turvill v. Tipper.

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And where ſuch goods are omitted in the inventory exhibited by the executor, a legatee may *falſify the inventory* in the ſpiritual court, but a creditor cannot. 8 Mod. 168. Hinton v. Parker.——It ſeems a creditor may falſify too, by the civil law. Dom. 622. cited in marg.

12. A. and B. were joint obligors; A. as principal, and B. as *ſurety*. A. (to ſave B. harmleſs) upon his *death-bed* made *B. a deed of gift* of all his goods, but they were *not removed* but remained in A.'s poſſeſſion, ſo long as A. lived, which was but a very little time; and though it was good conſcience to free his ſurety, and A.'s continuance in poſſeſſion after the death was very ſhort, yet it was ruled a fraudulent deed and gift; for debts upon ſpecialty are to be preferred to this equity, and it was his folly not to take counter-ſecurity. Clayt. 38 Auguſt, 11 Car. Per Berkley J. Legard v. Linley.

13. Fraudulent

13. Fraudulent deed to *deceive creditors* was ſet aſide. 15 Car. 1. Chan. Rep. 132. Naylor v. Baldwin. Jenk. 49. pl. 94. cites D. 295.

———A. has *goods worth* 30*l.* and owes 20*l.* to B. and 10*l.* to C. and *aſſigns his goods to C.* to the intent, that for the reſidue above the debt of 10*l.* he ſhall be *favourable to him.* Per Coke, Ch. J. it is altogether void, becauſe it is fraudulent in part; but per Foſter, J. it is void only for the ſurplufage. Godb. 161. Paſch. 8 Jac. C. B. in caſe of Wilſon v. Wormal.——cited. 3 Rep. 81. Twine's caſe.

14. Tenant for life, being *in debt*, to defraud his creditors *commits a forfeiture*, to the end that he in reverſion may enter, who is made privy to the contrivance: per Hale, the creditors ſhall avoid this, as well as any fraudulent conveyance. Vent. 257. Paſch. 26 Car. 2. B. R. Anon.

15. A voluntary ſettlement *diſables a deviſe of the ſame*, though it be for payment of his debts; for, per Jefferies C. it is not revocable. Vern. 464. Trin. 1687. Bale v. Newton.

Such conveyance having been got from A. *by undue means*, a few months before his death, he deviſed *all his land for payment of his debts.* On a bill by creditors to ſubject theſe lands, it was objected, that at beſt this was but in nature of a choſe en action, and not aſſignable; but Lord Wright, and Maſter of the Rolls held, it was in nature of an equity of redemption, and aſſignable, and as he might have been relieved, ſo may his deviſees. Ch. Prec. 142 Hill. 1700. Blake v. Johnſon.

16. 3 & 4 *W. & M. cap.* 14. *ſ.* 2. enacts, that *all wills concerning lands, or any rents, profits, term, or charge out of the ſame, whereof the deviſors ſhall be ſeiſed in fee ſimple in poſſeſſion, reverſion or remainder, ſhall be deemed to be fraudulent and void againſt creditors upon bonds, or other ſpecialties, their executors, adminiſtrators, &c.*

S. 3. *And every ſuch creditor may maintain an action of debt upon the ſaid bond and ſpecialties againſt the heir at law, and ſuch deviſee † jointly, and ſuch deviſee ſhall be liable, and chargeable for a falſe plea, as an heir at law ſhould have been for any falſe plea pleaded, or for not confeſſing the lands and tenements to him deſcended.*

A man *binds himſelf, and his heirs* and dies, *leaving a real eſtate* to deſcend to his heir, *ſubject to a mortgage* for years; the *heir aliens* the real eſtate before a bill brought, and if the obligee was relievable here, againſt the heir and purchaſor, on the ſtatute for preventing fraudulent deviſes, or if he was to be ſent to law to get judgment firſt, was the queſtion? The Lord Keeper thought, that ſtatute being *introductive of a new law*, the relief on it muſt be at law; and held likewiſe, that a bond creditor could not redeem a mortgage for years, without firſt having judgment at law againſt the heir, though it might have been otherwiſe in caſe of a mortgage in fee. Tr. 1702. Ch. Prec. 198. Bateman v. Bateman.———Note, Chancery at this day gives relief upon the ſaid ſtatute in ſuch caſe. Ch. Prec. 198. in a nota there.

A. *bound himſelf and his heirs* in a bond, *and deviſed all his lands to J. S.* a bill was brought upon this ſtatute, to affect the real aſſets in the hands of the deviſee; but the heir not being made a party, it was objected to; but it was anſwered, that nothing being deſcended to him, it would be in vain to make him a party; for it would only oblige the plaintiff to pay coſts. And though in an action at law it was neceſſary to make him defendant, it was becauſe the debt was in the debet & detinet, and the heir at law privy to the anceſtor, and the deviſee not; and ſo for conformity the ſtatute in action at law directed the heir to be a co-defendant; yet that it was otherwiſe in a court of equity; but Lord C. Cowper ſaid, that it is the act of parliament makes this aſſets in the deviſee's hands, and that requiring the heir to be made defendant, you muſt follow the remedy therein preſcribed, and *this bill in equity, is as an action at law, otherwiſe if there were no heir; and perhaps* it might * be otherwiſe too, *if the bill had charged, that the plaintiff had made enquiry, and could find or diſcover no heir.* Wms's Rep. 99, 100. Mich. 1707. Gawler v. Wade.

Though by the ſaid ſtatute, a man is prevented from defeating his creditors by his will; yet *any ettlement* or diſpoſition he ſhall make *in his life* time of his lands, whether voluntary or not, *will be good againſt bond creditors*; for that was not provided againſt by the ſtatute, which only took care to ſecure ſuch creditors againſt any impoſition, which might be ſuppoſed in a man's laſt ſickneſs; but if he gave away his eſtate in his life-time, this prevented the deſcent of ſo much to his heir, and conſequently took away their remedy againſt him, who was only liable in reſpect of the lands deſcended; and as a *bond is no lien* whatſoever *on lands in the hands of the obligor*, much leſs can it be ſo, when they are given away to a ſtranger. Decreed. Trin. 1718. Abr. Eq. Caſes, 149. Parſlow v. Weedon.

Weedon.———S. C. cited per Mr. Vernon. Chan. Prec. 521. though he ſaid, that till that reſolution, he ſhould have been of another opinion, and that ſuch a diſpoſition had been held fraudulent againſt creditors by Lord Ch. J. Holt, in the caſe of Templeman v. Beke.

S. 4. Deviſes for payment of debts, or children's portions, purſuant to a marriage agreement excepted.

17. A man ſteals a young woman, who had a conſiderable *portion in truſtees hands*; after the marriage, *her friends refuſed to part with the portion without ſecurity* from the huſband, *that it ſhould be ſettled on the wife*, who gave a judgment, that it ſhould be laid out in land, to be ſettled to them, and the heirs of their bodies; a creditor of the huſband brought a bill for his debt, and to be let in; for that it was after marriage, and voluntary, and ſo ought not to prevent a creditor of his debt; but the court diſmiſſed the bill, though without coſts. Ch. Prec. 22. Paſch. 1691. Moor v. Rycault.

18. *Goods were taken in execution in the poſſeſſion of S.* who had them by virtue of a ſale from G. upon which S. brought an action, and the defendant inſiſted, that the *ſale to S.* was fraudulent againſt him, be being a creditor by judgment; Holt, Ch. J. ſaid, that if the *judgment was upon a point tried*, in ſuch caſe he *need not to prove the conſideration*, but it ſhall be intended good: *but if* it be a judgment *by confeſſion*, he ought to *prove* it to be for *a juſt debt*, otherwiſe he ſhall not overthrow the ſale, though it be fraudulent; for it is good againſt all but creditors for a juſt debt bona fide due, Skin. 586. Trin. 7 W. 3. B. R. Sanders, v. . . . .

19. A. being in debt to ſeveral perſons, and apprehenſive of a verdict, and great damages to be given againſt him, in an action brought againſt him by B. for *criminal converſation with B.'s wife*, *conveys his eſtate to truſtees, for payment of debts* mentioned in a ſchedule, and ſuch other debts as he ſhould mention in 10 days afterwards. A verdict is given againſt him, and 5000 *l.* damages. B. by bill endeavours to ſet aſide this ſettlement as fraudulent *to defeat his recovery*. But the court held it not fraudulent, either in law or equity, for ſuch debts as are named in the deed, thoſe being real debts, and his only *ex maleficio*. But he may have an intereſt in the ſurplus, and ordered him to declare, if he would controvert any of the debts, and come in upon the ſurplus after the debts mentioned in the ſchedule, or ſuch other, as were appointed within 10 days purſuant to the deed, are ſatisfied. Mich. 1699. Ch. Prec. 105. Lewkner v. Freeman.

20. It was held by the court of chancery, that if there be *two dealers*, and *one* of them is very *much indebted to the other*, *and*, in order to get an abatement from him, he *makes him believe he is inſolvent, by abſconding*, ſkulking, or ſhutting up ſhop, whereby the other has *juſt cauſe to fear the loſs of his debt*, and thereby *procures a releaſe or* an *abatement*, *when* in truth, the man *was really ſolvent*, this court would relieve againſt ſuch releaſe, &c. and this was agreed to have been often done, and the caſe of Bonney and Bonney quoted for an inſtance; ſecus if the party had not juſt cauſe to fear the loſs of his debt. 12 Mod. 558. Mich. 13 W. 3. cites the caſe of Monger v. Kett.

21. A.

21. A. *purchaſes* a leaſe of a houſe *in B.'s name*, and takes a declaration of truſt *to permit A. to enjoy for life*, and then *in truſt for C. who lived with A. as his wife*, and was ſo reputed. Wright K. inclined that this leaſe is not aſſets of A. nor liable after his death to his creditors; for when a man purchaſes, he may ſettle as he pleaſe; and thought that fraudulent conveyances are made ſo only by the [523] ſeveral ſtatutes made for that purpoſe. Hill. 1704. 2 Vern. 490. Fletcher & al. v. Lady Sidley & al.

22. A. *conveys* his eſtate to the *uſe of himſelf for life, with power to mortgage ſuch part as he ſhall think fit*, remainder to the truſtees to ſell and pay all his debts, but *continues poſſeſſion*, and *keeps the deed.* — A. becomes indebted afterwards by judgments, bonds, and ſimple contracts. The deed of truſt is fraudulent as againſt creditors by bond and judgment, who, having *no notice of the ſettlement*, ſhall not come in in average only with the other creditors. Trin. 1705. 2 Vern. 510. Tarback v. Marbury.

23. If A. makes a *bill of ſale to B. a creditor, and afterwards to C. another creditor*, and *delivers poſſeſſion* at the time of the ſale *to neither*, and after *C. gets poſſeſſion* of the goods, and B. *takes them out of his poſſeſſion*; C. cannot maintain treſpaſs, becauſe the *firſt bill of ſale is fraudulent againſt creditors, and ſo is the ſecond*, yet they both bind A. and B.'s is the elder title; and the naked poſſeſſion of C. ought not to prevail againſt the title of B. that is prior where both are equally creditors; and poſſeſſion at the time of the bill of ſale is delivered over to neither. Per Holt, Ch. J. 2 New Abr. 606. cites Trin. 1706. Baker v. Lloyd.

24. A. made a *bill of ſale of goods* on ſhip-board, (which were invoyced particularly) *and of the produce and advantage that ſhould be made of them* to B. and this was in nature of a ſecurity for money lent on a bottomree bond. Theſe goods were afterwards *inveſted in other goods*, and thoſe again bartered for others. A. dies, and was *indebted by judgment to J. S.* Ld Cowper thought, that this was no fraudulent bill of ſale; for the *truſt appeared on the very face of the bill of ſale*, and here B. was intitled preſently to the truſt of thoſe goods on the ſale, and to all the advantages conſequential to that truſt, and may *follow the goods* for that purpoſe, and if that could be diſtinguiſhed from other goods, then B. was to be paid prior to J. S. but otherwiſe, J. S. muſt be preferred, and B. paid only in a courſe of adminiſtration. Hill. 1709. Ch. Prec. 285. Bucknal v. Royſton.

25. A. going beyond ſea, conveys an eſtate *to truſtees to raiſe* G. Equ. R. 5000 *l. for a daughter's portion, to be paid 3 months after marri-* 37. S. C. *age.* About a month after, A. being on ſhip-board, *wrote a letter to the truſtees, to correct* the abſoluteneſs of the truſt. While A. was beyond ſea, the daughter marries and dies. The huſband had an eſtate of about 800 *l.* per ann. Ld Cowper was againſt reading the letter, and ſaid it could be no controul of the deed, eſpecially being a month after, and that ſuch a method would break through all ſettlements, and cited the caſe of CLAVERING v. CLAVERING. He ſaid, that *as to creditors*, this deed would be voluntary; but there being no

no ſuch, he decreed the 5000 *l.* to be raiſed for the huſband, with intereſt from three months after the marriage, but being againſt the heirs at law, would allow no coſts. Ch. Prec. 306. Mich. 1710. Clavel v. Littleton.

A. going beyond ſea, in the ſervice of the Eaſt India company *gives bond to the company of* 2000 l. *for his fidelity*, and a few days after conveyed land in truſt to raiſe 5000 *l. for his daughter's portion, payable 3 months after marriage*. B. married the daughter; and afterwards A. *embezzled* 26000 *l. of the company's effects*. Decreed the 5000 l. to B. after payment of 2000 l. only to the company. Ch. Prec. 377. Paſch. 1714. E. Ind. Comp. v. Clavel.

26. A. conveyed lands in *truſt to raiſe portions for his children*, and 5 *s.* only, or ſuch a trifling ſum, was paid by the feoffee for land worth 1000 *l.* A. died, and B. was his heir. It was held, that this land is not extendible on a judgment had againſt B. ſo that the conveyance was not fraudulent. Clayt. 7. March. 8 Car. per Davenport Ch. B. Sir Francis Ireland's caſe.

27. *A man being much indebted gave* 600 *l. for the benefit of his younger children* 6 *hours before his deceaſe.* This is not fraudulent, as againſt creditors, though it would have been ſo of a real eſtate or *chattel real*; yet the court would not have taken it pro confeſſo, to be ſo, but would have *directed an iſſue to try it*, as the ſame was done in Ld Sommers's time, and, an iſſue directed, determined fraudulent before Holt Ch. J. Sel. Ch. Ca. in Ld. King's time, 77. 14 July, 1729. Duffin v. Furneſs.

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28. 5 *Geo.* 2. *cap.* 30. § 11. enacts that, *every bond, bill, note, contract, agreement, or other ſecurity whatſoever, to be made or given, by any bankrupt or other perſon, unto, or to the uſe of, or in truſt for any creditor or creditors, or for the ſecurity of the payment of any debt or ſum of money due from ſuch bankrupt, at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and ſuch bankrupt's diſcharge, as a conſideration, or to the intent to perſwade him, her, or them to conſent to, or ſign any ſuch allowance or certificate, ſhall be wholly void, and of no effect; and the monies thereby ſecured, or agreed to be paid, ſhall not be recovered or recoverable.*

(G) By one Creditor, Protecting or Screening againſt another.

1. A. deviſed lands to B. *charged with* 600 *l. and in default of payment, deviſed them to C.* afterwards *B. and C. joined in a mortgage* to D. and D. ſuffered B. to continue in poſſeſſion, and to fell timber, ſo that the eſtate would not anſwer the legacy and mortgage. But decreed the legacy to be paid firſt, D. having notice of the will. Trin. 27 Car. 2. Fin. R. 225. Green v. Gardiner.

So where mortgagor becomes a bankrupt, & mortgagee refuſes to enter, and

2. Mortgagee recovers judgment in *ejectment*, but, in *combination* with the tenant in poſſeſſion, *refuſes to take out execution.* North K. thought it reaſonable, that if he would not receive the profits, the rent ſhould be brought into court, and ordered, that unleſs he took out execution before the end of the term, he ſhould be anſwerable for

for the profits, as in caſe of wilful default. Mich. 1684. Vern. 258. D. of Bucks v. Sir Rob. Gayer.

permits the bankrupt to *continue in poſſeſſion*, and to fence againſt the *ejectment*, brought by the aſſignees, with this mortgage. Mortgagee ſhall be charged with the profits, from the time of the ejectment delivered. Mich. 1684. Vern. 267. Chapman v. Tanner. ——— So where mortgagee enters, and thereby prevents ſubſequent incumbrancers from entering, and yet *permits mortgagor to receive the profits*, he ſhall be charged with all the profits he had or might have received ſince his entry. Mich. 1684. Vern. 270. Coppring v. Cook.

3. A. has *judgment* againſt B. for a juſt debt.——A. takes out a *fi. fa.* and gets the ſheriff to *ſeize*, but would not let him proceed further, and lets the *goods remain in B.'s hands.*—C. who had alſo a judgment for a juſt debt againſt B. takes out a fi. fa.——C. may ſeize the goods; for the former was a *fraudulent execution*, and the ſheriff might very well return nulla bona, on the firſt execution. Farr. 37. Trin. 1 Annæ, B. R. Rice v. Serjeant.

4. There being *accounts current, between A. and B. a goldſmith, B. gives* out his *caſh note to C. for* 5000 *l.* and *A. mortgages his eſtate as a collateral ſecurity* for the money. *B. gives C.* 100 *l. for his favour* in the matter, *who keeps the caſh note by him.* Some time *after the mortgage forfeited B. becomes a bankrupt.* A. prays relief, becauſe C. neglected to turn his caſh note into money, when he might have done it. It was directed, that an account be taken, how matters ſtood between A. and B. MS. Rep. ſaid to be Ld. Harcourt's, tit. Fraud; cites 10 Feb. 1717. Maſon v. Lake.

(H) By Conveyance or Gift, to Perſons not Creditors, to ſcreen. [525]

1. *TENANT in tail*, by fraud, *grants to the king*, and after bargains to another. This conveyance is void to the king; becauſe it is by fraud; per Coke, and cites it to be ſo held by Popham. Roll. R. 167. Paſch. 13 Jac. B. R. Anon.

2. A. made a *leaſe* for years to B. and others for payment of his debts, and died. The *reverſion deſcended to C.* The *truſtees and C. aſſign* the term to D. by way of truſt, *to pay D.* 750 *l.* C. confeſſes *judgment to R.—D. receives the profits and pays them to C.* to the value of 800 *l. but D. had no notice* of the judgment, nor was there any extent on the judgment. Decreed by Ld. Keeper, that he account, and the 800 *l.* not to be allowed otherwiſe than as to go in ſatisfaction of his debt. viz. D.'s debt. Mich. 27 Car. 2. 2 Chan. Caſes, 207. Miller v. Stephens.

3. A. makes an *abſolute conveyance to B.* for 1500 *l.* B. executes a *defeazance upon payment* of 1500 *l. within* 6 *years*, and after *on marriage ſettles it* as an abſolute eſtate, *on his wife and iſſue.* There being proof, that A. made the *conveyance, to enable B. to get a fortune*, though that was another lady, and not the wife B. really married, it was decreed, that A. was *bound as particeps criminis*, and this decree was now affirmed by eight lords againſt ſeven. Cowper and Harcourt, againſt the decree. Parker for it. MS. Rep. ſaid to

There is added a note in the M. S. that the wife's father had notice of the defeaſance, before the ſettlement made. Ibid.

to be Ld. Harcourt's, tit. Fraud. 21 Jan. 1718. Webber v. Farmer.

(I) As to Purchaſors. Caſes in Law and Equity, upon the ſeveral Statutes.

1. A. has theſe *four feoffees to his uſe. B. C. D. and E.*—A. *ſells this land to F. and requires B. and C. to paſs the eſtate* of it *to F.* and A. alſo requeſts B. and C. to require D. and E. in the name of A. that they alſo ſhall paſs the eſtate to F. and they and B. and C. do all this and paſs the eſtate accordingly to F. but A. did not ſpeak with D. and E. to this purpoſe; A. *afterwards ſells the ſame land to G. and requires D. and E. to make an eſtate* to him of it, and they do ſo. Upon a ſuit in chancery by F. againſt D. and E. they were diſcharged by the advice of the juſtices; for A. did not perſonally require them to make an eſtate to F. —— F. may ſue A. and alſo G. if G. had notice of the firſt ſale; and G. may alſo ſue A. for this diſceit. Jenk. 107. pl. 5. cites 39 H. 6. 36. and 7 E. 4. 14.

2. *Leſſee for* 60 *years, if he ſo long lived, forged a leaſe for* 90 *years abſolutely, and* then *by indenture, reciting the forged leaſe, ſold the ſame, and all his intereſt in the eſtate* to R. G. *for valuable conſideration.* It ſeemed to Coke, that R. G. was no purchaſor within the ſtatute 27 Eliz. for he contracted not for the true and lawful intereſt, (for that was not known to him, or otherwiſe perhaps he would not have dealt for it, and the viſible and known term was forged), and tho' [it was] by general words, [yet that] the true intereſt paſt, notwithſtanding he gave no valuable conſideration, nor contracted for it. And all the judges of Serjeant's-Inn in Fleet-Street were of this opinion. Co. Litt. 3. b.

3. If a *leſſee for years demiſeth parcel of the term* to another, and covenouſly *forfeits his whole leaſe* for any condition broken, and takes the land back in leaſe again, his leſſee ſhall find help in chancery. Cary's Rep. 25. cites Crompton 64.

[526] 4. The plaintiff bought land of the defendant, which the defendant had *conveyed* before *to the uſe of himſelf, his wife and ſon.* It was decreed; that the plaintiff ſhould have the land againſt all. Toth. 125. cites 13 and 14 Eliz. Frankland v. Gray.

5. The bill ſets forth, that *G.* one of the defendants, *in conſideration of* 286 *l.* did bargain and ſell unto the plaintiff certain lands in the bill mentioned; and made unto him a deed of *feoffment*, and a letter of attorney, to make livery and ſeiſin; and *before livery made a leaſe to C. who knew of the bargain*, and he leaſed to B. who knew alſo of the bargain, and this appearing to this court to be true, an injunction is granted to the plaintiff, untill the cauſe ſhould be heard and determined. Cary's Rep. 117, 118. cites 21 and 22 Eliz. Ireby v. Gibone, & al.

Vid. Recovery (C a. 2) 6. By the ſtatute 27 Eliz. 4. where a ſale was alledged to be fraudulent within that ſtatute, againſt a grant of rent made by a remainder

mainder man, to iſſue out of the ſame land, it was held not to be fraudulent. Becauſe the *grant and ſale ſhould be made by the ſame perſon*, and here tenant in tail made the ſale, and the remainder man granted the rent. Mo. 158. Paſch. 23 Eliz. Hunt v. Gately, al. Capel's Caſe.

7. 27 *Eliz. cap.* 4. § 2. enacts that, *every conveyance, grant, charge, incumbrance, and limitation of uſe or uſes of in or out of any lands, or other hereditaments, made to defraud any purchaſor of the ſame in fee, in tail for life or years, ſhall (as againſt ſuch purchaſors only, and every other perſon lawfully claiming from, by, or under him) be utterly void, the ſaid purchaſor having obtained the ſame for † money, or ſome other good conſideration.*

This ſtatute *extends* only *to purchaſers* of lands, and *not to creditors.* 1 Lut. 435. Hill. 2 and 3 Jac. 2. Young v. Johnſon.

Tenant in tail, remainder over; if he in *remainder* perceiving tenant in tail about to alien and bar him of his remainder, *grant his remainder to the queen, by deed inrolled*, with intent *to deceive the purchaſor*, and tenant in tail dies without iſſue, the *purchaſor* ſhall *enjoy* the land *againſt the queen*, by this ſtatute; for the ſtatute makes void, not only fraudulent conveyances, made by the *vendor himſelf*, but every ſuch conveyance, made with intent *to deceive purchaſors*, and even *grants to the king*, the ſtatute being general, and made in ſuppreſſion of fraud. per Coke Ch. J. Paſch. 13 Jac. 11 Rep. 74. in Magdalen College caſe.——And ſays Popham Ch. J. was of the ſame opinion.

† One covenanted to *convey to the uſe of himſelf and his feme, and the heirs* of his body, with remainders over, before ſuch a day; but *in the mean time makes a leaſe* of his eſtate to others for ſeveral years, and after makes an aſſurance according to the covenant, and held a good leaſe, and out of this ſtatute; for this act is only in favour of *purchaſors*, who give *money, or other conſideration* for the land. per 3 Juſt. And. 233. Trin. 32 El. Beaumont v. Needham.——S. C. cited 3 Rep. 83. b.——In the preamble it is ſaid, *for money or other good conſideration*, and ſo it is in the body of the act, yet thoſe words are to be *intended only of valuable conſideration*, as appears by the clauſe about revocation, in which it is ſaid, (money, or other good conſideration) and the word (paid) is to be referred to the money, and (given) to the conſideration, and thoſe words *exclude all conſiderations of nature or blood*, &c. 3 Rep. 83. a. in Twine's, cites it as adjudged. 37 Eliz. in C. B. in caſe of Upton v. Baſſet.

A. made a *feoffment to the uſe of himſelf for life*, remainder *to his ſon in tail*, remainder over, with *power of revocation, by writing under his hand and ſeal, and publiſhed in preſence of three witneſſes.* Afterwards in conſideration of 400 l. he *entered into a recognizance* of 800 l. and died, and held that this recognizance was *extendible againſt the ſon*, by this ſtatute, becauſe the ſtatute aids, not only *purchaſors of lands*, but thoſe who, for *valuable conſideration*, have any *charge out of, or upon it.* And though it does not expreſsly ſpeak of *conuſees*, yet it ſhall be expounded to extend to them. In Canc. Vid. Bridg. 22. Garth and Ereſfield.

A. becomes *tenant for life*, remainder *to his ſon B. and his wife for their two lives, remainder over to them in ſpecial tail, remainder to B. in tail general*, with a *power* reſerved to A. *by any writings, to charge* the lands *with* 2000 *l.* A. and B. after *mortgage part* of the land to C. *in fee*, with condition of *re-entry, on payment* of the 2000 l. in 10 *years*; A. dies. B.'s wife dies without iſſue. B. marries again, and has iſſue a *ſon*, and dies; the 10 years *expire.* Held that the eſtate limited *to the heirs general of B.* is not fraudulent, nor within the *words*, or the *equity* of this ſtatute, and ſo good againſt the *mortgagee*, though perhaps he may have *relief in equity* for the 2000 l. per Hale, Ch. B. Hardr. 337. Paſch. 17 Car. 2. Jenkins v. Kemiſh——A bill was afterwards brought in Chancery, and there decreed that the conſideration of the firſt ſettlement, (viz. marriage and marriage portion,) may extend to the iſſue of ſuch ſecond marriage, and that the power being executed by leaſe and releaſe, was not a good execution, and the bill was diſmiſſed. Lev. 237. S. C.——Ch. R. 274. S. C.——Chan. Caſes, 104. S. C. Paſch. 20 Car. 2.

A. *bargains and ſells a term* to B. *in conſideration* that B. was *ſurety for him*, for 3000 l. to J. S. and covenants, that he had power to grant it, whereas he had *before ſettled it*, in conſideration of a marriage portion, *in truſt to the uſe of himſelf and his wife*, for life, *and then of his iſſue male.* All agreed, that this leaſe ſhall not avoid the eſtate of the *feme and iſſue in tail.* Ley Ch. J. ſaid, that in caſe A.'s *wife had died, and the children by her*, the *leaſe would be good againſt* A.'s *right heirs.* But whether A.'s* eſtate ſhall be void by this ſtatute, as fraudulent againſt B. at leaſt *during A.'s life*, quære. 2 Roll. R. 305. Paſch. 21 Jac. B. R. Beverly v. Gatacre.——[*So that* it ſeems upon the laſt caſe, a *ſurety* to whom a ſecurity is made of lands for his indemnification, by the perſon for whom he is ſurety, is a purchaſor within this ſtatute.] *[527]

§ 4. *Conveyances made upon good conſideration, & bona fide, ſhall be good, notwithſtanding this act.*

5 Rep. 60. b. cites Paſch. 3 Jac. C. B. S. P. Standen v. Bullock.—Mo. 615. S. C.—cited Bridgm. 23.———2 Lev. 106.

8. Fraudulent conveyance within the 27 Eliz. 4. is void againſt a purchaſor, notwithſtanding, during the treaty, the *purchaſor had notice* of the fraud. For the notice cannot make that good which an act of parliament has made void, as to him. per Wray Ch. J. 5 Rep. 60. b. Mich. 32 & 33 Eliz. B. R. in Gooch's caſe.

9. At *common law*, there was not any fraud remedied, which ſhould *defeat an after purchaſe*, but that only which was committed to defraud a former intereſt. Cro. E. 444. Mich. 37 and 38 Eliz. C. B. in caſe of Upton v. Baſſet.

S. P. per Anderſon, Ch. J. 3 Rep. 83. b. cited in Twine's caſe.

10. If a perſon that has *not good government of himſelf*, by advice of friends conveys his lands *in truſt*, and *without any conſideration*, and afterwards one procures him to ſell him land of 500 *l. per. ann. for* 500 *l.* or other petty conſideration.——Though this laſt purchaſor pays money, yet he ſhall not avoid the firſt conveyance; for the ſtatute was made to help thoſe that came to land on good conſideration lawfully, and not without conſideration, or by any *indirect means*; cited by Anderſon Ch. J. to have been ſo adjudged. Cro. E. 445. Mich. 37 and 38 Eliz. C. B. in caſe of Upton v. Baſſet.

11. A. a woman living ſeparate from her huſband had ſaved money, and *purchaſed in B.'s name in truſt*. B. lying ill, *made a leaſe at the requeſt of A. for* 200 *years to C.* on condition that C. ſhould pay the profits to A. and alſo upon condition, that if B. ſurvived the firſt day of June, and then payed 1 ſhilling to C. the leaſe ſhould be void. B. ſurvived the day but paid not the ſhilling. But after *B. for* 100 *l. made a leaſe to J. S.* with covenants for quiet enjoyment, and againſt incumbrances made by him. B. died. C. having notice given him now, and not before, of the leaſe made to him, enters upon J. S. The queſtion was, whether the leaſe made by B. at A.'s requeſt, in part of performance of the truſt, be fraudulent and void by the ſtatute 27 Eliz. 4. againſt J. S. as purchaſor, or by virtue of the revocation left to B. who made the leaſe to C. and alſo the after leaſe to J. S. As to the intent, it was ſaid againſt the fraud, that the *intent* was the performance of the truſt, and could not be to deceive a purchaſor, becauſe in good conſcience it was to perform the truſt to one, who did not direct any ſecond ſale. As to the ſecond branch it was ſaid, that at the time of the ſecond leaſe, the *power to revoke was lapſed* and void, and ſo the firſt leaſe became abſolute and irrevocable. Mo. 757. Trin. 2 Jac. Sheldon v. Hanbury.

Upon evidence to the jury this caſe was cited by Tanfield J. to have been ſo adjudged in one Woodies caſe. Vid. Cro. J. 158. Paſch. 5 Jac. B. R. in caſe of Colvil v. Parker.

12. In an information on the ſtatute, it was adjudged, that if one, *after marriage*, *voluntarily aſſigns a leaſe in jointure* to his wife, *without any conſideration of* the wife's *portion*, *or* any *other recompence* by her friends, and takes the profits himſelf, and afterwards ſells it to one who had not any notice of this aſſignment; it is within the ſtatute, becauſe voluntary, which ſhall be intended fraudulent; but if it had been in conſideration of a portion, and for a proviſion for the wife, and had taken the profits, and then ſold the term, it had been otherwiſe. Nelſ. Abr. 890. pl. 9. cites Cro. J. 158. Colvil v. Parker.

13. A

13. A. the grandfather, B. the father, and C. the ſon; A. on the marriage of B. made the feme of B. a jointure of S. and at the ſame time, * *covenanted to demiſe D. to B.*—*A. demiſed* one moiety accordingly, *to commence after A.'s death, for* 1000 *years*, and the other moiety to commence from a day to come, *proviſo if B. die without iſſue, or make any leaſe, without reſerving the ancient rent, the leaſes to be void; B. aſſigned over the leaſes to the uſe of C. an infant to prevent a merger by deſcent of the inheritance, and* with this colourable pretence, *that C. ſhould pay his debts.* The aſſignment was to ſeveral perſons of credit, but delivered in a ſecret manner to one of a meaner quality; A. died; B. for a great ſum of money, by indenture inrolled, bargained, and ſold D. to W. R. It was reſolved, that though at the time of the aſſignment the inheritance was in A. yet after A.'s death the vendee ſhall avoid the term, the ſaid aſſignment upon the evidence being taken to be fraudulent. 6 Rep. 72. Paſch. 5 Jac. C. B. Burrel's caſe.

14. The words of 27 Eliz. 4. are general, and there is no need that he that ſells the land ſhould be the *maker of* the fraudulent eſtate, or incumbrance; but if the eſtate be fraudulent the purchaſor ſhall avoid it, *be who will the ſeller*, nor ſhall any *colourable pretence* of payment of debts, &c. or his making privately a *jointure* on his wife ſecure it, if the fraud be proved in evidence, or confeſſed in pleading. Paſch. 5 Jac. C. B. 6 Rep. 72. in Burrel's caſe. Cro. J. 158. Colvil v. Parker.

15. If the *father make a leaſe to a ſtranger* for 40 years and *continues poſſeſſion*, and after *conveys to a younger ſon, who ſells it* for a valuable conſideration, it was doubted if the *purchaſor* ſhould avoid this leaſe. But it was ſaid, that if in that caſe the father, after the making ſuch leaſe, had ſuffered the land to deſcend to his eldeſt ſon, who had been privy to this truſt, then the purchaſor *from the eldeſt ſon* ſhould avoid this leaſe. Lane 113. Paſch. 9 Jac. in the Exchequer, in caſe of Clerk v. Rutland.

16. Every voluntary conveyance is *not fraudulent*, but prima facie it is *preſumed* to be ſo againſt purchaſors, unleſs the contrary be made appear. Chan. Caſes 100. Hill. 19 & 20 Car. 2. Douglaſs v. Ward. Chan. Caſes, 217. Holford v. Holford. S. P. where there is a conveyance for a conſideration.——So where perſons of honour are truſtees, per Finch. C. Chan. Caſes, 291. Mich. 28 Car. 2. Biſco v. E. of Banbury.

17. A *conveyance* cannot be fraudulent *againſt articles*, unleſs another conveyance be executed in a legal courſe. Hill. 23 & 24 Car. 2. 1 Ch. Caſes 217. Holford v. Holford.

18. A. made a *leaſe for* 99 *years in truſt to raiſe portions for his children*; ſome years after A. *mortgages* the ſame to B. for 500 years, but with *notice* of the ſettlement; the laſt leaſe was ſet aſide ſo as not to hinder the raiſing the portions. Fin. R. 439. Mich. 31 Car. 2. Aldridge and al. v. Duke and al. *Mortgagor marries and after marriage ſettles on his wife* the mortgaged lands which was recited to be in conſideration of a portion paid, and then *he mortgages a 2d time to another perſon who had notice of the jointure at the time* of the mortgage; there were *no articles previous to the jointure, nor any money proved to be paid after the marriage*; the huſband died; on a bill by the wife to be let into her jointure, on payment of one third due on the firſt mortgage, without being obliged to redeem the ſecond, as having notice of the jointure, it was decreed at the Rolls, that ſhe muſt redeem both; and on appeal Ld. C. King ſaid, it can never be a queſtion, whether a voluntary ſettlement,

tlement, be good againſt purchaſors, and affirmed the decree. Sel. Ch. Ca. in Ld. King's time, 65. Mich. 12 Geo. 1. 1726. Gardiner v. Painter.———A purchaſor for valuable conſideration *ſhall hold*, or take place againſt a prior voluntary ſettlement, *though he had expreſs notice* thereof; at the time of his purchaſe, ſuch voluntary ſettlement by 27 *Eliz.* being made void againſt a purchaſor with or without notice. Mich. 1727. per Cur. Abr. Equ. Caſes, 334. Tonkins v. Ellis.

2 Ch. R. 74. 24 Car. 2. Thorn v. Newman.

19. A voluntary conveyance is a fraudulent conveyance as to a *purchaſor*, and therefore *notice*, or no notice is not material in ſuch caſe. 1 W. & M. N. Ch. R. 161. Watkins v. Stephens.

20. A enters into *partnerſhip* with B. C. and D. for 21 years, *for digging mines in A.'s lands*, and A. to have ſuch a ſhare in conſideration of his ownerſhip of the land; A. dies; his widow ſets up a *voluntary ſettlement*, *after marriage for a jointure*; it was inſiſted [529] that the plaintiffs B. C. and D. were in nature of purchaſors, and that by 27 El. all voluntary conveyances are void as againſt purchaſors; and there was a *difference between purchaſors* and *creditors*; for the 13 El. makes not every voluntary conveyance, but only fraudulent conveyances, void as againſt creditors, ſo that as to creditors, it is not ſufficient to ſay the conveyance is voluntary but muſt ſhew they were creditors at the time of the conveyance made, or by ſome other circumſtances, ſhew it was *made with intent to deceive*, or defraud a creditor. But as to purchaſors all voluntary conveyances are void without more. The court inclined that plaintiffs were as purchaſors and to decree an execution of the agreement againſt the voluntary ſettlement. Mich. 1695. 2 Vern. 326. Shaw and al. v. Standiſh.

21. Reverſioner in fee of a *copyhold* eſtate ſurrenders it to his heir apparent in tail, remainder to his own right heirs, and this was *in order that his ſon*, *coming in as a purchaſor*, and not as heir, after his death *ſhould pay a leſs fine*; afterwards the *father on a treaty of marriage of his ſon with B. tells B.'s friends that this copyhold was ſo ſettled*, and propoſed therefore a ſettlement of other lands on B. Whereupon a ſettlement was made, the marriage was had, and a portion paid of 2000 *l.* Afterwards the *father ſettles the copyhold on a ſecond wife*. Ld. Cowper decreed the ſurrender good to the ſon, and though *voluntary at firſt*, yet upon his treaty of marriage, it being regarded as a principal inducement to it, it *now became valuable*, and ought to be conſidered as if it had been then ſurrendered to the ſon, and diſmiſſed the bill of the father's ſecond wife and her truſtees with coſts. Ch. Prec. 275. Hill. 1708. Kirk v. Clark.

22. A *ſettlement* may be *made after marriage* [without articles or agreement precedent] and not be fraudulent againſt purchaſors; as if a marriage be had and *in conſideration of a ſum of money paid after the marriage* [and which the huſband was not intitled to before] it will be good, as was ſaid by counſel; to which Ld. C. King ſaid, that that would be *as a new agreement for a valuable conſideration*, and for a ſum of money to which he had not been intitled, unleſs he had conſented to the making ſuch jointure, and would be good againſt purchaſors; but if he make a jointure in conſideration of money which he was then intitled to, it is voluntary. Sel. Ch. Ca. in Ld. King's time, 65. Mich. 12 Geo. 1. 1726. in caſe of Gardiner v. Painter.

(K) Relating

(K) Relating to Landlords and Tenants, and other Perſons claiming Right in the Lands.

1. A. Held lands of *ſeveral lords*, and in order *to defraud* them *of their heriots* made a fraudulent *gift of all his horſes* to B. who, to prevent the lord from ſeiſing, inſiſted on his fraudulent gift; upon which the lord brings *debt* on the ſtatute 13 Eliz. 5. *for the value of all the horſes* ſo given away, though he claimed *but one heriot*; and whether or no the plaintiff could *recover the value* but *of one or of all* was the queſtion? and per Dyer and Harper J. the action well lies; but Manwood e contra. D. 351. b. pl. 23.

2 Le. 8. S. C. per Dyer and Manwood J. the action did not lie; but per Mounſon J. it did lie. 19 Eliz. C. B. Creſwell v. Coke.——S. C. cited Arg. 3 Lev. 354. out of D. 351.

2. If A. *makes a leaſe for years by fraud*, and covin, *and after makes another leaſe bona fide*, but *without fine or rent* reſerved; the ſecond leſſee ſhall not avoid the firſt leaſe; for it was agreed, firſt, that by the common law, eſtate made by fraud ſhall be avoided by him only who had former right, title, intereſt, debt, or demand, but that he who has a later right, &c. could not avoid gift or eſtate precedent by fraud at the common law. Secondly, that no purchaſor ſhould avoid precedent conveyance made by fraud and covin, but he who is purchaſor for money, or other valuable conſideration. 3 Rep. 83. cites it adjudged. Trin. 37 Eliz. C. B. Upton v. Baſſet.

Cro. E. 444. Mich. 37 & 38 Eliz. C. B. S. C. reported as here, that no rent was reſerved though Hughes Abr. tit. Deeds, 605. pl. 13. is miſprinted by ſaying that rent * was reſerved, and Nelſon's Abr. tit. Fraud, pl. 4. by copying from Hughes is ſo too, and as Hughes cites no book, ſo neither does Mr. Nelſon, and both give it as a reaſon why the ſecond leaſe ſhould not avoid the firſt, viz. "because an eſtate by fraud ſhall be avoided only by him who "has a former right;"——without taking notice that it was ſo by the common law.——*Leſſee at a rack rent* has been adjudged at law, though he paid no fine, to be a *purchaſor* within the ſtatute. 2 Vern. 327. Arg. in the caſe of Shaw & al. v. Standiſh.——6 Rep. 72. b. Purrel's caſe.——Cro. J. 181. cites it as adjudged 29 Eliz. in caſe of Hind v. Collins.

*[530]

See Faits (S)

3. *One, that could read*, made an *agreement for a leaſe for* 21 *years*, the *leſſor* himſelf *drew the leaſe but for one year*, and *read it for* 21 years, and after the expiration of a year ejected the leſſee, and he brought a bill in Chancery, to be relieved upon all this matter which was in proof; but it was *diſmiſſed with coſts*; for it was within the ſtatute of frauds and perjuries; and being able to read it was his own *folly*; otherwiſe if he had been *unlettered*. Hill. 35 & 36 Car. 2. Skin. 159. Anon. in Chancery.

4. 11 *Geo.* 2. *cap.* 19. § 12. *Every tenant, to whom any declaration in ejectment ſhall be delivered, ſhall forthwith give notice thereof to his or her landlord or landlords, or his, her, or their bailiff, or receiver, under penalty of forfeiting the value of* 3 *years improved or rack rent of the premiſes ſo demiſed or holden in the poſſeſſion of ſuch tenant, to the perſon of whom he or ſhe holds, to be recovered by action of debt, wherein no eſſoign, protection, or wager of law ſhall be allowed, nor any more than one imparlance.*

(K. 2) Voluntary Conveyances. In what Caſes they ſhall be ſaid to be Fraudulent.

1. IF one makes a voluntary conveyance in conſideration of natural affection, and is *not* at that time *indebted* to any, *nor in treaty* with any *for the ſale* of the lands, ſuch conveyance has no badge of fraud, but otherwiſe it is if he be indebted, or in treaty for the ſale of the lands. Sti. 446. Paſch. 1655. Anon.

2. A. ſeiſed in fee-tail, in purſuance of ſeveral promiſes to M. his couſin, ſuffered a common recovery, and declared the uſes to M. and her heirs after his death, and after he *ſold the land* to J. S. who was alſo his couſin for a 1000 *l.* the ſaid *firſt conveyance not being diſcovered till after his death*; the court held the *deed of uſes of the common recovery* to be fraudulent within the ſtatute. Sid. 133. Paſch. 15 Car. 2. B. R. Fitzjames v. Moys.

3. In a trial at bar, *the ſon and daughter* of A. were defendants; the action was an ejectment; the defendants admitted the point of A.'s *bankruptcy*, but ſet up a *conveyance* made by A. to them *for* the *payment of* 1500 l. *apiece, being money given them by their grandfather* B. to whom A. took out adminiſtration. Per Hale Ch. J. it is a voluntary conveyance unleſs you can prove that A. had *goods in his hands* of B.'s *at the time of the executing it*; ſo they proved that he had, and there was a verdict for the defendants. Mod. 76. Mich. 22 Car. 2. Sir Anthony Bateman's caſe.

4. If the *ſon be diſſolute*, and the *father* with advice of friends doth *ſettle things ſo that he ſhall not ſpend all*, though here be not a conſideration of money, yet it is no fraudulent deed; and a deed may be voluntary, and yet not fraudulent, otherwiſe moſt of the ſettlements in England would be avoided; per Hale Ch. J. and Twiſden Juſtice. Mod. 119. Paſch. 26 Car. 2. Lord Tenham v. Mullins.

2 Vern. 271. Trin. 1692. Sanders v. Dehew.

5. Voluntary ſettlement made *by the father*, is fraudulent as to any mortgage made by himſelf, otherwiſe as to a *mortgage made by the ſon*. Vern. 46. Paſch. 1682. Jones v. Purefoy.

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6. Every voluntary conveyance is not therefore fraudulent; but if there was a *reaſonable cauſe for making it*, may be good and valid, even againſt a creditor; per Jeffries C. 2 Vern. 44. Paſch. 1688. in caſe of Sagittary v. Hide.

If a *feme* joins in alienating her *jointure*, and the ſame day a new one is made, and of greater value, and without articles, or agreement, it is not fraudulent againſt purchaſors. 2 Lev. 70. Mich. 24 Car. 2. B. R. Scot v. Bell. —— A *temporary* conveyance made by a huſband in place of a jointure before marriage agreed to be made on the wife, and of a like value, though by a different way of grant, as by a leaſe to truſtees for 100 years, and though it was *indorſed that when a jointure ſhould be ſettled upon her of* 1000 l. *per ann. according to the firſt agreement, then the leaſe ſhould be void*; yet it was held after the baron's death, he having made no other jointure, that this conveyance was good againſt a purchaſor. Cro. J. 454. Mich. 15 Jac. B. R. Griffin v. Stanhope. —— Vent. 194. Paſch. 24 Car. 2. Sir Ralph Bovey's caſe —— Clayt. 39. Lent Aſſiſe, 14 Car. 1. coram Vernon. Anon.

7. In debt upon a *recognizance* forfeited by reaſon of an *eſcape*, a voluntary ſettlement *made* 30 *years before* the eſcape was adjudged to

to be fraudulent. Arg. Paſch. 1688. 2 Vern. 44. cites it as adjudged in B. R. in Lenthall's caſe.

8. A. purchaſes a copyhold, and takes a *ſurrender to himſelf, his wife and his daughter*, and their heirs; A. as viſible owner of the eſtate takes on him to make a conditional ſurrender by way of *mortgage* to the plaintiff, and dies; plaintiff brings a bill againſt the mother and daughter to diſcover their title, and to ſet aſide their eſtate as fraudulent againſt him, who was a purchaſor; but bill diſmiſſed, though without coſts; for per Lds. Commiſſioners, the huſband and wife take one moiety by entierties, ſo that the huſband cannot alien, nor diſpoſe of it, ſo as to bind the wife, and the other moiety is well veſted in the daughter. 2 Vern. 120. Hill. 1690. Back v. Andrewes.

9. Father makes a voluntary ſettlement *on truſtees to raiſe money to pay his debts and portions for younger children*, reſerving 50 *l.* per ann. to himſelf for life, remainder to his ſon for life, remainder, &c. Father continues in poſſeſſion, and 12 *years after contracts new debts by bond.* Per Hutchins commiſſioner, it is a fraudulent ſettlement and not purſued; for the truſtees did not enter according to the deed, but let the father live in the houſe, but, the other 2 commiſſioners doubting, it was ſent to law. 2 Vern. 261. Paſch. 1692. Hungerford v. Earle.

(L) In Reſpect of Power of Revocation.

1. *By* 27 *El. cap.* 4. § 5. *if lands be firſt conveyed with clauſe, proviſion, or condition of revocation, determination, or alteration, and afterwards ſold, or changed for money, or other good conſideration before the firſt conveyance was revoked, altered, or made void, according to the power given thereby; in this caſe ſuch firſt conveyances ſhall be void againſt the vendee, and all others lawfully claiming from, by, or under him. Howbeit, no lawful mortgage made* bona fide *without fraud ſhall be impeached by this act.*

A conveyance by *covenant to ſtand ſeiſed* in conſideration of *nearneſs of blood* is not a conveyance upon *valuable conſideration*, within this ſtatute, to make void a *former* conveyance with *power of revocation.* Mo. 602. Trin. 42 Eliz. in Chancery, Burgh's caſe. als. Burgh (Lady) v. Williams.

If A. *bargains and ſells* his land to B. with intent *to make B. tenant to the precipe*, and B. ſuffers a *recovery*, declaring by indenture the *uſes to A. for life*, remainder over with *power* to A. *of revocation*, A. ſhall be ſaid to be the *perſon who makes this conveyance*, and therefore if A. *ſells* the ſame land afterwards to C. for *valuable conſideration*, the firſt conveyance is void as to C. by this ſtatute, and if A. had made a *leaſe* of the land, after the firſt conveyance, this ſhall not be ſaid an *extinguiſhment of the power of revocation*, ſo as to make void the ſale to C. Per Cur. Mo. 615. Paſch. 42 Eliz. C. B. Bullock v. Thorne.

A. *ſeiſed* of land *in truſt* for B. makes a *leaſe for years* at B.'s requeſt *to* C. on condition that *C. pay the profits to B.* and that *if A. ſurvive ſuch a day* the leaſe *to be void on payment of* 12 d. to C.——A. ſurvives the day, but does not pay the money, and after in *conſideration of* 100 *l. A.* makes a *leaſe to D.* and then dies, after which C. on notice of the leaſe to him, enters, and D. brought ejectment. It was ſaid, that the *firſt* leaſe is not fraudulent, nor within this ſtatute, and that the *power of revocation* being *extinguiſhed* at the time of making the *ſecond* leaſe, the firſt became *abſolute and irrevocable.* Mo. 757. Trin. 2 Jac. Sheldon v. Handbury.

2. If A. reſerves a power to himſelf to revoke *by aſſent of B.* and after A. *bargains and ſells the land to C.* this is a good bargain and ſale, and within the remedy of the 27 Eliz. 4. 3 Rep. 82. b. in Twine's caſe. [532]

3. If a man has power of revocation, and after, to the intent to defraud a purchaſor, he *levies a fine, or makes feoffment*, or other conveyance *to a ſtranger, and thereby extinguiſhes his power, and* then *bargains and ſells the land to a third perſon for a valuable conſideration*, the bargainee ſhall enjoy the land; for as to him the fine, &c. by which the condition was extinct, was void by the ſtatute, and ſo the *firſt clauſe, which makes all fraudulent* and covenous *conveyances void as to a purchaſor, extends to the laſt clauſe* of the act, viz. *when he who makes the bargain and ſale had power of revocation.* 3 Rep. 83. a. in Twines's caſe, cites 38 Eliz. C. B. Lee v. Colſhill.

4. *Voluntary eſtates* made with power of revocation are, by the ſtatute of 27 Eliz. as to purchaſors, put upon the ſame foot with conveyances made by fraud to deceive purchaſors. 3 Rep. 83. reports that it was ſo ſaid.

5. A man had *conveyed* his land to the uſe of *himſelf for life*, and then to the uſe *of diverſe others of his blood*, with future *power of revocation*, as *after ſuch a feaſt or* after the *death of ſuch a one*, and after, and before the power of revocation commenced, he (for a valuable conſideration) did bargain and ſell the land to another and his heirs; this bargain and ſale is within the remedy of the ſtatute; for although this ſtatute ſaith, (*the ſaid firſt conveyance not by him revoked according to the power by him reſerved*) which ſeems, by the literal ſenſe, to be intended of a preſent power of revocation, (for no revocation may be made by force of a future power until it comes in eſſe;) yet it was holden that the intention of the act was, that ſuch a voluntary conveyance which was originally ſubject to the power of revocation, be it in preſent, or in future, ſhall not be good againſt a purchaſor bona fide upon a valuable conſideration, and if other conſtruction be made, the act will ſignify very little, and it will be eaſy to evade ſuch an act. Bridgm. 23. in caſe of Garth v. Eresfield, cites it as Mich. 42 & 43 Eliz. 3 Rep. 82. b. Standen v. Bullock.

So, where A. had made ſuch conveyance, and had made a *leaſe reſerving rent*, without other conſideration, it was ſaid to be reſolved that it was ſufficient, and a revocation of the former eſtate quoad that leaſe. Cro. J. 180. cites 29 Eliz. B. R. Hinde v. Collins.

6. A. *covenants to ſtand ſeiſed* in conſideration of love, &c. to himſelf for life, remainder to his eldeſt ſon, &c. *with power to leaſe for* 21 *years*, and reſerving a *power to revoke* the uſes; A. for 30 *l.* made a leaſe to B. for 21 years; though the power was ill, being on covenant to ſtand ſeiſed, yet, having power of revocation, the law conſtrues it as revoked and void quoad the *leaſe*, and that A. was a tenant in fee when he made the leaſe; and it is expreſsly within the 27 El. 4. being in conſideration of a *fine paid.* Cro. J. 180. Trin. 5 Jac. B. R. Croſs v. Fauſtenditch als. Shoreditch.

Godb. 289. pl. 416. S. C.—2 Roll. R. 204 S. C.—S. P. and reſolved that it was ſo without averment

7. The *king's debtor* is ſeiſed of lands in fee; and being ſo indebted and ſeiſed *makes a feoffment* to a ſtranger, with power of revocation, and *dies without revocation.* This land is liable to the king's debt; for it was in the power of the debtor to revoke this feoffment, and then without doubt the land had been liable to this debt; and his not revoking it was *with an intent to defraud the king* as the law will preſume; and therefore it was adjudged by the

the two Chief Juſtices and Chief Baron, that this land is liable to the king's debt by the common law. Jenk. 285. pl. 19.—— Marg. cites Paſch. 21 Jac. in the court of Wards, Sir Edward Coke's caſe.

of fraud under the inquiſition quæ terras & tenementa habuit. S. C. cited Hob. 339. in caſe of Lord Sheffield v. Ratcliff.

8. A. before marriage with M. *agreed to aſſure* 1000 l. *a year for a jointure*, and after marriage *conveyed lands of greater value to truſtees to her uſe for* 100 *years, if ſhe ſo long live*, to commence after his death, but there was an indorſement to make void the deed upon the making a jointure of 1000 *l.* a year according to the firſt agreement, and in the leaſe there was a *proviſo to determine at the will of A.* This was held a good leaſe being made in purſuance of the firſt agreement, though no mention then was of any leaſe to be made, but it is founded on a good conſideration and not fraudulent. Cro. J. 454. Mich. 15 Jac. B. R. Griffin v. Stanhope.

[533] Nelſ. Abr. Fra. (A) pl. 10. cites S. C but omits the proviſo.

9. A. ſettled a *jointure on his wife with power of revocation*, and afterwards A. on the marriage of B. his nephew with M. agreed to ſettle *on B. lands of* 700 *l. per ann.* Though the *lands fall ſhort of that value*, it ſhall not be ſupplied out of the jointure; for though the jointure, being with power of revocation, was fraudulent as to purchaſors, yet it was not ſo to the nephew or his wife, being made long before the marriage. Mich. 26 Car. 2. Fin. R. 146. Parker v. Serjeant.

10. *Baron and feme* ſeiſed in right of feme, of a *rectory*, in conſideration of *marriage of their ſon, and of a portion* to be paid him, levy a *fine* to four others, to the uſe *of baron for life*, and then of *feme* for life, remainder *to the ſon and his heirs*, with a *power* to baron and his feme, *with conſent of the ſaid four perſons*, or *the ſurvivor of them to revoke* the uſes. Baron dies, *feme* enters and *ſells the rectory for* 1400 *l.* to J. S. (who had *notice of the fine and uſes*) and *without conſent of the ſurvivor* of thoſe four, there being only one then living; and reſolved per Cur. that this firſt conveyance is not within the 27 *Eliz.* nor fraudulent againſt J. S. the *purchaſor*. Jones. 94. Mich. 29 Car. 2. B. R. Buller v. Waterhouſe.

11. A. makes a voluntary ſettlement reſerving a *power to mortgage* and charge the eſtate with *what ſums he thought fit*; ſo that he may charge it to the full value. This, in effect, *amounts to a power of revocation*, and therefore fraudulent as againſt creditors, by ſtatute and judgment. 2 Vern. 511. Trin. 1705. Farback v. Marbury.

But if no fraud be found, a proviſo to charge with 2000 *l.* (being *a particular ſum*) is not within the ſtatute, per Cur. Lev. 152. Mich. 16 Car. 2. B. R. Jenkins v. Keymis.

(M) Forfeitures or Penalties inflicted for fraudulent Conveyances and abetting the ſame.

1. 13 *Eliz. cap.* 5. § 3. enacts that *every of the parties to ſuch a fraudulent conveyance, bond, ſuit, judgment or execution, who, being privy*

devoving a fraudulent conveyance

of goods, in *delay of execution of proceſs* by *attachment*, was held within this ſtatute. Le. 47. Mich. 28 and 29 Eliz. C. B. Pendleton v. Gunſton.

privy thereunto, ſhall wittingly juſtify the ſame to be done bona fide, *and upon good conſideration, or ſhall alien or aſſign any lands, leaſe or goods ſo to them conveyed as aforeſaid, ſhall forfeit one year's value of the lands, leaſe, rent, common or other profit out of the ſame, and the whole value of the goods, and alſo ſo much money as ſhall be contained in ſuch covinous bond; and being thereof convicted, ſhall ſuffer half a year's impriſonment without bail. And here the ſaid forfeitures are to be divided between the queen and the party grieved.*

2. A. *owes B.* 20 *l.* and he makes a frauduleut *gift of his goods worth* 2000 *l.* though A. is defrauded but of 20 *l.* yet B. ſhall forfeit the whole value of the goods ſo contracted; per Mounſon J. becauſe the perſon of the debtor is chargeable. 2 Le. 8. 19 Eliz. C. B. Creſwell v. Coke.

[534] Reſolved, 1ſt, that where W. had *agreed for* 1000 *l. paid by one T. to aſſure* 100 *l. per ann.* to him during his own life and his wife's, and for aſſurance of which, a *mortgage* was made, though W. did *not pay* the money, yet is he a *purchaſor within* 27 *Eliz.* becauſe *named as party in truſt for benefit of T.*——2dly. That the eſtate on the mortgage was a *ſufficient purchaſe*, within the ſtatute.——3dly, That *one entire year's profit* ſhall be forfeited without *apportionment*, on a mortgage, as well as on an *abſolute ſale*; ſo on a *leaſe* or a petty *annuity* made by fraud——4thly, That every defendant found guilty ſhall pay a year's value of the land, *every one by himſelf*, and not *jointly* amongſt them all.——5thly. That a defendant being 16 *years of age*, and privy to the conveyance, and having *juſtified* it to be made bona fide, ſhall be puniſhed as of *full age*.——6thly. The bill being preferred *only on this ſtatute*, the court of *Star-Chamber* could not *increaſe* or *diminiſh the penalty* of the ſtatute, nor *impoſe a fine for the king*. Noy. 105. Poulton v. Wiſeman.

3. 27 *Eliz. c.* 4. § 3. enacts that *every of the parties to ſuch fraudulent conveyances, or being privy thereunto, who ſhall juſtify the ſame to be made* bona fide, *and on good conſideration, to the diſturbance and hindrance of the purchaſor, or of any other lawfully claiming, from by or under him, ſhall forfeit one year's value of the lands, or other hereditaments ſo purchaſed or charged, to be divided betwixt the queen and the party grieved, and being thereof convicted, ſhall ſuffer half year's impriſonment without bail.*

Upon evidence in an action on this ſtatute, defendant on his *examination in chancery* depoſed, that *he thought it a good deed, and on good conſideration*, and reſolved——1ſt. That a *purchaſor*, after ſuch *avowing*, ſhall not have an *action*.——2dly. That *(thought)* or *(believing)* is not a direct *affirmation*.——3dly. That it is not a *voluntary* avowing, but *ſub pœna*, and ſo not within the ſtatute.——4thly. That he that had the *future intereſt for years*, might have an action on the ſtatute, as *he in remainder* might have an action for *forging deeds, &c.* Noy. 115. Covil v. Barton.

(N) Actions and Pleadings on the ſeveral Statutes of Frauds.

1. THE action on the 13 Eliz. 5. *is not a popular action*, but extends only to the party grieved, per Dyer and Manwood J. 19 Eliz. C. B. 2 Le. 9 in the caſe of Creſwell v. Cook.

2. The *father aliens to his ſon and heir for money* (and money is really paid) yet it ſhall be intended fraudulent, unleſs the contrary be ſhewed and averred; per Harris Serjeant. 3 Le. 254. Mich. 32 Eliz. C. B. in the SERJEANT'S caſe, ſays it was lately ſo adjudged in the Court of Wards.

3. A. brought *debt on a bond* againſt B. as heir to his father, who entered

entered into the bond. B. pleaded *riens per deſcent*. He having, long before the action brought, made a *feoffment of the lands by deſcent* to one W. but this was proved to be by *fraud, to bar A. of his action*, and ſo avoid feoffment by the 13 *Eliz.* 5. and this was allowed to be *given in evidence* without pleading it, becauſe the ſtatute was made in *ſuppreſſion of fraud*, and therefore muſt have a favourable interpretation; and it would be very unreaſonable to oblige the party to plead a feoffment to which he is an entire ſtranger. 5 Rep. 60. Mich. 32 and 33 Eliz. B. R. Gooch's caſe.

4. If the party be charged with a *ſpecial fraud*, he may *plead* that the conveyance was made *bona fide*, and it will be a good plea *without any traverſe*. Arg. Goldſb. 119. Hill. 43 Eliz. in caſe of Price v. Sands.

5. If the *iſſue* is general, *ſeiſed or not* ſeiſed *by the feoffment*, the covin may be given in evidence, when the feoffment is given in evidence; *but* if the iſſue be taken directly, *infeoffed or not* infeoffed, the feoffment muſt be avoided by pleading the covin ſpecially; for it is a feoffment tiel quel. Hob. 72. Trin. 12 Jac. Humberton v. Howgill. ——*Ne infeoffa pas*, cannot be pleaded. Hob. 166.

6. An *information* upon the ſtat. 27 Eliz. of fraudulent conveyances by the party grieved, though *brought after the year*, is good, and not within the ſtat. 31 Eliz. 5. for that is to be intended of common informers. Noy. 71. Anon. cites it to have been ſo agreed in one Holden's caſe.

7. A conveyance made *to avoid a wardſhip* was decreed not to be given in evidence. Toth. 105. cites Mich. 6 Car. Biſhop of Hereford v. Bright and Barkley.

8. If the ſtat. of 29 Car. 2, 3. be *not inſiſted upon*, the court will compell the performance of an agreement, though not in writing. Arg. 10 Mod. 404. cites it as held in caſe of Kingſman v. Kingſman. [535] And the ſame was done per Parker C.

Paſch. 4 Geo. 1. 10 Mod. 405. in caſe of Nab v Nab.——And G. Equ. R. 146. Jones v. Nab. S. C.

(O) By Perſons intruſted.

See (U)

1. A. gave to B. ſeveral ſums of *money to put out at intereſt* for his uſe. B. pretended he had put it out, and that he had the ſecurities in his cuſtody, when in truth he had *purchaſed copyhold lands in his own name* with the money, and was admitted, and ſurrendered the ſame to himſelf for life, and after to a nephew. This being found out, B. entered into a ſtatute to ſurrender to A. the copyhold, and B. ſurrendered accordingly; but before that A. was admitted B. died. The nephew being preſented as next heir of B. the lord would not admit A. on a bill brought by A. and the eſtate of B. appearing not ſufficient to ſatisfy A. and B. having promiſed, that his nephew, when of age, ſhould ſurrender, it was decreed that A. ſhould hold the lands till the infant come of age, and then he ſhould ſurrender; Per Ld. K. Coventry. Nelſ. Ch. R. 33. Coſin v. Young and Fuller.

(P) By Conſtruction.

So where *A.* granted a leaſe for 30 years, and the ſon, knowing that the father had no power to grant ſuch leaſe, acquainted the father of it; but *B. ſuffered the leſſee to lay out 2800 l. in improvement, without acquainting him that A. had no right to grant ſuch leaſe*, but encouraged him to proceed. It was decreed that the leſſee ſhould hold during the reſidue of the term againſt B. his father being dead. Hill. 9 Annæ, G. Equ. R. 85. Huning v. Ferrers.——Abr. Equ. Caſes, 357. S. C. Haning v. Ferrers.

1. A. Was *tenant for life, remainder in tail to B.* his ſon. *J. S. thinking that A. had fee, applied to B. to procure a leaſe for three lives of A. for* 400 *l. fine*, and a ſmall yearly rent. *B. told J. S. that A. had power to grant ſuch leaſe, and intermeddled in the procuring it*, and part of the money was applied to B.'s uſe. Decreed that A. and B. both join at their own coſts to confirm the leaſe to J. S the plaintiff during the eſtate thereby granted. Anno 1649 N. Ch. R. 46. Hunt v. Carew.

* Vern. 136. Hill. 1682. S. C.

2. A. having title to an eſtate *ſtood by, and ſuffering a purchaſor to go on* without diſcloſing his title was poſtponed. 2 Vern. 151. cited by the court in the caſe of Hunſden v. Cheyney, as the caſe of Dr. Amias. ——The caſe was mortgagee or conuſee of a ſtatute was inquired of by one treating for the purchaſe of the land, if it was free from incumbrances, who ſaid it was, on which he purchaſed, and was relieved. Cited Mich. 34 Car. 2. in the caſe of * Hobbs v. Norton. 2 Chan. Caſes, 128.

This was firſt decreed by the Maſter of the Rolls, and upon appeal to the Lord Chancellor, the decree was affirmed. Hill. 1697. Ch. Prec. 80, 81. Smith v. Loader and Burroughs.

3. A gentleman of 3000 *l.* per ann. being tricked into a recognizance, (by a *ſcrivener*, who wormed himſelf in as a co-ſecurity) for 1000 *l.* of which 300 *l.* only was paid to himſelf; and the reſidue, after ſeveral delays, being made up in money and goods, &c. to the ſcrivener (in confederacy with the lender), was relieved on the circumſtances of fraud, and decreed to repay only the 300 *l.* and intereſt, and a perpetual injunction againſt the ſtatute, as to the plaintiff; per Somers C. Hill. 1697. 2 Vern. 346. Smith v. Burroughs and Loader.

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4. A. deviſed 300 *l.* to B. but *if B. married without conſent of C.—C. to have the* 300 *l.*—B. married D.—C. knew of the courtſhip and the *marriage had with the privity of C.* but he never conſented or contradicted. Cowper K. thought it a *tacit conſent and a fraud*, and decreed the 300 *l.* to B. Hill. 1706. 2 Vern. 580. Meſgret and Ux. v. Meſgret.

It is not neceſſary that ſuch feme covert or infant be *active in promoting* the purchaſe, if it appears that they

5. A. had two daughters B. and C.—A. was tenant for life of lands, *remainder to B. a feme covert in tail*; on a treaty of marriage between J. S. and C. J. S. inſiſted on 1000 *l.* which A. could not give B. and her huſband encouraged the *marriage*, and *ſolicited A. to convey the intailed lands to J. S. and C.* which A. did: it was decreed after A.'s death, that B. ſhould be bound by the conveyance, and levy a fine on penalty of payment of coſts; and a perpetual injunc-

tion

tion granted to J. S. and C. for quiet poſſeſſion. Tr. 9 Geo. 9 Mod. 35. Savage v. Foſter.

were *privy* to it, and that it could not be done without their knowledge, and they gave no notice. 9 Mod. 37.

6. *Qui tacet conſentire videtur.* See Maxims.

(Q) By Conſtruction, as to Mortgagees.

1. A Prior incumbrancer *witneſſes a ſubſequent mortgage*, and told the money lent at his maſter's chambers, being his clerk, and for that alone had his own ſecurity poſtponed. Tr. 1690. 2 Vern. 151. in the caſe of Hunſden v. Cheyney, cited as the caſe of Clare v. Earl of Bedford.———Though he was an *infant*. Tr. 9 Geo. 9 Mod. 38. SAVAGE v. FOSTER, cites the caſe above, but adds that the infant was clerk to an attorney, and *ingroſſed* the ſubſequent mortgage.

Where a firſt mortgagee is *witneſs* to a ſecond mortgage, though it appears not, that he actually knew the contents, yet ſince it did not appear but that he might know them, it would be preſumed, that if he could write or read, that he knew the ſubſtance of the deed, which he, having atteſted it, undertook to ſupport by his evidence, and he not acquainting the ſecond mortgagee with his former mortgage, the ſecond mortgagee ſhall be preferred, per Cowper C. Wms's Rep. 394. Hill. 1717. Mocatto v. Murgatroyd.———But in a note, there it is ſaid, that King Ch. in Mich. 1732. thought that a bare atteſtation, without other circumſtances of preſumptive notice, was not ſufficient.

2. A *counſellor* has a ſtatute from A. and is *adviſed with about lending* 1000 *l.* on a mortgage by B. to A. and draws the mortgage, in which was a covenant that the eſtate was free from incumbrances, and *conceals his own ſtatute*. Per Cur. If he, who only conceals his incumbrance, ſhall be *poſtponed*, much more ought a counſellor acting thus, and decreed accordingly. Mich. 1699. 2 Vern. 370. Draper v. Hill, & al.

3. A. mortgaged his land to B. and propoſing to borrow money of C. on the ſame land. C. ſends D. to B. to *aſk B. if he had any mortgage on A.'s land.*—*B. ſaid he had not.*—but D. never told B. that C. was about to lend money on the ſecurity to A. and the queſtion D. aſked was in a public market, and it was what A. owed him? Decreed at the rolls, that the eſtate ſhould ſtand charged with B.'s debt firſt. But Lord King directed a trial at law, whether D. told B. that C. was about to lend money on A.'s eſtate when D. enquired what B.'s debt was, and directed B.'s anſwer to be read as evidence. Paſch. 1706. 2 Vern. 554. Ibotſon v. Rhodes.

4. A. having leaſe-hold eſtate mortgaged it to B. and afterwards, on a plauſible pretence, *borrows of B. the original leaſe, and ſhews it to C. of whom he then borrowed* 250 *l. on it*, but returned the leaſe to B.——Decreed at the rolls to poſtpone B. to C. as guilty of fraud on C. But Cowper C. reverſed the decree; for that B. had acted innocently in what he had done. Mich. 1716. 2 Vern. 726. Peter v. Ruſſel.

Mich. 2 Geo. G. Equ. R. 122. S. C. and reports that A. borrowed the leaſe of B. a *ſecond time, and then C. lent more money*, but the leaſe was returned to B. in an hour's time; and B. in his anſwer denied, and no proof was made of B.'s knowing the occaſion of the borrowing it. But otherwiſe a *combination*

nation between a firſt mortgagee and mortgagor to draw in a ſecond mortgage will poſtpone the firſt. But here C. truſted A. more than B. did.

[537] 5. J. S. an owner of a ſhip *mortgages his ſhip to A. with whom he leaves the* original *bill of ſale*, and this mortgage was by deed of mortgage only, *without any indorſement* or notice of the mortgage *on the bill of ſale*, as is uſual; afterwards (at the requeſt of J. S.) *A. lets J. S. have the original bill of ſale*; and thereupon *J. S. made ſeveral ſubſequent mortgages* of ſeveral parts of the ſhip, which were *indorſed* upon the original bill of ſale, and ſome time after *J. S. delivered the bill of ſale to A. who made no objection* as to the indorſements. Cowper C. decreed that this, together with the long acquieſcence afterwards, amounted to an *implied conſent* in A. to the ſubſequent mortgages indorſed, and ſhould give them a *preference*. Wms's Rep. 392, 393. Hill. 1717. Mocatto & al. v. Murgatroyd.

6. *And* in this caſe, *A. was ordered to pay coſts to the indorſees* of the ſubſequent mortgages on the bill of ſale, who were the plaintiffs; *but not to have his coſts over againſt J. S.* in regard, as Ld. Chancellor ſaid, it was not reaſonable that A. ſhould onerate his pledge with coſts *occaſioned by his unjuſt defence*. Ibid. 395.

S. C. cited P. 10 Geo. Arg. accordingly. But by the counſel of the other ſide it was

7. Tenant for life borrowed money, and his ſon, who was *next in remainder* and an *infant*, was a *witneſs to the deed of mortgage*. The mortgagee was relieved on the foot of fraud, becauſe the infant did not give him notice of his title, cited as the caſe of * WATTS v. HASEWELL. Tr. 9 Geo. 1. 9 Mod. 38. in the caſe of Savage v. Foſter.

ſaid, that the ſon *ſolicited the lending the money, and carried the deed to counſel*, and witneſſed the mortgage. 9 Mod. 96. by the name of Watts v. Treſwick.——A leſſee for 21 years was a witneſs to a conveyance in fee, and ſome years after, when his leaſe was expired, and not before, he claimed by a prior releaſe from the ſame perſon that executed the conveyance he was witneſs to, but decreed againſt him by the Ld. Keeper Coventry. Neſſ. Ch. R. 28. Gwin v. Edmonds.

(Q. 2) By Conſtruction, as to * Purchaſors.

* Vid. (I.)

So where *remainder-man in tail*, expectant on eſtate for life, *encouraged* leſſee of tenant for life *to expend money on repairs*;

1. THERE is a great difference between a *mortgagee's not giving notice* to a perſon whom he knows to be in treaty for the ſale, or any ſettlement of the land in his mortgage, and where the mortgagee himſelf *helps carry on* ſuch a treaty. Paſch. 10 Geo. 1. 9 Mod. 96. Oſborne v. Lea.

the leaſe, though for 30 years, was eſtabliſhed againſt the remainderman, per Ld. Harcourt. Hill. 9 Annæ, G. Equ. R. 85. Huning v. Ferrers.——Abr. Equ. Caſes 357. S. C.——*Concealment only* will not make a grant ill, which at firſt was good. And all acts ought to have reſort to their firſt original, per Montague, Ch. J. on a trial at bar of an iſſue out of Chancery. Cro. J. 455. Mich. 13 Jac. B. R. Griffin v. Stanhope.

(R) By Conſtruction, relating to Marriage.

1. THOUGH the conſideration of *marriage* be a good conſideration, yet if *power of revocation* be annexed to it, it is void

void as to ſtrangers. Lane 22. Mich. 4. Jac. in the Exchequer. Anon.

2. A *widow* makes a deed of her *former huſband's eſtate*, and marries, the ſecond huſband not privy to it; decreed the ſecond huſband to enjoy the eſtate notwithſtanding. 2 Car. 2. 2 Chan. Rep. 81. Howard v. Hooker.

3. Plaintiffs were the defendant's ſiſter's children, and on a bill againſt defendant (being an infant) to diſcover a deed, the queſtion was, if defendant's father had ſettled lands on plaintiff's mother? The proof was, that about two years before her marriage, he *had put* her *in poſſeſſion* of theſe lands, and had *articled*, on her ſaid marriage, *to ſettle them* on her and her heirs, and the *defendant, (then an infant) was a witneſs* to the articles. But though there was no other [538] proof of ſuch deed of ſettlement, yet the court decreed for the plaintiff. But it was reckoned a hard caſe to decree an equity on a deed which had no other proof. N. Ch. R. 94. Kingſton v. Manwaring.

4. A *recognizance* entered into by the *wife, the day before marriage*, was ſet aſide, and a perpetual injunction granted though one witneſs depoſed the huſband's conſent to the drawing it, but that witneſs had an aſſignment of it to himſelf. 24 Car. 2. 2 Chan. R. 79. Lance v. Norman.

5. A *widow intitled to dower releaſed the ſame, upon a falſe ſuggeſtion*, viz. that her huſband by his will had given her 3500 *l.* in lieu thereof; and this releaſe having been *produced to M. and her relations, on the ſon's marriage with M. and a ſettlement made, and portion paid*, the mother the widow, ſhall be bound by it, and even though her ſon, who ſurpriſed her into ſuch relèaſe, had defrauded her of all the money left her by her huſband's will, and which was the like ſum of 3500 *l.* which was given her abſolutely, and not intended to be in lieu of dower. Hill. 1690. 2 Vern. 133. Beverley v. Beverley.

6. On a treaty of marriage, the *mother hears her ſon declare, that* ſuch a term was to come to him after his mother's death, and *witneſſes a deed of ſettlement* of the reverſion thereof on the iſſue of that marriage, after the mother's death; the term was in truth entailed on the mother. Yet ſhe is decreed to make good this ſettlement, and to ſettle the reverſion accordingly after her death; per Commiſſioners. Trin. 1690. 2 Vern. 150. Hunſden v. Cheyney.

7. A. the *father, denied to conſent to his ſon's marriage* with B.'s daughter, *unleſs he would give bond to pay* 100 *l. to him*, which he pretended he wanted for a proviſion for younger children, upon which the ſon, rather than the match ſhould go off, complied. But upon a bill brought by the ſon and his father in law, he was relieved. Arg. 10 Mod. 448. cites it as the caſe of Sloan v. Fowler.

And if the father in law alone had brought the bill, he would be relieved. per Maſter of the Rolls. Mich. 1718. Wms's Rep. 497. in caſe of Turton v. Benſon——S. P. Ibid. 498. by Parker C. for he is as a purchaſor, by giving a portion or ſettling lands.

(S) By Conſtruction. As to Settlements or Portions.

See 2 Vern. 220. Paſch. 1691. Cottle v. Fripp.

1. *BOND to ſettle a jointure.*——The bond is given before marriage, and after a ſettlement is made, which ſettles the eſtate on the wife, and the iſſue of the marriage. ——This ſettlement is good, as to the jointure, but fraudulent as to the children, in reſpect of a purchaſor, Hill. 1684. Vern. 286. in the caſe of Jaſon v. Jervis.

2. *Widow* before her marriage with her ſecond huſband, *aſſigns over* the greateſt part of her eſtate to truſtees, *in truſt for her children by her former huſband*, though this was without the conſent of her ſecond huſband, yet per Jefferies C. it being done for a proviſion for her children by a former huſband, it is good, and decreed that the huſband, he having *ſuppreſſed the deed*, pay the ſum mentioned in the deed to be the value of the goods. Mich. 1686. Vern. 408. Hunt v. Matthews.

Mich. 1691. Ch. Prec. 35. S. C.—S. C. cited Mich. 2 Geo. G. Equ. R. 123. in caſe of Peter v. Ruſſel.——S. C. cited P. 10 Geo.

3. A. on his marriage with M. ſettled on her the lands in queſtion, for her *jointure*. *B.* the ſecond brother of A. *was privy to an entail, and to the treaty of marriage, and engroſſed the jointure deed.* A. dying without iſſue, deviſed the inheritance to J. S. B. having the deed of entail, brought ejectment and recovered. J. S. marries M. the widow. Decreed for M.'s jointure againſt B. and all claiming by, or under him, but as to J. S. who claimed the inheritance by a voluntary deviſe, the bill was diſmiſſed. Mich. 1691. 2 Vern. 239. † Raw v. Pool.—affirmed in Dom. Proc. 240. ut ante.

by the name of RAWS * v. POTTS, but ſays, that the brother B. who was the remainderman, *joined in the jointure* on M. was decreed to confirm it. 9 Mod. 96. Paſch. 10 Geo. in Canc. in caſe of Oſborn v. Lea.

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But by the ſettlement, the huſband was made tenant for life, and the wife, tenant in tail, which the court would not decree, but ordered an uſual jointure to be made on her, viz. an eſtate for life, impeachable of waſte. Ibid. 60. in a note there.

4. *B. on marriage with M. ſettles a jointure on her, with the approbation of A. his father, and who witneſſed the deed.* The ſon died, afterwards *A. diſcovered, that B. was only tenant for life, and that the fee was in himſelf*, and recovered at law, upon a bill by the wife; Ld. C. King ſaid, he ſhould make no difference, whether A. knew of his title or not, at the time, conſidering the near relation of *father and ſon*, that it was plain, it was thought the ſon had the fee, and had it been known it had been in the father, his joining would have been inſiſted upon, elſe the marriage would not have been had, and as he knew of the ſettlement, he ſhall not take advantage againſt it. And though there was a *covenant in the deed, and the ſon left aſſets* ſufficient, his lordſhip ſaid, he would compleat her jointure, and would not oblige her to have recourſe to the covenant. Sel. Ch. Ca. in Ld. King's Time. 59. Mich. 1726. Teaſdale v. Teaſdale.

(T) By Conſtruction, as to Settlements, or Portions, in Reſpect of Promiſes, &c. for Refunding, &c.

See (R) pl. 7.

1. FATHER promiſes 100 l. in marriage with his daughter to A. The *daughter* in conſideration of this *promiſes to pay 10 l. to the father*. Per Popham, pleading the covin will deſtroy the father's action. Mo. 468. Mich. 39 and 40 Eliz. Collins v. Willes.

Roll. 21. pl. 16. Collins's caſe.—Cro. E. 774. S. C. —Ow. 63. S. C.

2. On a treaty of marriage between A. and the daughter of B.—B. would not conſent to the match, becauſe A. owed 200 *l.* to D.—To remove this obſtruction, C. (A.'s brother) takes up his brother's bond, and gives B. his own.—A. *privately gives C. a counterbond*, and *B.'s daughter is privy* to all this matter, and encouraged it —A. dies,—his widow takes adminiſtration. The widow ſhall avoid this counterbond, though *party to the fraud*.—And if C. himſelf had been plaintiff, he ſhould have been relieved.—And if this bond ſhould be ſuffered to lie on A.'s eſtate, it might ſwallow the aſſets, and defraud the creditors, as it alſo injured the plaintiff, in the right ſhe had by the cuſtom of London, to the perſonal eſtate of her huſband. Mich. 1685. Vern. 348. Redman v. Redman.

2 Vern. 500. S. C. cited. Paſch. 1705. in the caſe of Lamlee v. Haman. —S. C. cited. Mich. 1719. Ch. Prec. 525. in caſe of Turton v. Benſon. —Vern. 475. Mich. 1687. Gale v. Lindo. S. P —cited 2 Vern. 500.—cited Ch. Prec. 522.

3. A. on the *treaty of marriage* of his ſiſter with B. *lends her privately* 160 *l.* to make up the fortune B. inſiſted upon, and ſhe gives *bond* to A. for re-payment.—A. and B. and the ſiſter all die.—The executor of A. ſues the bond againſt the ſiſter's executor. Jefferies C. decreed the bond to be delivered up as fraudulent. For *once a fraud and always a fraud*. Mich. 1687. Vern. 475. Gale v. Lindo. The reporter makes a quære, if the condition had been that in caſe ſhe had ſurvived the huſband, then ſhe ſhould repay, whether ſhe could have been relieved? and ſays, note, it was opened in this caſe, that *the wife after the huſband's death, agreed to repay* the money, and actually paid part. Sed non allocatur; ibid 476.

4. A widow agrees on marriage of her ſon to releaſe and ſettle her jointure; the ſon privately agrees to convey to her a leaſehold. It is an *underhand agreement* to defeat the agreement made on the marriage, and ſet aſide as fraudulent. Mich. 1704. 2 Vern. 466. Lamlee v. Haman.

S. C. cited, Arg. 10. Mod. 448. —2 Vern. 499. S. C. and P.—— Vern. 240. Paſch. 1684. Peyton v. Bladwell.——S. C. cited 2 Vern. 500.

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5. Where the *ſon without the privity of the father* or parent, treating the match, gives a bond to return, or *refund* any part of the *portion*, it is void. Mich. Vac. 6 Annæ, 1 Salk. 156. Kemp v. Coleman.—*But* where he delivered up and *releaſed a ſhew-bond* for 100 *l.* as he promiſed, and gave a releaſe for the real portion; on the payment to the truſtees, the ſon could have no relief. Mich. 1717. 2 Vern. 752. Williams v. Callow.

S. C. cited. Arg. 10. Mod. 447. —2 Vern. R. 764. Mich. 1719. Turton v. Benſon. S. P. and adds, that *an after promiſe* by the ſon to pay it, is but *nudum pactum*.——Wms's Rep. 496, 499. S. C. and P.

And the *aſſignment over* of ſuch bond *to creditors*, does not make the bond obligatory. Ch. Prec. 522. Turton v. Benſon.——S. P. 2 Vern. 764. S. C.——Wms's Rep. 496. 499. S. C. and P.

where

Where the ſon covenanted in conſideration of 3500 *l.* that his father ſhould ſettle 300 *l.* per ann. which the father did, and the ſon *over and above the ſettlement, [voluntarily] gave a bond to leave his wife* 1000 *l.* if ſhe ſurvived him; the ſon died, and on a bill by the father, to ſet aſide this bond, as in fraud of the marriage agreement, decreed againſt him. Mich. 1699. Abr. Equ. Caſes, 88. Gifford v. Gifford.

And the court took a *difference, where the father was party to the articles*, and the ſon privately agreed to releaſe ſo much a year to the father; ſo as the wife's father, who was party, was deceived. Whereas in this caſe, *ſon only is party to* the articles, *and was to have the portion*, and might give it as he pleaſed. Ibid. S. C. cites the other point, as the caſe of Butler v. Chancey. —— S. P. cited Wms's Rep. 121. by Ld. Ch. in caſe of D. Hamilton v. Ld. Mohun

See (O)

(U) By Conſtruction. In Breach or Prejudice of a Truſt.

1. STOCK was inveſted in truſtees, by will. The *truſtees ordered their agent*, the teſtator's brother, *to ſell* the ſtock, *ſo that he did not ſell for leſs than* 2500 *l. and whatever he ſold for more ſhould be for his own trouble. The agent agrees* for the ſale of this ſtock *for* 3400 *l. and after purchaſes the ſtock from the truſtees for* 2800 *l. who allow him* 100 *l. for his trouble in buying*, ſo that he got 600 *l.* by the ſtock, beſides what was allowed for his trouble. Upon a bill brought for the overplus, the ſame was decreed; the court declaring, that no truſtee, or any perſon acting under a truſtee, can ever be a purchaſor in this court, on account of the great inlet to fraud. Sel. Ch. Caſes, in Ld. King's time. 13 Paſch. 11 Geo. 1. 1725. Whitaker v. Whitaker.

2. An *advantageous leaſe made* of 9 houſes, much under the real value, *by a charity to the nephew of their clerk*, and *which the nephew afterwards aſſigned over to the clerk*, in conſideration of 100 *l.* proved to be paid, and of which leaſe, the clerk made great advantages afterwards, was decreed to be ſet aſide. And the court looked upon the payment of the 100 *l.* to be only colourable, and the granting the leaſe, an impoſition on the truſtees, who are not ſuppoſed to know the value ſo well as the clerk. But he having made an under leaſe of five of the houſes to one, who paid the clerk a fine of 20 *l.* and covenanted to rebuild the ſame; that was decreed to continue, and the rent to be paid to the truſtees. But it appearing, that the clerk had rebuilt one of the four remaining houſes, the court by conſent, ſet the 20 *l.* received, and the profits he had made againſt his expences; otherwiſe would have ordered an account of his receipts and expences, and the eſtate to ſtand a ſecurity for what he had laid out. Sel. Ch. Caſes, in Ld. King's time, 40. 5 July, 1725. Pugh v Ryall.

Vid. Facts. (R. a)

(W) By ſuppreſſing, &c. Wills, &c.

1. A. The plaintiff, claimed as deviſee under B. the defendant's father's will. It appeared by *proof, that there was ſuch a will, but no exact proof was given of the contents* thereof. But be-

cauſe the court was ſatisfied that the defendant had ſuppreſſed the will, and becauſe, * (though no exact proof was made of the contents) the defendant might clear this, by producing the will. It was *decreed, that the plaintiff ſhould hold and enjoy, until the defendant produced the will, and farther order*; cited, per Jekyl, Maſter of the Rolls, who ſaid it was decreed firſt by the late maſter, and after affirmed by the Ld. Chancellor on appeal, and afterwards by the Houſe of Lords. 2 Wms's Rep. 733. cites it as 1708, the caſe of Hampden v. Hampden.

2. *But* in a like caſe, where it was proved, that there was ſuch will as plaintiff ſuggeſted, and that defendant had deſtroyed it, Parker C. *decreed the defendant to convey* the premiſſes to the plaintiff *in fee, and to deliver up the poſſeſſion*, cited per Jekyl, Maſter of the Rolls, and which he ſaid, ſeemed to him to be the moſt effectual and reaſonable decree, and ſaid it was ſo decreed in Feb. 1719. Woodroff v. Burton.

(X) Fraud, to avoid Executions, &c.

1. TRESPASS of cattle taken; it was found by verdict at large, that *J. N. recovered damages againſt W. N.* and that the *defendant, as officer, by precept took theſe beaſts in execution*, but *that W. N. had given the beaſts to the plaintiff, by covin, meſne between the judgment and the execution*, to defraud the execution. And the plaintiff, by reaſon of the gift, brought the action, and was barred by judgment; for the fraud [gift] was awarded void. Quod Nota. Br. Treſpaſs, pl. 240. cites 22 Aſſ. 72.

The gift is void, and the plaintiff may have execution thereof. Br. Done, pl. 20. cites 22 Aſſ. 72.— Br. Executions, pl. 80. cites S. C.

2. If a man recovers damages, and the defendant *aliens his goods* by fraud, there *iſſue may be taken* upon it; and if it be found, the plaintiff ſhall have execution of the goods aliened by fraud; per Belknap. Quod non negatur. Br. Colluſion, &c. pl. 9.

3. *Judgment* was againſt A. for debt and damages, and after, by covin to defraud the execution, he *ſells his goods* and receives the money. Per Cur. If the buyer had *knowledge* of the judgment, the ſale is void, and within the purview of 13 Eliz. 5. Dal. 79. 14 Eliz. pl. 14. Anon.

4. In information on the 13 Eliz. cap. 5. for that the plaintiff had brought a *plaint of debt againſt J. S. &c.* whereupon an *attachment iſſued*, and the ſheriff being ready to attach him by his goods, the defendant, in diſturbance of the execution of the ſaid proceſs, did publiſh, and *ſhew to the ſheriff, a conveyance, by which he claimed the ſaid goods*, and averred the fraud. It was objected, that this is not within the ſtatute, becauſe the avowing the conveyance, *goes* not in delay of execution, no judgment being given, but *only in delay of proceſs*. But the court held contra, by reaſon of the words, viz. delay, hinder or defraud creditors of their juſt and lawful actions, ſuits, &c. here being delay; becauſe for want of ſerving the attachment, the appearance of J. S. to the plaintiff's ſuit is delayed, which

And Periam and Rhodes J. conceived that avowing ſuch conveyance, *though no ſuit is depending*, is within the ſaid ſtatute, but Anderſon doubted. Le. 47. pl. 60.

which miſchief is within the remedy of the ſtatute. Le. 47. Mich. 28 and 29 Eliz. C. B. Pendleton v. Gunſton.

So in caſe of an *arreſt*. Kelw. 24. 119. b. pl. 64.—129. pl. 96.

5. J. S. ſues a *replevin* to the ſheriff to replevy the cattle, and J. S. comes *and ſhews the ſheriff the beaſts of a ſtranger*, and ſaith they are his cattle, and he makes replevin of the beaſts; he is a treſpaſſor to the ſtranger and the ſheriff may have treſpaſs againſt J. S. for his falſe information; for the ſheriff muſt, at his own peril, take notice whoſe cattle they are. 3 H. 7. . . . 14 H. 4. . . . But if there be any fraud in the matter, he may aver that. Brownl. 210. Mich. 5 Jac. Buckwood v. Beal.

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2 Roll. R. 393. S. C.

6. One knowing that execution would be made on his goods, *procures J. H. to put his cart in his yard*, to the intent that the bailiff ſhall take it in execution, and ſo have treſpaſs againſt him. The bailiff takes it, and after he knew the matter, releaſes the cart. Yet J. H. brought treſpaſs. Per Lea Ch. J. the bailiff may *plead the fraud in excuſe*. Palm. 395. Mich. 21 Jac. B. R. Grome v. Grome.

7. *One defendant in ejectment*, where the plaintiff was nonſuit, and where that defendant did not appear, and confeſs leaſe, entry and ouſter, *releaſed coſts*. The court ſuppoſed, if there ſhould appear to be covin between the leſſor of the plaintiff, and that defendant, as to the releaſe, that they might correct ſuch practice, when it ſhould be made appear. 2 Vent. 195. Trin. 2 W. & M. C. B. Fagg v. Roberts.

Mo. 638. Mich. 44 El. In the Star-Chamber, Chamberlain v. Twyne.

8. *Goods left in the poſſeſſion* of a perſon, againſt whom judgment is had, and his diſpoſing of ſome of them, is a ſtrong evidence and badge of fraud. Per Holt, Cumb. 348. Mich. 7 W. 3. B. R. Orlabar v. Harwar.

(Y) To avoid Decrees.

1. PENDING *a ſuit* for land againſt the father, he makes a *conveyance* of it to his ſon; this conveyance, though prior to the decree, ſhall not defeat the decree. cited Trin. 1687. Vern. 459. in the caſe of SELF v. MADOR, as ſo decreed in 1680, in caſe of Goldſon v. Gardiner.

2. A. being decreed to deliver poſſeſſion of an houſe, or pay a ſum of money to B. by a certain time, after the day voluntarily conveys the houſe to a creditor, *in ſatisfaction of a real debt by bond*; this ſhall not defeat B. of the benefit of the decree. Trin. 1687. Vern. 460. Self v. Madox.

(Z) Purged. How.

S. P. Arg. Goldſb. 118. Price v. Sands, cites 36 H. 6. 28.

1. IF leſſee for years, againſt whom judgment is had, *aſſigns his term* over by fraud, *to avoid execution*, and the aſſignee *aſſigns to another bona fide*, it is not liable to the execution in the hands of the

the ſecond aſſignee. Per Coke Ch. J. Godb. 161. Paſch. 8 Jac. C. B. in caſe of Wilſon v. Wormal.

2. *Leaſe* for 500 years, *voluntary at firſt* is *made good* by money paid after, on an aſſignment of it, before the purchaſe of the inheritance. 3 Lev. 388. Paſch. 6 W. & M. C. B. Smartle v. Williams.

And the eſtate is legitimated by the *words of the ſtatute*, 27 *Eliz.* per Holt Ch. J. Comb. 249. S. C.——Comb. 222. Mich. 5 W. & M. B. R. S. P. per Holt Ch. J. in caſe of Porter v. Clinton.

3. Where fraud is, no *length of time* can bar. Arg. Sel. Ch. Caſes in Ld. King's time, 35. ſaid, it was ſo reſolved in the Houſe of Lords, in caſe of Ld. Warrington v. Booth. And it was, by the counſel of the other ſide, admitted to be certainly true, that no time will bar where there is fraud, but ſaid, that that is to be underſtood where the fraud is concealed; for if it be known it certainly may. Ibid.——And of this opinion Ld. C. King ſeemed to be. Ibid. 36. Trin. 11 Geo. 1. Weſtern, executor of Weſtern, v Cartwright, executor of Cartwright.

(A. a) Diſcountenanced, and ſet aſide; In what Caſes. [543]

1. *FRAUS & dolus nemini patrocinari debent.* 3 Rep. 78. b. in Fermor's caſe. Palm. 158.—The law doth not favour frauds, Godb. 39. Cropp's caſe.—Fin. Law. 13.—So *though the party has right*; for if he, that has right, is of *covin with one to diſſeiſe* him that is in poſſeſſion, *with intent to recover againſt him*; now this recovery, though he hath right, will do him no good, per Popham, Goldſb. 179. in caſe of Goodale v. Wiatt.—See Remitter (C).——A recovery upon a good title by colluſion, *ſhall not abate the writ.* 13 Rep. 24. Trin. 44 Eliz. B. R. in caſe of Sprat v. Heale, cites 33 H. 6. 5.—See Falſifying Recoveries. (F) (F. 2)

2. The *juſtices reſpited judgment, where the tenant confeſſed the action*, for fear of covin between the demandant and the tenant, *to make a third perſon to loſe his intereſt.* Br. Judges, pl. 14. cites 39 E. 3. 35.

3. *Uſurpation was of a preſentation by fraud* between the uſurper and him that had the grant of next preſentation; but upon filing a bill it was decreed, that no benefit ſhould be had by this uſurpation, ſo as to defeat the plaintiff's title; neither ſhould it be given in evidence againſt him, at a trial at law. 3 Car. 1. N. Ch. R. 4. Market v. Hyde.

4. Debt is brought by a feme adminiſtratrix, ſhe obtains judgment, but before execution, the *adminiſtration is revoked by covin*, and committed to the woman and her ſon; the ſon *releaſes the debt*; the woman ſues execution; the debtor brings in audita querela, but it does not lie, becauſe of the covin. Jenk. 285. pl. 17. S. C. cited per Gawdy J. Goldſb. 178. in caſe of Goodale v. Wyatt.

5. That cannot be called a good *cuſtom*, which is *grounded on* fraud. Mich. 15 Car. 2. Chan. Caſes, 30. Borr v. Vandal.

6. A *truſt* decreed for a perſon, who, in his anſwer on oath in another cauſe, had denied the truſt, becauſe drawn in to anſwer

ſo by fraud. Mich. 21 Car. 2. Chan. Caſes, 134. Smith v. Palmer.

7. A *tinner* articles to deliver tin to the merchant *cuſtom-free*; after delivery to the merchant, it is ſeiſed for cuſtom, and the merhant ſues to be *relieved*, but denied; becauſe it is *in fraudem regis*. Hill. 26, 27 Car. 2. 1 Chan. Caſes, 256. Papilion v. Hix.

8. A *bill of exchange* for 50 l. was made for *value received*, but being gained by fraud, and for a fictitious conſideration was ſet aſide. Hill. 1690. 2 Vern. 123. Dyer v. Tymewell.

And in caſes of fraud, *equity ſhould relieve againſt the very words of a ſtatute*, as if *one agreement in writing*, ſhould be *propoſed, and another fraudulently*, or ſecretly brought in, and *executed in lieu of the former*; in this, or ſuch like caſes of fraud, equity would relieve; but where there is no fraud, but *only relying upon the honour, word, or promiſe of the defendant*, the ſtatute of frauds making thoſe promiſes void, equity will not interfere. per Ld. C. Parker. Wms's Rep. 620. Paſch. 1720. in caſe of Montague (Viſcounteſs) v. Sir Geo. Maxwell.

9. Equity has ſo great an abhorrence of fraud, that it will ſet aſide its own *decrees*, if founded thereupon.

10. *A* decree on a commiſſion for *charitable uſes*, fraudulently taken out, was ſet aſide, though confirmed by the chancellor, and a new commiſſion was ſued out, and the lands charged with the charity, though exempted on the former commiſſion. Arg. Show. 206. cites Moore Char. 75.

11. *Money paid upon a bubble in the year* 1720, and which was called the land ſecurity, and oil patent, being *for extracting oil out of radiſhes* was *ordered to be re-paid with intereſt and coſts*; and the Maſter of the Rolls ſaid, that the gaining a patent could be no ſanction to the cheat. 2 Wms's Rep. 154 to 157. Trin. 1723. Colt v. Woollaſton and Arnold.———And a like decree at the ſame time for Spackman v. Woollaſton.

12. A *fine and non-claim* ought not to *ſkreen a fraudulent purchaſe*, but the conuſee ſhall be deemed a truſtee for the equitable title. So decreed; but the caſe was compounded in the Houſe of
[544] Lords. MS. Rep. ſaid to be Ld. Harcourt's, tit. Fraud, 6 March, 1724. Martin v. Martin.

13. Equity will never countenance *demands of an unfair nature*; in this caſe it was to have an *allowance for attending at auctions, to enhance the price of goods*; nor will equity ſuffer them to be ſet againſt fair and juſt demands in an account; and a croſs bill for that purpoſe was diſmiſſed with coſts. MS. Rep. ſaid to be Ld. Harcourt's, tit. Fraud, 6 March 1726, Walker v. Gaſcoigne.

(B. a) Fraud ſet aſide. By what Court.

1. IT is no objection, that the parties to a fraud have their remedy at law, and may bring actions for monies had, and received to their uſe; for in caſes of fraud, the court of *equity has a* * *concurrent juriſdiction with the common law*, matter of fraud being the great ſubject of relief there; and ſo money paid by the plaintiffs to the defendants, as managers and projectors of a *bubble*, (in the year 1720) *called the land ſecurity, and oil patent*, (which was to extract

* 2 Wms's Rep. 220. Paſch. 1724. by the Maſter of the Rolls, in caſe of Stent v. Baylis.

tract oil out of Engliſh radiſhes) was decreed to be paid back, with intereſt and coſts; per the Maſter of the Rolls. 2 Wms's Rep. 154 to 157. Trin. 1723. Colt v. Woollaſton and Arnold.

(C. a) By Circumvention.

1. CREDITOR was *for wares of which* the *debtor could not make half the money.*—The court not favouring contracts of that kind ordered the *maſter to make allowance* as he ſaw cauſe. Chan. 15 Car. 1. 1 Rep. 132. Naylor v. Baldwin.

2. A. as principal, and B. as ſurety, were bound in a bond to C. The *obligee's name was uſed only in truſt for A. one of the obligors*, and if any money was paid, it was A.'s money, but it did not appear that any money was lent; B. being ſued, brought his bill, and the court decreed the bond to be delivered up and cancelled, and ſatisfaction acknowledged, with coſts to the plaintiff. See Mich. 26 Car. 2. Fin. R. 127. Launce v. Marden & al.

3. Tenant in *tail of* 30 *or* 40 *l. per annum in remainder*, of old houſes, after the death of his father, who would allow him no maintenance, for 30 l. in money paid, and 20 l. per annum annuity, during the joint lives of himſelf and his father, conveyed the old houſes to A. in fee.—The annuity was paid 5 years.—And though it was urged, that being tenant in tail, if he had died, the whole money had been loſt; yet by Ld. Chan. the bargain was ſet aſide; and he ſaid, by the civil law, a bargain of double the value ſhould be avoided, and wiſhed it were ſo in England. Trin. 34 Car. 2. 2 Chan. Caſes, 120. Nott v. Hill.

North K. diſmiſſed the bill. Vern. 167. Paſch. 1683. Nott v. Hill.——2 Vern. 27. S. C. and Ld. Guildford's order of diſmiſſion diſcharged, and Lord Nottingham's decree confirmed by Jeffries C. Trin. 1687.

4. One intitled to an eſtate after the death of two old lives takes 300 *l. to pay* 600 *l. when the lives fall*, and mortgages the eſtate as a ſecurity.——The lives die within two years, yet no relief againſt this bargain, nor was any thing ill in it. Per North K. Hill. 1682. Vern. 141. Batty v. Lloyd.

5. A. *an old man*, being *almoſt in his dotage*, and ſeiſed of an eſtate, was *made to believe* by W. S. and J. N. (who had an intention to purchaſe his eſtate at an undervalue, as if it was for another perſon, and in * whoſe name letters were ſent to A. preſſing the completion, and that it would not admit of any longer delay) that they *could help him to a great match, and told him, that to qualify himſelf for the lady, he muſt convert his land into money*, whereupon he entered into articles under hand and ſeal, and after conveyed the lands purſuant to the articles, and the purchaſe money was all paid, or ſecured; but what was paid, was all borrowed, and what *money was ſecured*, was *to be paid by inſtalments*; and the money agreed for, if really paid, was ſo much under the real value, that the *profits in a little time would pay the purchaſe money*. Afterwards, A. levied a fine likewiſe to the purchaſor, made his tenants attorn, and his ſon (who ſhewed a diſcontent at what was done) releaſe all his right to

This caſe was cited by the Ld. Chancellor, Hill. 1685, who ſaid, that a *fine, conveyance, releaſe, articles, and ſeveral other deeds, made at a conſiderable diſtance of time*, one after another, were all ſet aſide. Vern. 390.

to the lands, with intent to eſtabliſh the purchaſe. On a bill by the ſon of A. (after A.'s death) to ſet aſide this purpoſe, as gotten by circumvention, it was *proved, that A. was a ſenſible man, and capable of managing his own buſineſs*, and had *not any apparent weakneſs* upon him; and that he had abſolute power over the eſtate, and after the conveyance declared, that if it were then to do, he would do it again; notwithſtanding all which, becauſe there appeared ſome art uſed, the Ld. Keeper decreed the purchaſe to be ſet aſide. Mich. 1683. Vern. 205. Coleby v. Smith.

6. A. articles for the *purchaſe of B.'s eſtate*, pretending he bought it for one whom B. was deſirous to oblige, but in truth bought it for another, and by that means got the eſtate at an undervalue. Equity will not decree an execution of theſe articles. Hill. 1683. Vern. 227. Phillips v. D. of Bucks.

A grant of a rent-charge in fee, of 300l. per annum, for 300 l. to commence *after the grantee's dying without iſſue*. The grantor, by debauchery, was diſabled to get iſſue.—This per North K. was ſet aſide for fraud. Paſch. 1684. Vern. 237. S. C.—S. P. decreed, by Jeffries, C. though the grantee anſwered, that he was wholly a ſtranger to the grantor, and the matter was tranſacted by a third perſon; fraus eſt celare fraudem, 1685, or 1686. Vern. 239. Earl Ardglaſs v. Pitt.

7. An over-reaching bargain upon contingency, was relieved; but the *principal money and legal intereſt* decreed to the bargainee. 35 Car. 2. 2 Chan. Rep. 266. E. Arglaſs v. Muſchamp.

9 Mod. 63. S. C. cited in Aliſon's caſe.—Le. 192. Rockwood v. Rockwood.

8. A man makes his *will*, and his wife executrix; the ſon after prevails on his mother to get the father to make a new will, and to name him executor, *promiſing* to be a truſtee only for his mother. *Truſt decreed*, notwithſtanding the *ſtatute of frauds*, &c. Hill. 1684. Vern. 296. Thyn v. Thyn.

9. Money was lent at very great advantage on *contingency* of deaths, &c. by A. to B.—A. ſometime after brings a *bill to be repaid, or to foreclоſe B. of any relief againſt the bargain*.—B. anſwers, that the bargain was fairly made, and intends to abide by it, and that *he would ſeek no relief againſt it*.—The contingencies happened.—B. brings a bill againſt A.'s executor, (A. being dead) and is relieved upon payment of principal and intereſt, without coſts. Hill. 1690. Per Commiſſioners, 2 Vern. 121. Hill. 1690. Wiſeman v. Beake.

Chan. Prec. 20. S. C.—*So*, where a merchant, who had a ſhip at ſea, had an *account of a ſhip's being taken, which anſwered the deſcription of his own ſhip*, inſured her, without acquainting the inſurers of any thing he had heard; upon a bill by the inſurers, to be relieved, Ld. Macclesfield thought the concealment to be a fraud, and relieved the plaintiff againſt the policy, and with coſts. 2 Wms's Rep. 170. Trin. 1723. Decoſta v. Scandret.

10. *Policy of inſurance*, for inſuring a life, was gained by fraud, as by *falſe pretences of health*, and a *ſham* inſurance, by a near neighbour of the inſured, ſet aſide after a verdict at law, with coſts, both at law and in equity; and the money received on the policy to go in part of the coſts. Hill. 1690. 2 Vern. 206. Whittingham v. Thornbury & al.

This goes beyond a *Briſtol bargain*. Ibid.

11. A. borrows money of B. and gives a *mortgage of a future diſtant term of years*, defeaſanced to be void on payment of 40 *l. per annum for eight years, by quarterly payments*, the ſum borrowed being but 200 l. redemption was decreed on payment of 200 l. with ſimple intereſt. Mich. 1700. 2 Vern. 402. James v. Oades.

12. J.

12. J. S. who was to have had a conſiderable advantage by a will, was *drawn in by fraud*, and falſe ſuggeſtions, to make a compoſition for his intereſt, and *to give a releaſe*; afterwards J. S. being ſenſible of the fraud, makes his will, and thereby (after other legacies) he deviſes all the reſt of his goods and chattels whatſoever to his wife, upon condition that ſhe paid all his debts; and made her ſole executrix. And it was held, that his *right to ſet aſide the releaſe*, was deviſable, and the words proper for that purpoſe. Decreed Trin. 1701. Abr. Equ. Caſes, 176. Drew v. Merry.

13. A. agreed for the *purchaſe of timber*; and *A. and B.* both *enter into a bond, that A. his executors and adminiſtrators ſhall not cut down under ſuch a ſize*; it comes out, that *A.'s name was only made uſe of for B.* in the agreement; *B. cuts down timber under ſize*; there can be no remedy at law againſt B. upon this bond; but it is a fraud on the ſeller, and relievable in equity. MS. Rep. ſaid to be Lord Harcourt's, tit. Fraud, 12 March, 1720. Butler v. Pendergraſs.

(D. a) By Circumvention, in Reſpect to *young Heirs, &c.* and relieved. On what Terms.

1. A. an infant, (newly come of age) by bill ſought to be relieved againſt ſeveral judgments in debt, which were got by *practice between the infant's guardian*, and attorney, and others; and drew into examination the reality of the debt, for which the *judgments* were, and how the ſame aroſe, and decreed to be referred accordingly; and thereupon further order to be taken. 15 Car. 2. 3. Ch. Rep. 10. Godfeall v. Walker and Wall. S. C. cited 3 Chan. R. 75. Hill. 1671, in caſe of Williams v. Smith.—N. Ch. R. 84. S. C.

2. A quadruple ſecurity given by young heirs, to be paid *on contingency* of their father's death, or their own marriage.—Equity will not help ſuch ſecurity (which was a judgment) to any thing to attach upon, the conſideration not being equitable, and ſo the bill was diſmiſſed, 1671. 3 Ch. R. 74. Rich v. Sydenham. The ſecurity was bond and judgment, and given when defendant was 23 Car. 2.

d. unk. Ch. Caſes, 202. S. C. Paſch.

3. A young gentleman employed A. to borrow 500 *l.* A. employs B.—B. goes to a ſilkman, and *buys ſilks for* 500 *l.* of him.—Plaintiff gave bond and judgment for the money.—B. ſold the ſilks for 250 *l.* kept 50 *l.* for himſelf, and *paid* 200 *l. to the plaintiff*.—Defendant never treated with the plaintiff, and denied on oath that he ever treated about the loan of money, and depoſed the ſilks to be of 500 *l.* value or thereabouts; but proof was to the contrary. Decreed only 200 *l.* and intereſt (quære for the intereſt) and relief againſt the defendant quoad the reſidue. Paſch. 28 Car. 2. 1 Chan. Caſes 276. Waller v. Dalt. Fin. R. 295. S. C. The plaintiff by his bill offered to pay intereſt. Paſch. 29 Car. 2.—2 Vern. 78. Whitley v. Price, S. P.—So 300 *l.*'s worth of ſilk-ſtock-

ings. Decreed the principal, but no intereſt, and *bond, judgment, and extent*, ſet aſide. Mich. 29 Car. 2. Fairfax v. Trigg. Fin. R. 214.

4. A ſale of *goods to a young gentleman*, in the life time of his father,

ther, at an extravagant price, ſome of which goods were horſes, &c. was relieved at the ſuit of an *honeſt mortgagee*, againſt whom the vendor of the goods had ſet up a ſtatute of 5000 *l.* given in conſideration of the goods, as a prior incumbrance on the eſtate mortgaged. Mich. 31 Car. 2. Fin. R. 439. Draper v. Dean and Jaſon.—— Decreed that the conuſee be allowed according to the real value at the time of delivery, with intereſt from that time, but the plaintiff's *coſts* to be deducted thereout. Ibid.

2 Vent. 359. Barney v. Tyſon. Mich. 33 Car. 2. Skin. Stiſtead v. Barney, 107. ſays the main reaſon of the decree was that the *father was ſick and like to die.*——2 Vern. 14. S. C.

5. Goods were ſold to a young gentleman heir apparent to a good eſtate, at * a *double value on a contingency* of his ſurviving his father, otherwiſe the whole debt to be ſunk. Relief decreed againſt the vendor; that decree was afterwards reverſed, and after the laſt decree was reverſed by Jeffries C. Hill. 34 and 35 Car. 2. 2 Chan. Caſes 136. Barny v. Beak.

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Wms's Rep. 312. S. C. cited per Cowper C. accordingly, only he adds that B. was to pay intereſt for the ſame, in caſe he ſhould marry in his father's life. And ſaid that the reaſon inducing the Ld. Jefferey's decree was (probably) to diſcourage a growing practice of devouring an heir, on a confidence in Ld. Nottingham's decree; but Ld. Jefferey's decree ſtanding ſhews that every one thought the ſame was juſt, and that there was therefore no attempt in parliament to reverſe it. Wms's Rep. 312. Paſch. 1716. in caſe of Twiſleton v. Griffith.

6. A. lent B. a remainderman in tail, expectant on an eſtate for life of his father, 1000 *l.* *to receive* 2500 *l.* *if B. ſurvived C. his father*, and to loſe the 1000 *l.* if B. died in his father's life time, and ſecured the ſame by judgment. The father died, A. ſued, and B. brought his bill in chancery, which was diſmiſſed by Ld. Finch. 9 Feb. 33 Car. 2. But upon rehearing the cauſe by Jeffries C. the plaintiff having before, by order of the court, paid the money, his lordſhip declared that theſe bargains were corrupt and fraudulent, and tended to the deſtruction of heirs ſent hither for education, and to the utter ruin of families; and that as there were new contrivances for the carrying them on, ſo the relief of the court ought to be extended to meet with, and correct ſuch corrupt bargains, and unconſcionable practices, and decreed the former order to be diſcharged, and the *plaintiff to be reſtored to what he had paid over and beſides the principal money and intereſt.* 2 Ch. Rep. 396. 2 Jac. 2. Berny v. Pitt.

7. *So* where B. remainder-man in tail, having incurred his father's diſpleaſure, was adviſed by *one that had been an attorney*, and who *pretended great friendſhip* for B. and afterwards B.'s father being reconciled to him, and offering B. 1000 *l.* for his reverſion, he was diſſuaded by the attorney from accepting it, as not a valuable conſideration, but about a year after, the ſame attorney, *when the father was in a very declining ſtate, bought it of B. for* 1050 *l.* (the eſtate being 150 *l.* per ann.) and B. was then about 34 years of age, and had a child 10 years old inheritable to the intail, and B. levied a fine to him of this reverſion. In about two years after B.'s father died; B. brought a bill to ſet aſide this conveyance, and to get an injunction; he, by direction of the court, ſuffered a common recovery, and declared the uſes to the two ſenior ſix-clerks, ſubject to the order of the court. It was objected, among other things, that at

at this rate, it would be almoſt impracticable for an heir ever to ſell a reverſion; but Ld. Cowper ſaid, that he ſaw no inconvenience in that objection; for it might force an heir to go home and ſubmit to his father, or to bite on the bridle, and endure ſome hardſhips, and in the mean time he might grow wiſer and be reclaimed; ſo directed that the plaintiff be *relieved on payment of principal intereſt and coſts*, but ſaid he meant *liberal coſts*. Wms's Rep. 310. to 313. Paſch. 1716, Twiſleton v. Griffith.

8. A. draws in B. a young gentleman, and *purchaſes an eſtate at a great under value* of him, and B. covenants for A.'s quiet enjoyment. A. is *evicted*, and brings action on the covenant. Per North K. It is unreaſonable that A. who was a lawyer, ſhould make advantage of this catching bargain; and ſo decreed A. his purchaſe money with intereſt, only diſcounting the meſne profits. Paſch. 1685. Vern. 320. Zouch v. Swaine.

But where man and his wife, being *very poor*, were drawn in to ſell an equity of redemption at a great under-va-

lue, yet as no ſuch fraud appeared as to ſet it aſide, Ld. Wright diſmiſſed the bill. Wood v. Fenwick. Ch. Prec. 206.

9. A contract to pay 450 *l.* *and* 80 *l.* *per ann. till* the 450 *l.* and every part of it be paid, being made with a young man on a ſecond agreement, after a firſt agreement made with his friends, and the ſecond being made without their privity, and by taking advantage of the plaintiff's neceſſity, was ſet aſide per Jeffries C. but no relief for what was overpaid. Mich. 1685. Vern. 352. Oddy v. Torlas.

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10. The defendant ſold goods to the plaintiff and two others at extravagant prices and *to be paid five for one* or more *on the death of their fathers*, and ſo obtained from the plaintiff and two other young gentlemen that were heirs to good eſtates, ſeveral ſecurities, wherein they were bound ſeverally and jointly in 4000 *l.* for payment of great ſums of money. The court decreed the plaintiff's ſecurity to be delivered up, on payment of what the defendant really and bona fide paid to him alone, and for his own proper uſe. Tr. 1687. Vern. 467. Bill v. Price.

Tr. 1688. 2 Vern. R. 77. Lamplugh v. Smith, S. P. —2 Vern. 78. Trin. 1688. Whitley v. Price. S. P.

11. A young gentleman of 3000 *l.* per ann. in poſſeſſion of truſtees, propoſed to a ſcrivener to *borrow* 1000 *l.* *on mortgage*, but he trickiſhly drew him into the giving a *ſtatute* inſtead of a mortgage, and was himſelf bound with him, and ſo let the *young gentleman receive only* 300 *l.* of the money, and he *received all the reſt himſelf* in goods of one kind or other, and diſcounting a debt of his own due to the lender; decreed payment only of the 300 *l.* and intereſt, and a perpetual injunction againſt the ſtatute as to the young gentleman. Hill. 1697. 2 Vern. 346. Smith v. Burroughs and Loader.

Ch. Prec. 80. S. C.

12. An unreaſonable bargain bought of a young heir, was relieved by *opening an account*, and the young gentleman allowing only what was juſtly due. Tr. 9 Geo. 9 Mod. 31. Spenſer v. Chaſe.—— But where the ſecurity was deficient, it was ordered that the young gentleman make it good at the others expence, ſo as to ſecure the money due. Ibid.

13. A was tenant for life, *remainder to B.* his ſon *in tail*, remainder *to A. in fee* of an eſtate computed worth 7000 *l.*—*B. at* 30 *years*

But had the *bargain* been *to pay down*

3300 l. when he should come into poſſeſſion, this would not have really been a purchaſe of the reverſion, but of an eſtate in poſſeſſion, as the payment and poſſeſſion would be at the ſame time; and in that caſe, on account of the *great over value*, chancery would relieve; per Raymond and Gilbert commiſſioners. Sel. Ch. Caſes, in Ld. King's Time, 7. 8. Paſch. 11 Geo. 1. Dews v. Brandt.

of age, in the life of A. articled to ſell the eſtate for 3300 *l. when he ſhould come into poſſeſſion* of it, *and to have intereſt for the ſame from the time of the articles to the time of his being in poſſeſſion.*——*A. died within two years*, ſo that the intereſt amounted to little. B. on his coming into poſſeſſion, compleated his agreement, and brings a bill to be relieved. It was inſiſted for the purchaſor, that there was a great difference between defeating an agreement, and carrying it into execution; and Raymond and Gilbert commiſſioners were of the ſame opinion, and ſaid, that had the bargain been to pay ſo much down in ready money, it would undoubtedly have been good, otherwiſe there is an end of all ſales of reverſions. And that this is the ſame as buying the reverſion for preſent money, and will be conſidered as ſo much money put out at intereſt by himſelf, and the ſame as if he had received it, and immediately lent it to the vendor at intereſt; that the intereſt might have run to the value of the eſtate, though it has happened otherwiſe, which was *a chance on both ſides*, and that it is not conſiſtent with common ſenſe, that a preſent *agreement* ſhould be *varied by future accidents*; that it muſt be conſidered as it is in itſelf without any thing extrinſick; that *bargains for ſales of reverſionary eſtates by heirs are never ſet aſide but on account of prodigality*; that nothing of that appeared in the preſent caſe, but the reverſe; for it appeared that both the father and he were in bad circumſtances. Sel. Ch. Caſes in Ld. King's time, 7. 8. Paſch. 11 Geo. 1. Dews v. Brandt.

(E. a) By Circumvention, in Reſpect of a preſent Want, or General Weakneſs *of Underſtanding*.

See Fines (O b) pl. 3. Wright v. Booth. S. P.

1. A. the plaintiff being ſimple, the defendant got a *conveyance of lands* from him, but though the defendant had *ſold the ſame* to purchaſors, *and a deſcent* was caſt, yet A. had the lands reaſſured to him. Toth. 104, 105. cites 4 Jac. Lewis v. Vaughan.

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2. If a *ſcrivener* by ſiniſter means *makes himſelf a truſtee*, he ſhall have no benefit by the conveyances, and making himſelf executor (the teſtator being of weak underſtanding) was ordered not to meddle in performing the will without his co-executors. 3 Car. 1. 1 Chan. R. 22. Herbert v. Lounds.

3. A. *on loan of* 90 *l. got a bond from B. of* 1600 *l. for payment of* 800 *l.* A. by bill ſued to ſubject certain lands B. was intitled to in right of his wife, the eſtate in law being in truſtees; but the ſecurity being got when B. was *drunk*, Bridgman K. would not relieve A. in equity even for the principal which he had really lent, but diſmiſſed the bill. Paſch. 23 Car. 2. 1 Chan. Caſes. 202. Rich v. Sydenham.

See 2 Vern. 189. Mich. 1690. Pottington v. Eglington.

4. A woman *of weak underſtanding*, though not a lunatic, made a *voluntary conveyance*; it was ſet aſide as fraudulent by Ld. Chancellor. Paſch. 34 Car. 2. 2 Chan. Caſes. 103. White v. Small.

5. One

5. One of 72 *years of age, conveyed lands of* 40 *l. a year for an annuity for his life of* 20 *l. a year*, who lived two years after, but was ſet aſide upon a bill brought by the heir at law, it appearing that the old man was weak and eaſily to be impoſed upon. 2 Wms's Rep. 203. Mich. 1723. Clarkſon v. Hanway & al.

This decree was affirmed on appeal to Ld. Macclefield. Ibid. 206.

(F. a) *Ignorance of Title* or Value, &c.

1. LANDS being originally charged with the payment of portions, a *releaſe* upon a covenant in truſt to pay does not diſcharge the ſame, the releſſor being ignorant of her real *right*, and impoſed upon by the releſſee. 31 Car. 2. 2 Chan. R. 173. Tucker v. Searle.

2. *Mortgage money was reſerved, payable to himſelf or heirs*; mortgagee died, and his *executors conſented to the heirs receiving it*, who got a decree againſt the mortgagor, and received the money. Yet what the executor did, being upon a miſtake, as thinking the heir was intitled by reaſon of the reſervation. It was decreed that the heir ſhould repay all the money received by him to the executor. 31 Car. 2. 2 Ch. R. 154. Turner v. Turner.

3. *Tenant by the curteſy* of gavelkind land, not knowing his title as ſuch, but being otherwiſe in poſſeſſion, *attorned tenant*, though he had a right to a moiety, and ſometime afterwards brought ejectment, and had a verdict before Ld. Ch. J. Hale. 32 Car. 2. Fin. R. 473. Vaulx v. Shelly.

4. Agreement being *to quit poſſeſſion* of lands, chancery will not decree a conveyance. But, per North K. If the agreement had been to have *conveyed* thoſe lands, he would have decreed the agreement though he was not *apprized what eſtate* he had in them. Hill. 1682. Vern. 121. Gerard v. Vaux.

5. A ſuit was to avoid a conveyance by *fine and deed* to lead the uſes of the fine 23 *years ſince* on ſuppoſition of fraud by purchaſing the fee of the land for 11 *l.* worth 60 *l.* per ann. and the plaintiff being *ignorant of the value*, but the defendant well apprized thereof, and the plaintiff being *ignorant alſo of his title*, which he came to the notice of after the fine. The bill was diſmiſſed. Hill 35 and 36 Car. 2. 2 Chan. Caſes 159. Hobert v. Hobert.

6. *The caſe was* thus, (viz.) A. having title, and B. poſſeſſion, *B. conveys* the land *to A. in truſt for B.* and then *gets A. to convey back to B. as in execution of the truſt*, whereby A. extinguiſhes his title, yet chancery will relieve. See Hill. 35 and 36 Car. 2. 2 Chan. Caſes, 160. in caſe of Hobert v. Hobert.

7. *Copyhold lands were deviſed* to J. S. ſome were ſurrendered to the uſe of the will, and ſome were not. The *heir at law was a feme covert*, and J. S. for a ſmall conſideration, drew them into articles to confirm his title without their being well appriſed of their intereſt when they articled. The Maſter of the Rolls would not decree a ſpecifick

ſpecifick execution of the articles of a feme covert for conveying her inheritance, but diſmiſſed the bill. On appeal to Ld. Somers, he confirmed the decree, but went upon the fraud, and ſeemed not to take notice of its being the inheritance of a feme covert. Tr. 1697. Ch. Prec. 76. Preſton v. Waſey.

But where by a will *duly executed* A. gave all his lands to C. his youngeſt ſon in fee, charged with an annuity to B. his eldeſt ſon for life, on condition B. ſhould releaſe all his right to every other part of A.'s eſtate, but B. oppoſed the eſtabliſhing the will in chancery, inſiſting on a will being made ſubſequent, which was denied by C. and not proved by B. and after a diſmiſſion of a bill brought by B. an agreement was made between B. and C. by which C. reciting the will, agreed to convey to B. ſuch part of the eſtate. B. *releaſed* to C. *all the reſt of the eſtate deviſed, or mentioned to be deviſed*, and afterwards brought a new bill upon pretence of having made new diſcoveries; and he dying, the ſame was revived by his heir. Ld. C. Macclesfield ſaid, that where two parties are contending in this court, and one releaſes his pretenſions to the other, there can be no colour to ſet this releaſe aſide, on account of the maker's having a right; for then there can never be any compromiſe made, but every releaſe may be avoided; and that this releaſe was very particular, in reſpect of the words of all lands deviſed *or mentioned to be deviſed*; that indeed, if the party releaſing, is *ignorant of his right*, or if *his right is concealed* from him by the perſon to whom the releaſe is made, theſe will be good reaſons for the ſetting aſide of the releaſe; but it not being ſo in this caſe, and his lordſhip, taking notice that the court ought to be very cautious in giving relief in a caſe ſo circumſtanced, and that the plaintiff being aſked at the hearing of the cauſe, whether he would reconvey the part of the eſtate conveyed by C. to B. his father, declined the doing it, diſmiſſed the bill of revivor with *coſts*. Trin. 1721. Wms's Rep. 723. to 728. Sir William Cann v. Cann.

8. *Deviſee of lands, by a will not duly executed*, by its not being atteſted in preſence of the teſtator, *prevailed upon the heir for* 100 *guineas, to execute a releaſe, reciting that the will was duly executed.* And afterwards, upon a pretence of more ſpeedy payments of the deviſor's debts, *for* 50 *guineas more, gets him to join in a leaſe and releaſe to a pretended purchaſor for* 4000 *l.* which was done in form. But by Ld. Harcourt * *ſuppreſſio veri*, or *ſuggeſtio falſi*, is either of them good reaſon to ſet aſide any releaſe or conveyance, and both of them concur in this caſe. And though one witneſs ſwore, that the heir declared to him before the executing the releaſe, that the will was not worth any thing, yet his lordſhip thought it not to be believed; and relieved againſt the releaſe, and alſo the leaſe and releaſe, but the heir to pay back the 100 guineas, and 50 guineas with intereſt. Wms's Rep. 239. to 241. Mich. 1713. Broderick v. Broderick.

9. A *ſtatute* was made in Ireland, *that all leaſes* which ſhould *not* be *regiſtered by ſuch a day ſhould be void.* The *reſpondent*, who *lived in the remoteſt part of Ireland*, not having notice of the act of parliament, *did not regiſter* within the time; whereupon *another leaſe* was made, and regiſtered, *to one who had notice of the firſt leaſe*, and an ejectment was brought upon it; but the reſpondent was relieved; becauſe the *ſtatute* which was *made to prevent fraud* ſhall never be *uſed as a means to cover it.* Note, this act was appointed to be read at every quarter ſeſſions and aſſiſe. MS. Rep. ſaid to be Ld. Harcourt's, tit. Fraud, 23 Feb. 1722. Ld. Forbes v. Deniſton.

(G. a) *Miſapprehenſion* relieved in Equity.

1. TENANT for life of a *copyhold*, with a contingent remainder to his firſt ſon in tail, having no ſon born, and thinking to veſt the whole fee in himſelf, buys in the reverſion in fee of the copyhold

copyhold at 550 *l.* but finding this would not by merger (the freehold being in the lord) deſtroy the contingent remainder, brought his bill to be relieved againſt the ſecurity he had given for the purchaſe money, being *deceived as to the effect of his purchaſe.* Per Cur. Pay principal intereſt and coſts, or be diſmiſſed with coſts. Mich. 1691. 2 Vern. 243. Mildmay v. Hungerford.

2. A *conveyance* by deed and fine was *gained indirectly* by impoſition, and without conſideration, the grantor intending it only in truſt for herſelf. Decreed the conuſee to convey the eſtate to the deviſee of the grantor and his heirs. Mich. 1693. Vern. 307. Wilkinſon v. Brayfield.

3. An eſtate was deviſed to the eldeſt ſon, *provided* he or his heirs *pay* 100 *l. a piece* to his three ſiſters, *at* their age of 21 *or marriage*; one of the daughters dies before 21 unmarried; after T. S. buys the eſtate, and thinking it ſubject to the dead daughter's portion, (a bill being brought for it in Canc.) gave bond to her executrix to pay it; but being afterwards adviſed, that the lands would not be liable, he brings his bill to be relieved againſt it; and it was held by my Ld. Keeper, that though by the law now uſed in Canc. the land would not be liable to the portion, yet perhaps when the bond was given, it might have been otherwiſe taken; and there being no fraud in getting the bond, he would not relieve againſt it. Mich. 1702. Abr. Equ. Caſes 269. pl. 9. Smith v. Avery. [551]

4. Where a *deliberate act* is done, though it attains not the end deſigned and ſhould in conſequence prove quite contrary, it is not relievable in equity. Mich. 1708. 2 Vern. 615. Hodges v. Hodges.

5. A. on a marriage with M. entered into articles to purchaſe lands, and makes a ſettlement on himſelf and M. and the iſſue male of the marriage, and for default of ſuch iſſue, the ſame was to be to A.'s next younger brother, and for default of iſſue male of him, then to go to the next brother, &c. The marriage took effect; A. died without iſſue male, or making any ſettlement, but made M. executrix, leaving aſſets; after A.'s death, the brothers immediately applied to M. who promiſed by letters to purchaſe and ſettle agreeable to the articles: but Ld. C. King held that thoſe letters ought not to bind her, unleſs ſhe was before bound by the articles, (which he held ſhe was) for that ſhe might be well under an apprehenſion of being liable by them, and therefore wrote ſuch letters; but that would be no reaſon to conclude her by her miſapprehenſion. 2 Wms's Rep. (594) 599. Trin. [1730] 1731. Vernon v. Vernon.

(H. a) By *Miſinformation*, and what ſhall be ſaid ſuch.

1. AN *agreement* by an heir at law upon a miſtake and miſinformation, as to his right to land deviſed from him to his younger brother, was decreed. 1 Chan. Caſes 84. Paſch. 19 Car. 2. Frank v. Frank.

2. A.

2. A. had an *annuity* iſſuing *out of lands* of B. C. purchaſes part of the lands charged and diverſe other lands of B. and notice is taken of the annuity by way of exception in the deed of purchaſe; C. *ſells* to D. *the lands not charged, and part of the lands charged by general words*, and deſired A. to join in a fine to D. he aſſuring A. that it would not prejudice him in the lands ſettled on him; but this was proved by one witneſs only, and his depoſitions uncertain as to the particulars. Finch C. ſaid that here was no conſideration for the rent, and *no agreement to extinguiſh* it, and when the land was ſold, it was ſold for 800 *l.* of which 700 *l.* was paid to C. and that A. was circumvented, and decreed relief againſt C. Hill. 27 & 28 Car. 2. 1 Chan. Caſes 273. ..... v. Hawkes.

2 Jo. 163. S. C.

3. A man going to diſturb a conventicle, aſked a conventicler there what his name was, he anſwered James (who was a known conventicler) whereas in truth James was not there, and the fellow that anſwered knew it, but defendant did not; defendant made oath according to the *falſe name told him*, and was convicted of *perjury*, but the verdict was ſet aſide, it not being wilful and corrupt perjury, but a plain miſtake, and a new trial granted. 2 Show. 165. Mich. 33 Car. 2. B. R. the King v. Smith.

4. A. articles with B. for purchaſing B.'s eſtate, *pretending he bought for one whom B. deſired to oblige*, but really for one whom B. would by no means conſent to ſell it to, and ſo got an agreement at a low price. Equity will *not decree an execution* of theſe articles; Per North K. Hill. 1683. Vern. R. 227. Philips v. D. of Bucks

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2 Chan. Caſes, 128. per Finch C. Mich. 34 Car. 2. Hobbs v. Norton.

5. A man being *about to purchaſe a rent-charge* makes inquiry of the title of one that had a right to the land, and to hold it diſcharged, but at the time knew nothing of his title, and told the purchaſor as much, yet this will not prejudice him who was *ignorant of his own title*. Trin. 34 Car. 2. 2 Chan. Caſes, 108. Dyer v. Dyer.

Norton. N. Ch. R. 46. contra, 1649. Hunt v. Carew.——Vern. 136. Hobbs v. Norton, decreed Hill. 1682. per North K. to confirm the annuity.

Raym. 186. Frere's caſe.

6. A fine ſet 2 or 3 terms ſince was *ſet aſide*, becauſe of ſome ſurreptitious practice and miſinformation to the *judge*. Vent. 69. Paſch. 22 Car. 2.

7. *Mortgagee*, to whom 200 *l.* intereſt money was due for 500 *l.* being inquired of, as to how much was due, by one that was going to be married to the heir of the mortgagor, and *ſaying the intereſt was all clear* to that time, ſo that a ſettlement was taken of the lands, and the 200 *l.* being ſecured by bond, decreed that the jointured land ſhould be charged only with 500 *l.* and intereſt from the time of the inquiry. Mich. 1700. Ch. Prec. 131. Barret v. Wells.

8. *A. charged all his lands by his will, for payment of* 500 l. *a year to M. his wife for life, and made her executrix and reſiduary legatee*, and ſubject to this annuity he *gave his real eſtate to R. L.* afterwards R. L. and M. *articled that M.* ſhould renounce the executrixſhip, and *deliver up the perſonal eſtate to R. L. and that R. L.* ſhould indemnify M. from A.'s debts, and *ſhould pay M. a further annuity of* 40 l. *a year*, and the 540 *l.* a year was *to be ſecured on part*

part of the eſtate only. R. L. prayed relief againſt theſe articles, pretending that the value of the perſonal eſtate was miſrepreſented to him, and that in reality it proved to be 4000 *l.* leſs than the teſtator's debts amounted to. But it appearing that there *was no falſe inventory*, or particular made *of A.'s perſonal eſtate, nor any eſtimate given of it, whereby to induce R. L. to come into thoſe articles* on account of the value, *and there being another motive* (viz.) *M.'s accepting the rent-charge* of 540 *l.* a year *out of part of the eſtate only*, Ld. Cowper diſmiſſed the bill with coſts; but as to M.'s croſs bill ordered a performance of the articles. Wms's Rep. 541. Trin. 1719. Litton v. Litton.

9. A *releaſe of an equity of redemption* obtained by miſrepreſentation was ſet aſide for that reaſon. MS. Rep. ſaid to Lord Harcourt's, tit. Fraud. 23 May 1721. Kirwan v. Blake.

10. An *aſſignment of a leaſe got by* miſinformation of the value of the land, and of the fine for renewal was ſet aſide, and the defendant the executor of the aſſignee ordered to account for the moiety of the profits, during his teſtator's life, and ſince his death, and to pay coſts of ſuit. Hill. 10 Geo. 1. 9 Mod. 83. Evans v. Hoſkins and Glouceſter city.

11. Obligor for 200 *l.* and 100 *l.* by note on payment of 20 *l.* to obligee, who was a man of weak parts and memory, procured the bond and note to be delivered up upon *pretence that he was poor, and nearly related to the obligee*, but that not being proved, he was ordered to account for the bond and notes to the executor of obligee. Mich. 11 Geo. 1. 9 Mod. 118. Lucas v. Adams.

(I. a) *Who* ſhall be *Bound by it*, and how Puniſhable.

1. THE heir is *bound to warranty*, and *aliens the aſſets* by covin; the *feoffee is impleaded* and vouches the heir; in this caſe, upon the matter found, he ſhall recover in value againſt the heir land purchaſed by the heir, but not the land aliened by him. Br. Colluſion, pl. 49. cites 31 E. 3.

2. *Formedon* was brought by covin of the tenant againſt himſelf, becauſe he was *feoffee upon condition*, and *had broken the condition, and would have the land to be loſt againſt the feoffor*, and this matter was alledged by feoffor who was a ſtranger to the action; for the defendant confeſſed the action, and thereupon proclamation was made, if any one could ſay any thing why the demandant ſhould not have judgment and execution? whereupon the feoffor came in as above, and ſhewed as above; and the matter was examined and confeſſed, and the *tenant put to give bail to attend his puniſhment for the diſceit*. Br. Colluſion, &c. pl. 15. cites 7 H. 4. 19. [553]

3. A deed of gift of goods ſhall *bind the maker, his executors and adminiſtrators*, notwithſtanding the 13 Eliz. 5 Brownl. 111. Hill. 8 J. Hawes v. Leader. Cro. J. 270. S. C. Yelv. 196. S. C.

4. *Action*

4. *Action* will lie againſt a defendant for *confeſſing a judgment* by fraud in order to prevent plaintiffs having benefit of a judgment he had obtained againſt him. Trin. 3 Jac. 2. B. R. Carth. 3. Smith v. Tonſtall.

5. In caſe of a *groſs fraud* the court will give *coſts*, to be aſcertained by the party's own oath; per commiſſioners. Hill. 1690. 2 Vern. 123. Dyer v. Tymewell.

(K. a) Pleadings. Averred in what Caſe.

1. IN a formedon, defendant *pleads non-tenure*; jury find that defendant made feoffment of the tenements to divers perſons to their own uſe before the writ purchaſed, and that the *feoffees never took the profits*, but the feoffor, till the day of the writ purchaſed, which feoffment was made by covin and fraud, to the intent that the plaintiff ſhould not know againſt whom to bring his action; adjudged that the defendant was tenant of the tenements to this action, and that, in reſpect of the bringing this action, the feoffment ſhall be void againſt the plaintiff and that he is ſufficient tenant to anſwer. Savil. 126. Hill. 32 Eliz. White v. Bacon.

5 Rep. 77. Hill. 44 Eliz. in chancery, Farmer's caſe.

2. Upon the ſtatute 13 *Eliz. cap.* 8. *againſt uſury*, and 27 *Eliz.* 4. *againſt fraud*, though *fines are levied* where there is uſury, fraud or covin, thoſe are *averrable* to be ſo againſt any deed. Jenk. 254. pl. 45.

Cro. J. 270. S. C. and ſeems to be a tranſcript of Yelverton's report.—And ſo does Brownl. 111. S. C.

3. A. *in conſideration of* 20 l. *paid* by B. *granted all his goods in a ſchedule annexed*, and gave poſſeſſion by a platter, but there was a *covenant that they ſhould remain in A.'s houſe, and to be carried away by B. on demand*, and A. to keep them ſafely in the mean time. A. died; B. demanded the goods of J. S. the adminiſtrator of A. but he not delivering them B. brought his action; J. S. *pleaded* the ſtatute of 13 *Eliz. of fraudulent deeds of gift, and that A. was indebted* to ſeveral perſons amounting to 100 *l.* in ſeveral ſums, and, being ſo indebted, made the grant, being at ſuch time poſſeſſed of thoſe and of other goods, not amounting to more than 80 *l.* and that this was by covin to defraud his creditors, and that A. dying adminiſtration was granted to him; plaintiff *replied that the defendant had aſſets to ſatisfy the debts demanded, and that the grant was upon good conſideration*; and upon demurrer adjudged for the plaintiff. Firſt, becauſe the defendant had *not averred in his bar, that the debts remained yet unpaid* to the creditors named, there being 4 years between the deed of gift and A.'s death, in which time the debts may well be preſumed to be ſatisfied. Secondly, the defendant did *not ſhew that the debts due to the ſuppoſed creditors were by ſpecialty*, and then the matter of his plea is not good; for he cannot plead this but in excuſe to free him from a devaſtavit, which cannot be here, he as adminiſtrator not being chargeable, unleſs the debts are by ſpecialty. Thirdly, where defendant ſuggeſts, *that his delivering the goods would be a devaſtavit*, this cannot be: for as to the creditors, they are liable in the hands of the plaintiff as executor de ſon tort,

tort, if the deed of gift be fraudulent. Fourthly, it may be the creditors named will never ſue for their debts, and ſo the defendant will detain the goods for ever; but had he *pleaded a recovery by any of the creditors, and thoſe goods to the value taken in execution*, it had been a good plea. Fifthly, the *defendant is not a perſon enabled by the ſtat.* 13 *Eliz. to plead this plea*; for though the deed is void againſt all creditors, yet it is not ſo againſt the party himſelf, his executors and adminiſtrators, and againſt them it remains a good deed; per tot. Cur. Yelverton a counſel with the defendant. Yelv. 196. Hill. 8 Jac. B. R. Hawes v. Loader. [554]

4. Covin ſhall not be intended unleſs it be *averred*, per Jones J. Jo. 20. cites 10 Rep. 56. a. Trin. 11 Jac. Chancellor of Oxford's caſe.

5. A *leaſe for years* was *conveyed by A. with an intent to defraud his creditors*, and died, making B. his executor; C. was a creditor of A. B. promiſed C. upon good conſideration, that if he could diſcover any *goods, parcel of the eſtate of teſtator at the time of his death*, then he ſhould have the goods in ſatisfaction; the court held the leaſe ſo conveyed to be parcel of his eſtate at the time of his death; for though the ſale bound himſelf, yet it was void as to creditors; and they agreed that the plaintiff in his *replication, ſhewing this ſpecial conveyance of the term by fraud in maintenance of his count* is good and purſuant, and no departure from it. 2 Roll. R. 175. Trin. 18 Jac. B. R. Anon.

6. An *executor confeſſes a judgment*, as he may lawfully do, yet this *may be averred* to be entered, or kept on foot by fraud, and that *by the common law*, which hates all frauds. Vent. 329. Trin. 30 Car. 2. B. R. in caſe of Knight v. Peachy & Freeman.

7. In *debt for rent againſt aſſignee of the executor of leſſee for years*, defendant *pleaded an aſſignment* by him to J. S. ſuch a day, *and* that he gave *notice* of it to the leſſor *before any rent due*; the leſſor, *plaintiff, replied that* the aſſignment was to defraud him of his action *by fraud and covin*; defendant demurred, and it was urged that fraud is not to be *averred* in this caſe; for the aſſignment is a lawful act; but it was anſwered, that fraud and covin make legal acts illegal and void; and judgment was given for the plaintiff, diſſentiente Scrogs Ch. J. 2 Jo. 109. Trin. 30 Car. 2. B. R. Anon.

Vent. 329. 331. S. C. by the name of Knight v. Peachy & Freeman. ——Raym. 303. Trin. 31 Car. 2. S. C. in the Exchequer on error brought there, but no judgment; for the parties agreed. But a diſtinction was taken by the counſel for the defendant, that, *in caſe of a recovery by default*, fraud may generally be alledged, as in Pl. C. 47. in caſe of Wimbiſh v. Talbois.——But if *after a verdict*, there it *muſt be ſpecially alledged*, and for this cited 9 Rep. 110. a. Treſham's caſe.

(L. a) In what Caſes, and where the Fraud ſhall be tried, and whether by Jury, or by the Court.

1. WHERE *land is recovered by jury, the ſame jury may enquire of the right and colluſion*, and *where* it is *by default* without jury, as in a præcipe quod reddat, it ſhall be enquired *by*

quale jus of office, and ſo 16 Aſſ. p. 1. and there it is determined, that *this inquiry is only an inqueſt of office*, ſo that if they find therein matter of abatement of the writ, yet the writ ſhall not abate, for it is only an inqueſt of office. Br. Colluſion, &c. pl. 25. cites 14 Aſſ. 13.

2. In an action of *waſt* by an abbot, the *ſheriff returned the writ of enquiry of the waſt for the abbot*, and judgment was given for the abbot, but *execution was ſtayed till the colluſion was enquired into*; but otherwiſe, it ſhall be *if the inqueſt had been before juſtices*; for then *the ſame inqueſt*, after the iſſue tried, *ſhould enquire of the colluſion preſently*, but now this ſhall be by *quale jus*. Br. Colluſion, &c. pl. 18. cites 38 E. 3. 12.

3. Jury found a deed, but left it to the court, if by the 27 Eliz. it be fraudulent againſt the defendant, and ſo void; it was argued that the *court* can *judge of fraud without the jury's finding it ſo*, but inſiſted on by the other ſide, that the court might judge of the proviſo in the ſtatute 27 Eliz. and if this ſettlement were void within that act; adjornatur. 2 Show. 46. Butler v. Waterhouſe.—The † court will not adjudge it fraud, * where the jury do not expreſsly find the fraud; for the judges have nothing to do with matter of fact, and ſo per tot. Cur. no fraud. Brownl. 36. ‡ Crier v. Littleton.

‡ Arg. Bridg. 112. S. C. cited —— S. C. 10 Rep. 56. b. Trin. 11 Jac. B. R. in the Chancellor, &c. of Oxford's caſe. —— Per Yelverton Serjeant, *covin apparent* need not be proved 3 Le. 256.—contra, per Beaumont Serjeant 3 Le. 255. Mich. 32 Eliz. C. B. in the ſerjeant's caſe.——— † Fraud is a pure matter of fact which is to be found by the jury, and *cannot* in any caſe *be preſumed by the court*, per Rainsford J. Vent. 129. Paſch. 23 Car. 2. B. R. Smith v. Wheeler.

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4. Where fraud is *apparent* chancery will decree againſt it without ordering a *trial*. 32 & 33 Car. 2. 2 Chan. Caſes, 46. Colſton v. Gardner.

5. A. conveyed lands to B. and C. for 99 years in truſt to raiſe a ſum of money, the reverſion to J. S. afterwards J. S. ſettled the reverſion on C. and his heirs in *truſt* for A. for life, and to the heirs of the ſurvivor; 10 years afterwards *B. lends money to J. S. and takes a mortgage of the truſt lands ſubject to the truſt*, and *without notice of the conveyance to C. in truſt for A.* J. S. dies, living A. On a bill by B. againſt A. and C. the laſt conveyance was ſet aſide as fraudulent, though A. ſwore that J. S. agreed at firſt to make ſuch re-conveyance bona fide, and that ſhe knew not of B.'s lending money to J. S. and decreed that it was not neceſſary to ſend it to be *tried at law, whether a voluntary conveyance be fraudulent or not*, but the court may decree it to be ſo meerly for being voluntary. Trin. 1691. Ch. Prec. 13. White v. Huſſey.

6. Fraud, *as to the ſettlement of a poor perſon*, is to be judged of *by the juſtices of peace* and not by B. R. Per Pratt J. 10 Mod. 393. Trin. 3 Geo. B. R.

7. In caſe of *great fraud*, equity will not direct an iſſue. MS. Rep. ſaid to be Lord Harcourt's, tit. Fraud. 5 Feb. 1722. White v. Lightburn.

(M. a) Evidence. In what Caſes Fraud may be given in Evidence.

1. IN *debt againſt the heir*, the defendant *pleaded riens per deſcent*, and the plaintiff replied, ——— that aſſets in the county of S. It appeared upon the trial, that lands deſcended, but *before action brought, defendant had enfeoffed J. S. which was proved to be by fraud.* Upon a ſpecial verdict found, it was reſolved, that this matter might well be given in evidence. 5 Rep. 60. Mich. 32 & 33 Eliz. B. R. Gooch's caſe.

(N. a) Badges of Fraud. What are.

1. DEFENDANT in debt, *after judgment aliens* his goods, and he *himſelf takes the profits*; yet the plaintiff ſhall have them in execution. Arg. Lane. 105. cites 22 Aſſ. 72. 43 E. 3. 2.

2. A *gift of goods* was held fraudulent on divers circumſtances. 1. It was *general*, without any exception. 2. It was *antedated*, and direction given to the attorney, to uſe his ſkill to prevent the plaintiff. 3. The making and ſealing it was *in the donee's abſence.* 4. It was agreed to be *kept ſecret.* 5. The * *donee never had poſſeſſion of the deed*, but it was kept by the brother of the donor. 6. The donor himſelf had all the *uſe of the goods*, and dwelt in the houſe, and bought and ſold, and killed the cattle into his houſe, and altered them, and ſpent the corn in his family all the time after; and they *coloured this by account made annually* between donor and donee, for ſhew only; but no money paid to the donee. 7. The donor after the deed, being aſſeſſor, *aſſeſſed himſelf to the ſubſidy ſeven pounds*; whereas if the deed was good, he had nothing. 8. The *donee took out an extent* upon a ſtatute afterwards againſt the goods of the donor, for a debt owing to him; and for theſe reaſons, though the deed was made upon good and valuable conſideration, to ſave harmleſs the donee from a juſt and true debt, for which the donee was bound as ſecurity for the donor, the deed was adjudged fraudulent. Mo. 638. Paſch. 44 Eliz. in the Star Chamber. Chamberlayne v. Twyne.

* Fin. R. 270. Mich. 28 Car. 2. Oakover v. Pettus.

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3. *Tenant in capite* made a *leaſe for* 1000 *years to B.* and further covenanted with B. and his heirs, that *upon payment of* 5 *s.* he and his heirs *would ſtand ſeized to the uſe of B. and his heirs*, and in the deed were all the ordinary clauſes of a conveyance bona fide. B. died, and the queſtion was, if the heir ſhould be in ward? It was held, that the heir had power of the inheritance on payment of 5 s. and that the leaſe carries with it the badges of fraud. Godb. 191. Trin. 10 Jac. in the court of Wards. Cotton's caſe.

4. If a man has any intention to evade the ſtatute 13 Eliz. 5.

whatſoever he ſhall ſay afterwards, will not any ways ſalve and amend the matter, but the ſame is fraud, and within the ſtatute, and *ſecrecy* is a *badge* of fraud, but no concluding proof; per tot. Cur. 2 Bulſ. 226. Paſch. 12 Jac. Stone v. Grubham.

5. It was ſaid, that if one make a *voluntary conveyance* upon conſideration of natural affection, and is *not* at that time *indebted* to any perſon, *nor in treaty* with any one *for the ſale* of the lands, ſuch conveyance has no badge of fraud; but otherwiſe it is, if he be indebted, or in treaty for ſale of thoſe lands. Sty. 445, 446. Paſch. 1655. B. R. Anon.

6. In evidence to a jury, it was held by the court, that a *voluntary conveyance* executed is not fraudulent, becauſe voluntary; but it is great evidence of fraud *againſt an after conveyance made bona fide*; becauſe the *ſtatute avoids* ſuch *deeds* as are *bona fide*, and on conſideration, *if made ea intentione to defraud purchaſors*; and therefore this fraud muſt be found by the jury. 1 Keb. 486. Paſch. 15 Car. 2. B. R. Garth v. Mois.

7. *Executor pleads a judgment*—per fraudem was replied, and iſſue thereupon; and by evidence it appeared, the *dettee was willing to take leſs than was recovered*, it is evidence of fraud; but if it be ſhewn, that adminiſtrator had not aſſets to pay that ſum, it is no fraud, 1 Salk. 312. Trin. 13 W. 3. B. R. Parker v. Atfield.

8. An *agreement for a purchaſe was with an old woman* 90 *years of age*, by an attorney, but *no money paid*, and pretended he bought it for another, of the name of the tenant in poſſeſſion, to whom ſhe was heir, if he died without iſſue, and ſeveral other ſuſpicious circumſtances appearing, the court would neither decree it to be carried into execution againſt the heir at law, not to be delivered up. Hill. 1708. 2 Vern. 632. Green v. Wood.

9. A. and B. married two ſiſters, preſumptive heirs of J. S. and *articled to divide equally between them, whatſoever ſhould be given by the will of J. S. to either of them.* J. S. by his will, gave a great real and perſonal eſtate to A. and only a ſmall real eſtate to B. who brought a bill againſt the executors of A. for an account of the real and perſonal eſtate which came to A. by the will of J. S. and inſiſted, that after the articles, *A. prevailed on J. S. to deviſe the greateſt part of his lands to the ſons of A. and that as ſoon as his ſons came of age, A. got his ſons to convey the lands to himſelf and his wife for life, remainder to truſtees for* 500 *years, to raiſe* 3000 *l. a-piece for two younger ſons, not provided for by the will of J. S.* ſo that in effect A. had the ſame power over the eſtate, as if it had been deviſed to himſelf in fee. Ld. C. Macclesfield declared, that if the eſtate had continued in the ſons of A. he would not have compelled the conveyance of a moiety
[557] to B. the plaintiff, according to the articles, there being no writing to manifeſt the truſt, as the ſtatute of frauds requires; but that if the ſons ſhould *without any conſideration*, convey to A. their father the eſtate left them by J. S. then he thought he might juſtly decree that A. ſhould convey a moiety of the premiſes to B. agreeable to the articles. 2 Wms's Rep. 182 to 185. Trin. 1723. Beckley v. Newland.

10. Land

10. Land of 40 l. a year was conveyed by one of 72 years of age, for an annuity of 20 l. a year for life, and there being *no evidence of any inſtruction given by the grantor to the drawer of the deed for preparing it, though the drawer has been examined*, but the inſtructions were given by the grantee only; and it *not appearing that the deed was read to the grantor* at the time of executing the ſame; and the *annuity being ſecured by covenant only*, inſtead of a mortgage of the ſame eſtate, and *he not having the deed itſelf in his hands*, the Maſter of the Rolls ſaid, that all this is fraud apparent, and that judging upon the face of a deed, is judging upon evidence, which cannot err, whereas the teſtimony of witneſſes may be falſe. 2 Wms's Rep. 203 to 206. Mich. 1723. Clarkſon v. Hanway, & al.

(O. a) As to Creditors relieved in Equity.

1. DEED of *gift of all his goods*, chattels, and houſhold ſtuff, by baron, in truſt for his *wife*, the baron continued in *poſſeſſion* during his life, and after his death, the widow admitted it to be a truſt, by exhibiting an inventory of them into the Spiritual Court; decreed, to be a fraud againſt *creditors*, there not being aſſets ſufficient, without thoſe goods to pay the debts; and ordered, after debts paid with them, that the ſurplus be accounted for to the adminiſtrator, when an adminiſtrator ſhall appear. Mich. 28 Car. 2. Fin. R. 270. Oakover v. Pettus, Haughton, & al.

2. Sale by *commiſſioners of bankrupts* is good againſt fraudulent *debt* or judgment, and ſhall be ſo taken in any action brought for the goods, if fraud be *proved upon the trial*. 2 Jo. 41. Mich. 27 Car. 2. C. B. Smith v. Harward.

3. A. got *judgment againſt B.* for 1400 l. on bond conditioned for payment of 700 l. and intereſt, and brings a bill, charging that *B. had conveyed his eſtate to truſtees*, and had lent 1200 l. to C. in the name of J. S. and prays that this may be made liable to the plaintiff's debt. Defendant demurs, for that he in his life-time was not bound to *diſcover* his perſonal eſtate, and demurrer over-ruled. Per Jeffries C. Paſch. 1686. Vern. 398. Smither v. Lewis.

4. A. got *judgment againſt B.* for 100 l.——C. on pretence of a debt due to him, and to prevent A.'s having the benefit of his judgment, had *got goods of B.'s*, of great value, into his hands, ſufficient to ſatisfy his debt *with a great overplus*, and prayed an account and *diſcovery* of theſe goods.——C. demurred, becauſe A. had not alleged, that he had ſued out execution, and actually taken out a fi. fa; for till he had ſo done, the goods were not bound by the judgment, nor A. intitled to a diſcovery or *account* thereof. Per Jeffries C. the plaintiff ought actually to have *ſued out execution before he had brought his bill*, and allowed the demurrer. Paſch. 1686. Vern. 399. Angell v. Draper.

5. At law, where a conveyance is found to be fraudulent, the creditor comes in and avoids all, *without re-payment* of any conſideration money. Per Cur. Trin. 1687. Vern. 466. in the caſe of Hern v. Meers.

But where A. was intrusted by B. to receive interests due upon tallies, and he received principal as well as interest, and compounding with his other creditors, made such an underhand agreement with P. and brought a bill to be relieved, Lord Cowper dismissed his bill, A. having *been guilty of as great breach of trust* and fraud as could be and not be criminal, and having agreed to make some satisfaction, he himself ought not to be relieved against such promise or security for performance. Hill. 1707. 2 Vern. 602. Small v. Brackley.

6. A. in order to draw in his creditors, *to compound his debts* at an easy rate, made an *underhand agreement* with some of them, *to pay them the whole*, in case they would seemingly come in; the creditors came in, but A. failed in payment at the time agreed, and now some of the creditors * refuse to stand to the agreement, which being under hand and seal, A. brought a bill to compel a performance; but the fraud appearing, Ld. Jeffries dismissed the bill. Trin. 1688. 2 Vern. 71. Child v. Dandridge.

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7. A. *purchases land in name of B.* his eldest son, *and puts B. in possession*; afterwards B. falling *sick*, *A. takes a declaration of trust* from B.——B. recovers, continues possession, and marries, and dies; A. gets a conveyance from the younger son, B. dying without issue; by agreement on the marriage B. was bound to leave the wife 4000 l. but nothing of dower mentioned. Widow brought her writ of *dower*. A. sued in equity for relief, and decreed him by Master of Rolls. On appeal, Wright K. dismissed the plaintiff's bill, declaring it to be a secret and fraudulent deed of trust, to deceive purchasors and creditors. Pasch. 1702. 2 Vern. 436. Bateman v. Bateman.

8. A. makes a *bill of sale of his goods* to a *trustee for one* that lived with him as his wife, and was *reputed as a wife*. Bill of sale set aside as fraudulent, as to creditors. Hill. 1704. Vern. 490. Fletcher & al. v. Lady Sidley & al.

9. A. indebted to B. 100 l. on bond, and to C. 200 l. on simple contract, makes his will, and D. executor; *C. purchases a leasehold of D. the executor for* 900 *l. and discounts his own debt of* 200 *l.* and 550 *l. due from D. to C. and pays* 150 *l. in money*. On a bill by A. it was decreed at the Rolls, and after, on appeal, per Cowper C. that this sale is not good to bind A. an unsatisfied *creditor*. Mich. 1708. 2 Vern. 616. Crane v. Drake & al.

10. A. being about to marry M. the daughter of J. S. *gave a bond for* 500 *l. payable to the father of A. at a day certain*, but *defeasanced not to be put in suit, but for security of the daughter, in case any misfortune should happen to the husband, to be paid before other creditors*. Ld. Ch. King held, that this is a fraudulent bond on the face of it, to disappoint creditors. Sel. Ch. Cases in Ld. King's time, 46. Trin. 11 Geo. 1. 1725, Wise's case.

(P. a) As to obtaining Wills, relieved in Equity.

1. A *Will*, whereby the heir was disinherited, and the estate given to two infants, strangers, though obtained by great fraud and circumvention of the father of one of the infants was denied to be set aside, for *want of a precedent*, though the Lord Chancellor declared

clared his reſolution to do all that he could; and though he had directions from the Houſe of Lords, to decree according to juſtice and equity though no precedent could be found. 15 Car. 2. Ch. R. 236. Roberts v. Wynne.

2. Jekyl, Ld. Commiſſioner, took a *difference between a will*, and a *deed gained upon a weak man, and upon a miſrepreſentation* or fraud; for if a will be gained from ſuch by falſe miſrepreſentation, this is not reaſon ſufficient to ſet it aſide in equity, as was determined in the late Duke of Newcaſtle's will, betwixt Ld. THANET and Ld. CLARE and in caſe of * BODVIL and ROBERTS; but where a deed, which is not revocable as a will is, is ſo gained from ſuch a perſon, and without any valuable conſideration, the ſame ought to be ſet aſide in equity. 2 Wms's Rep. 270. Paſch. 1725, in caſe of James v. Greaves.

* See pl. 1. ROBERTS v. WYNNE. S. C.

3. A bill was brought to ſet aſide a will *of a perſonal eſtate*, and to ſtay the probate, upon a ſuggeſtion of it's being obtained by fraud, and the defendant demurred to the juriſdiction of the chancery, whereupon an injunction was moved for, inſiſting that the demurrer confeſſed the fraud, and that fraud was cognizable in equity, as well as in the Spiritual Court. But per Cur. the Spiritual court has juriſdiction of fraud, relating to a will of a perſonal eſtate, and can examine the parties, by way of allegation, touching the ſame, and if the will *was falſely read to the teſtatrix*, then it was not her will, and denied the injunction. Trin. 1725. 2 Wms's Rep. 286. Stephenton v. Gardiner.

[559]

(Q. a) What Acts are to be ſaid fraudulent, in regard to After-Creditors or Purchaſors.

1. THE plaintiff had brought his *action* againſt M. *for lying with his wife*; and 13 January, 1689, M. made a conveyance of his lands to truſtees, in *truſt, to pay his debts mentioned in a ſchedule* annexed to the deed, *and ſuch other debts as he ſhould appoint within ten days in Hillary Term* following; the *plaintiff recovered* 5000 *l. damages* againſt M. and brought this bill to be relieved againſt the deed as fraudulent againſt him, and made to defeat him of his debt. Per Cur. This deed is not fraudulent, either in law or equity, for ſuch debts as are named in the deed; for the plaintiff was no creditor at the making of the deed; and though it were made with an intent to prefer his real creditors before this debt, yet, when it became afterwards to be a debt, it was a *debt founded in maleficio*, and therefore it was conſcientious in him to prefer the other debts before it; but the *plaintiff may come in upon the ſurplus*, after the debts mentioned in the ſchedule, or appointed within ten days, purſuant to it, are ſatisfied. Mich. 1699. Abr. Equ. Caſes, 149. Lewkner v. Freeman.

2. A *man indebted to his daughter-in-law* for money of hers received by him, *purchaſed a leaſe for years, and had the ſame originally conveyed to her*. She had no bond, or any other ſecurity for her money,

ney, at the time of the conveyance, nor till ſeveral years after, when he gave her a bond, and died without aſſets. A creditor for a debt contracted after the conveyance brought his bill, to ſubject this leaſe to his debt; but Ld. C. King ſaid, he thought it would be very extraordinary to do ſo for *debts not then contracted*; and that he did not know that it had ever been determined, that a man indebted, minding *to provide for his children, has an eſtate originally conveyed to them*, it ſhould be ſubject to debts; whereas here the father-in-law was indebted to her, and ſo denied to ſubject it to the plaintiff's debt. Sel. Ch. Ca. in Ld. King's time, 78. Mich. 1729. Proctor v. Warren.

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[560]

Freſh Suit.

(A) At what Place.

S. P. agreed by Pigot. Br. Freſh Suit, pl. 2. cites S. C.

[1. IF I take your *beaſts as a diſtreſs, which come back* to you *of their own accord*, I cannot retake them by reaſon of the firſt diſtreſs, without freſh ſuit. 9 E. 4. 2. b. per Danby.]

[2. Dy. 8 El. 246. 70. Replevin brought for taking of beaſts in Dale. Defendant ſaid, that he *took them in another place for damage feaſant, and* ſhewed that the beaſts *eſcaped to Dale, as they were driving to the pound*, and upon freſh ſuit, he retook them in the place called Dale, and admitted a good juſtification.]

[3. Old Natura Brevium, 53. *after ſuch diſtreſs, eſcape, and freſh ſuit*, if the *party who diſtreined prays deliverance, and he will not* [deliver them] writ of *reſcous lies.*]

[4. If I diſtrain for damage feaſant, or for rent, and *in chaſing them to the pound, they eſcape into the ſoile of another*, yet upon freſh ſuit I may re-take them. 33 H. 6. 55.]

S. P. Br. Freſh Suit, pl. 5. cites 33 H. 6. 52. S. C.

[5. So if the *tenant reſcues, and drives them out of the land.* 33 H. 6. 53. agreed.]

[6. If a *miniſter of the court, by the cuſtom, attaches a man by a horſe*, yet upon freſh ſuit he may retake *in other county*. 33 H. 6. 52. b. 55. adjudged.]

7. Note, that it was touched, if a man *makes an affray*, and the *juſtices of the peace, or conſtable ſeeing it, come to it, and would arreſt him, and he flies into another county*, and the other freſhly purſues him, he may arreſt him in the other county; and for affray, freſh ſuit is material,

material, *but* if it was *for felony*, it is not material; for he may take him in any county. Br. Freſh Suit, pl. 3. cites 13 E. 4. 8.

(B) What ſhall be ſaid, Freſh Suit.

1. WHERE felony is done, and the felon is not taken, *within a year after* the felony done; *yet if he*, who was robbed, *does his endeavour to take* the felon, and to eſpy him, and he is taken, *though it be not at his ſuit*, it ſhall be adjudged freſh enough, per tot. Cur. and therefore the party ſhall be reſtored to his goods. Br. Freſh Suit, pl. 1. cites 7 H. 4. 44.

2. If *beaſts eſcape in view of the owner, by default of incloſure*, as out of an highway, &c. and Freſh Suit be ſhewn in juſtification, but it appears not, that they were in view of the owner, Freſh Suit ſhall not be pleaded in bar, except the *plaintiff alleges notice*. F. N. B. 128. (298) in the notes there. cites 15 H. 7. 17. 21 E. 4. 8. 49. 10 E. 4. 8.

(C) Neceſſary in what Caſes, to preſerve Property.

1. *HE, who takes goods from the enemies* of the king, *which were taken before from an Engliſhman*, ſhall have it as a *thing gained in battel*, and not the king, the admiral, nor the party to whom the property was before, becauſe the party came not freſhly, the ſame day that it was taken from him, and before ſun ſet, and claimed it. Br. Forfeiture de terres, pl. 57. cites 7 E. 4. 14. Br. Freſh Suit, pl. 5. cites 33 H. 6. 52. [561]

2. If *goods* are *ſtole*, and they *come into a franchiſe*, the *lord* of the franchiſe *ſhall have them*, if freſh ſuit be not made, and *if it be no franchiſe*, the *king ſhall have them*, if the party does not make *freſh ſuit*. But this ſeems to be of ſuch franchiſe as has a waife, or bona & catalla felonum & fugitivorum. Br. Forfeiture de terres, pl. 110. cites 21 E. 4. 16. Br. Freſh Suit, pl. 4. cites S. C.

3. *And* it was granted, per tot. Cur. that if a man *ſteals goods, and waives them*, he who was robbed, may *ſeize them* 20 *years after*, if the king, nor the lord of the franchiſe have not ſeized them; but if they are ſeized, then he who was robbed ought to ſue appeal, and ſhall have them, if he makes freſh ſuit. Quod nota. Br. Forfeiture de terres, pl. 110. cites 21 E. 4. 16. Br. Freſh Suit, pl. 4. cites S. C.

(D) In

(D) In Treſpaſs. In what Caſes it is a good Plea in Treſpaſs.

1. TRESPASS in the county of E. of a horſe taken, the *defendant ſaid, that the city of E. is an ancient city*, and a corporation of mayor and ſheriff, and *have had a court before the mayor every day*, and *that one T. affirmed a plaint* againſt the plaintiff and ſhewed proceſs in certain, till an attachment, *and how he attached him by the horſe, as officer in the city* of E. *and the plaintiff reſcued it, and went into the county of E.* and the defendant freſhly purſued and retook, which is the ſame taking, &c. judgment, &c. and a good plea; for *by the freſh ſuit, the horſe was always in his poſſeſſion in the law*, and therefore the *re-taking good in the foreign county, and out of the juriſdiction of the city* of E. quod nota. Br. Treſpaſs, pl. 32. cites 33 H. 6. 52.

2. Treſpaſs of cattle taken in A. in D. the *defendant ſaid, that he was ſeiſed of four acres, called C. in D. and found the cattle there damage feaſant, and chaſed them towards the pound, and they eſcaped* from him, *and went into A. and he freſhly re-took them*, which is the *ſame* treſpaſs, and admitted for a good plea. Quære, if he ought not to ſay, that they *eſcaped* into A. *againſt his will?* Br. Treſpaſs, pl. 355. cites 21 E. 4. 64.

(A) Fugitives.

See Gavelkind (D) pl. 1.

1. A. Went beyond ſea, without licence of the king, with Robert de Mortimer, and the *king certified the ſame into chancery, reciting that he had ſent his privy ſeal*, &c. but that the ſaid A. *(ſpretis mandatis noſtris redire recuſavit)* and thereupon iſſued a commiſſion to ſeiſe, &c. Le. 10. ſays, that ſuch a precedent of ſeizure was ſhewn as of 18 E. 2. † Edmond de Wooditock's caſe.

† S.C. cited by Manwood Ch. B. in delivering the judgment of the court. Mo. 111.

in S. C. Knowles v. Lute, by the name of Mortimer's caſe.——S. P. and upon a bill of intruſion againſt the grantee of the queen, and judgment thereupon for him, it was aſſigned for error, that it was *not alledged in the replication of what date the privy ſeal was, nor that any notice* of the privy ſeal *was given to A.* But it was anſwered, that the privy ſeal needs not any date, eſpecially in this caſe. For the matters which are under the privy ſeal, are not iſſuable and cites * D. 177. nor can any traverſe be taken to it; and *this privy ſeal is not* as other writs and præcipes are, *returnable in any court but the queen herſelf*, from whom it originally came, *ſhall receive it, and alſo the meſſage upon it, and ſhe herſelf & in ſuch caſe, is judge of the contempt and no record* of that privy ſeal, *remains in any court*, but ſhe herſelf ſhall keep it, and then when ſhe is informed of the contempt, *ſhe makes a warrant*, ſometimes to the Ld. Chancellor, ſometimes to the Ld. Treaſurer, and Barons of the exchequer, to the ſame purpoſe *to ſeiſe the lands*, and that warrant is *ſigned with the ſeal manual* of the queen, and ſhe may certify and ſet down ſuch cauſe of ſeiſure in ſuch warrant, and no other certificate is made by her, and ſhe may *certify the ſame commiſſion by word of mouth*, and the party ſhall be concluded by the commiſſion under the great ſeal to ſay that ſhe hath not certified it. And of this divers precedents were ſhewn, and the ſame was all agreed to by the chancellor, treaſurer and juſtices. † And alſo, that the *queen may ſeiſe and aſſign* her intereſt over, and that ſuch *aſſignees*, *may*

may grant copyholds, being parcel of a manor aſſigned, and that they ſhall bind any, that come in after the queen's hands are amoved. And alſo, that the ſtatutes of 13 *and* 14 *Eliz.* do not amend the eſtate of the queen, but it continues as before, and ſo do all the eſtates under it. Le. 9. Mich. 25 and 26 Eliz. in the Exchequer Chamber. Cater's caſe.——* D. 176. b. 177. a. pl. 30, 31. Bartue's caſe.——F. N. B. [85] (A) in the notes there (a) cites D. 176, 189, 375. and ſays note, that the king has only the profits of the lands.——† In ſuch caſe, the K. has only *veſtarum terræ*, as in caſe of outlawry, and cannot grant copyholds. D. 176. b. Marg. pl. 30. cites it as held in Lady Baſſet's caſe.

It was alſo held, that whereas the *queen ſeiſed by force of the common law, and granted a copyhold* out of it; now when the ſtatutes *of* 13 *and* 14 *Eliz.* [3.] was made, ſhe had not any eſtate thereby; for ſhe had ſuch intereſt before; and this new ſeiſure after the ſtatute, works nothing, and nothing accrues to her thereby, whereof ſhe can make a ſeiſure; for ſhe had departed with the whole before. And note, that the grant in the caſe at bar, was quamdiu in manibus fore contigerit. And judgment was affirmed in omnibus. Le. 10. Cater's caſe.—— S. P. Paſch. 23 Eliz. in Scacc. D. 375. b. pl. 21. S. C.——And. 95. S. C. and P. by name of Knollis v. Carter.—— S. C. cited. Mo. 779.

The ſtatutes of 13 *and* 14 *Eliz.*. were made *in affirmance of the common law*, and gave to the queen nothing new, but *explained that which ſhe had before*; ſo that ſhe having upon the ſeiſure of the manor prior to thoſe acts, granted the manor to B. and C. quamdiu in manibus noſtris fore contigerit ratione contemptus, the ſame is not by thoſe acts veſted again in the queen, and ſhe cannot ouſt the patentees, by reaſon of thoſe acts, in favour of any after patentees. Mo. 109. S. C. by name of Knowles v. Luce.

2. *The letters* under the great ſeal or privy ſeal, to re-call any from beyond ſea, *ought to be ſerved by ſome meſſenger, who upon his oath, is to make a certificate thereof in chancery, and thence a mittimus to be ſent into the exchequer*, and thereupon a commiſſion to be granted to ſeize the lands and goods of the delinquent. 3 Inſt. 180. This was the method taken. D. 176. b. pl. 30. 177. a. pl. 31. Hill. 2 Eliz. in Bartue's caſe

3. A *merchant* of London *departing* the realm, to the intent to live freely from the penalty of the law, and out of his due obedience to the queen, and *not for any merchandize*, was reſolved by all the juſtices except two, to be no contempt to the queen; for merchants were excepted out of the ſtatute of 5 R. 2. cap. 2. and by the common law, merchants might paſs the ſea without licence, though it were not to merchandize. 3 Inſt. 180. D. 296. pl. 19. Mich. 12 & 13 Eliz. S. C. Anon.

4. The king cannot *re-call* one that is beyond ſea, but by the great ſeal, or privy ſeal, and not by the privy ſignet. 3 Inſt. 180.

5. A. privy ſeal, was iſſued to *re-call a fugitive*, but the ſervants of the fugitive *hindered the ſervice of it*, of which the meſſenger made affidavit; this affidavit is not traverſable, and the matter being out of the realm cannot be tried by a jury, and this matter being tranſmitted by mittimus into the Exchequer, and the fugitive not returning, his lands and goods were ſeiſed. Jenk. 220. pl. 69. D. 176. b. pl. 30. Hill. 2 Eliz. the Q. v. Bartue, and Dutcheſs of Suffolk.

6. The king may *fell ſeaſonable woods*. Jenk. 246. pl. 35. D. 375. b. pl. 21.

7. Per Tanfield, Ch. B. upon the *return* of a fugitive he ſhall rehave his eſtate again in right, and not of ſpecial grace only, but the Lord Treaſurer ſaid, he ſaw no reaſon for that. Lane, 48. Sir Robert Dudly's als. Ld. Nottingham's caſe. Mo. 111. Knowlis v. Lucy

8. 5 *Geo.* 1. *cap.* 27. § 3. enacts that *if any artificer in wool, iron, ſteel, braſs, metal, clock-maker, watch-maker, or any other artificer of Great Britain, being the king's ſubjects, ſhall go into any country, out of his majeſty's dominions, to exerciſe or teach the ſaid trades to foreigners; and if any of the king's ſubjects, in any ſuch foreign country, exerciſing any of the ſaid trades, ſhall not return in this realm, within* 6

months after warning given by the ambaſſador, miniſter, or conſul of Great Britain, in the country where ſuch artificers ſhall be, or by any perſon authoriſed by ſuch ambaſſador, &c. or by any of the ſecretaries [563] *of ſtate, and from thenceforth inhabit within this realm; ſuch perſon ſhall be incapable of taking any legacy, or of being an executor or adminiſtrator, and of taking any lands, &c. within this kingdom, by deſcent, deviſe, or purchaſe, and ſhall be deemed alien, and out of his majeſty's protection.*

(A) Funeral Charges.

1. A Perſon died in debt, and 600 *l.* was laid out in his funeral, decreed the ſame ſhould be a debt, payable out of a truſt eſtate, charged with payment of debts, he being *a man of a great eſtate and reputation in his country, and buried there*, but had he been buried elſewhere, it ſeemed his funeral might have been more private, and the court would not have allowed ſo much. Trin. 1691. Ch. Prec. 27. Offley v. Offley.

2. Where a citizen of *London* deviſed 700 *l. for mourning*, the queſtion was, if it ſhould come out of the whole eſtate, or out of the legatory part only; it was inſiſted, if there had been no direction by the will, or if the will had directed, that the expences of the funeral ſhould not exceed ſuch a ſum, there the deduction muſt have been out of the whole eſtate. Per Cur. Mourning deviſed by the will, muſt *come out of* the legatory part, and not to leſſen the orphanage and cuſtomary part. Mich. 1691. 2 Vern. 240. Deakins v. Buckley.

3. *Executor* is *not liable* to pay for funeral expences, *unleſs he contracts for it.* Per Holt Ch. J. 12 Mod. 256. Mich. 10 W. 3. Anon.

4. Settlements for *ſeperate maintenance of the wife* ſhall never extend to funeral charges, and though ſhe made a will, (according to a power given her) and an executor, and gave ſeveral legacies, but there was no reſiduum for the executor, the huſband's eſtate in the hands of a deviſee ſubjected to the payment of debts was made liable to the funeral charges of the wife. 9 Mod. 31. Trin. 9 Geo. at the Rolls. Bertie v. Ld. Cheſterfield.

In ſtrictneſs no *funeral expences* are allowable againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearer's fees; but not for pall or ornaments. Per Holt. 1 Salk. 296. Trin. 5 W. & M. B. R. Shelley's caſe.——10 *l.* is enough to be allowed for the funeral of one in debt. Per Holt. Baron Powell in his circuit would allow but 11 *s.* 6 *d.* as all the neceſſary charge. Cumb. 342. Trin. 7 W. B. R. Anon.

THE END OF THE THIRTEENTH VOLUME.